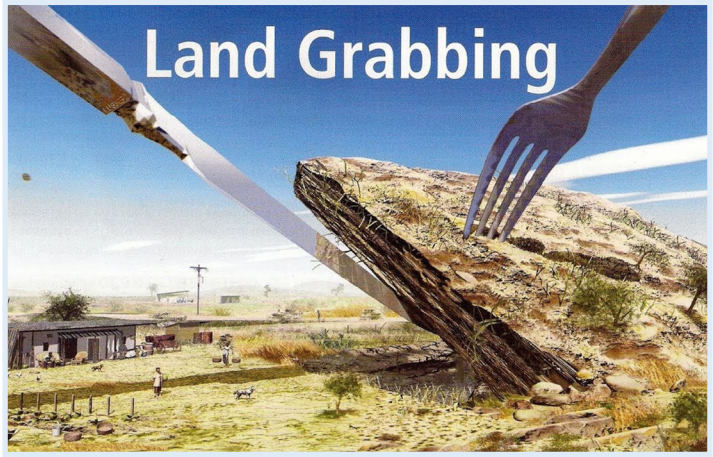
PROPERTY RIGHTS EROSION TRENDS (Surface)

April 9, 2020

On April 2nd, Alberta's Legislative Assembly passed **Bill 12**, the *Liabilities Statutes Amendment Act 2020,* which expanded the rights of well, facility, and pipeline licensees, as well as a "delegated authority", to enter on lands they do not own for a broad range of energy purposes. Prior to Bill 12, rights to enter, granted by well, facility, and pipeline licensing statutes as opposed to by way of the *Surface Rights Act*, were minimal and very restrictive, Such is no longer the case, which has numerous, varied implications including on matters of compensation for exercise of a right of entry.

After royal assent of Bill 12, the School of Pubic Policy, University of Calgary, published the attached piece: ***OWED LANDOWNERS: THE STATUS OF ORPHAN WELL RENTAL RECOVERY IN ALBERTA.*** The focus of the aforementioned piece is on backlog of applications filed by landowners with the Surface Rights Board and one obvious solution. The root causes of the identified problem and other obvious solutions were not discussed.



Any entry upon, or use of, land surfaces governed by the misunderstood* Surface Rights Act, *which is contrary to this statute or any of the energy activity licensing statutes contemplated in the* Surface Rights Act *is a land rights grab.

Contrary to what is stated in the School of Public Policy piece, in Alberta, owners of the surface absolutely can by law, and often do, deny use of or access to their land to mineral rights holders and for other energy purposes. When such a denial occurs, the mineral rights holder, or the holder of a facility or pipeline licence, may apply for an order of the Surface Rights Board granting 'right of entry'. The purpose of a right of entry order is to ensure that the rights conferred on the holder of a well, facility, or pipeline licensee are not arbitrarily sterilized or neutralized by the act of a titled surface rights owner having exercised their guaranteed right to withhold consent to enter upon or use their land for specific purposes (Section 12(1) of the *Surface Rights Act*). The Surface Rights Board also issues compensation orders.

For clarity, pursuant to common law principles, in the distant past the owner of the surface could not deny entry upon or use of the surface of their land to the person who possessed subsurface (mineral) rights. Moreover, the surface rights owner did not need to be compensated, This changed no later than 1947 pursuant to the *Right of Entry Arbitration Act*, which was repealed in 1972 and replaced by the *Surface Rights Act*. Later, the abilities to obtain a right of entry order for approved facility, pipeline, and power transmission line purposes, among others, were added. The concept of "right of entry" is activity based.

The Law in Alberta as Clarified by the Judiciary

The extremely limited rights that flow from a petroleum and natural gas lease in Alberta are classified as a *profit a prendre*, which is a non-possessory incorporeal hereditament interest in property. The rights conveyed by a *profit a prendre* are: (1) the right to apply for a well licence, and the right to *seek* a surface right of entry by (2) agreement with the surface rights owner and/or occupant, or an order of the Surface Rights Board. These rights are associated with removal of minerals.

The right to *seek* a surface right of entry not associated with the removal of minerals is conveyed by the issuance of a licence, permit, or other approval to construct or operate a pipeline, power transmission line, or telephone line.

Polluter Pay Federation
Temporary Steering Committee

Polluter Pay Federation
Box 835, Didsbury, Alberta T0M 0W0
1501—16th Avenue

Author: Mark Dorin (Steering Committee Member)
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Alberta Statutes Granting Conditional "Right of Entry"

For clarity, the term "right of entry" refers to the right or ability of persons other than the titled owner of the surface rights, or an occupant of the surface as defined in Section 1 of the *Surface Rights Act*, to enter upon certain Alberta lands under precise conditions. Three laws in particular purport to grant rights of entry, or provide the legal power to persons other than the owner of the surface rights (Surface Rights Board members alone) to grant a right of entry. These laws and their applicable provisions are referenced below:

1. The *Surface Rights Act*:
   - Section 12 lists the activities for which a right of entry order may be issued by the Surface Rights Board in the event right of entry by consent cannot be obtained.
   - Section 13 deals with other circumstances under which a right of entry order may be issued by the Surface Rights Board.

2. The *Oil and Gas Conservation Act*, Section 101:

   ⇒ *Prior to Bill 12*, a person could enter to "suspend" a well or "abandon" a well or facility under this law that governs licensing of wells and facilities, but no more.

2. The *Pipeline Act*, Section 28:

   ⇒ *Prior to Bill 12*, a person could enter only to "discontinue" or "abandon" a pipeline, which is a pipe that is not wholly contained within the boundaries of a "surface facility lease" as that term is used in the related regulations, under this law.

EFFECTIVE EXPROPRIATION

Whether an acquisition of the right to use the surface for an energy – related activity occurs by private agreement or a right of entry order issued by the Surface Rights Board, compensation for rights conveyed to the energy developer is to be determined based on well-established expropriation principles (by agreement or Surface Rights Board decision).

The owner of the *profit a prendre* interest in the minerals, or the holder of a facility, pipeline, or power transmission line llicence or permit is the effective expropriator of some of the rights of the titled surface owner, or the rights the surface owner previously conveyed to an "occupant".

The mandate of the Surface Rights Board, in the event the parties cannot agree, includes to determine the compensation to be paid for use (taking) of land rights, and to whom any such compensation is to be paid.

PREVAILING LAW

In the event of a conflict between a grant, licence, or other instrument and the *Surface Rights Act*, this Act prevails (S. 2(2)). Whether Bill 12 is largely an exercise in futility remains to be seen.

Bill 12 Amendments to Entry on Land Provisions of Activity Licensing Statutes Because of Orphan Well Association Trespass

Bill 12, or the law that amends certain provisions of the *Oil and Gas Conservation Act* and the *Pipeline Act,* significantly expands the reasons for which a person (as opposed to only the Orphan Well Association or other "delegated authority") can enter upon lands without compliance with the procedures set out in and governed by the *Surface Rights Act.*

Amended provisions of Section 101 of the *Oil and Gas Conservation Act*, and Section 28 of the *Pipeline Act*, allow persons who are not registered owners or "occupants" of the land to enter upon land for purposes in the following categories in addition to suspension of a well or discontinuance of a pipeline, or abandonment of a well or facility:

1. First, a person can now engage in land "remediation" activities, governed by Section 112 of the *Environmental Protection and Enhancement Act (*the "*EPEA*") without seeking the consent of the landowner and occupant, and without applying for a right of entry order, which was not previously possible.
2. Second, a person can now engage in land "reclamation" activities governed by Section 137 of the *EPEA* without seeking landowner consent or applying for a right of entry order, which was not previously possible;
3. Third, a person can now engage in activities related to "impairment or damage", which is a new term defined broadly for the first time in Bill 12, without landowner consent or applying for a right of entry order, which was not previously possible. This new term is defined as follows (from the amended *Pipeline Act* definition):

> *"impairment or damage" means impairment or damage that results in or could reasonably be expected to result in harm to the integrity of a [pipeline], well or facility or harm to the environment, human health or safety or property;*

LEGISLATIVE AND PROCEDURAL CHANGES REQUIRED

Surface Rights Act and the Surface Rights Board

The perfunctory review of the problem of Surface Rights Board backlog by the , School of Pubic Policy, which failed to consider the full ramifications of Bill 12 and other Board backlog reduction strategies, must be supplemented.

In addition to those identified in the School of Public Policy publication attached, numerous changes to the *Surface Rights Act* are required to protect property rights. The same is the case related to Surface Rights Board (the "Board") application intake and compensation determination policies.

For decades the courts have effectively amended the *Surface Rights Act.* The judiciary has clarified which authority effectively makes the decision that a right of entry order must issue, in some but not all, circumstances. These binding judicial decisions have been applied too broadly in circumstances that are arguably remarkably different from those in various cases decided by the judiciary. Simply put, legislative changes have not kept up with jurisprudence related to issuance of right of entry orders. This has led to inappropriate refusal of jurisdiction by the Alberta Energy Regulator (the "AER") and/or the Alberta Utilities Commission (the "AUC") - jurisdiction the courts have confirmed is prioritized over that of the Board.

The Supreme Court of Canada has effectively confirmed that the AER (or AUC) and the Board must work together without duplication of efforts, but this is simply not occurring in practice. The results are disastrous for landowners.

As repeatedly confirmed by the judiciary, a decision of the AER (or the AUC) to issue a licence, permit, or other approval is binding on the Board. There are very few reasons why the Board can refuse to issue a right of entry order once the AER or AUC has effectively made the decision to issue a licence, permit, or other approval in the public interest. Any such refusal constitutes a collateral attack on an AER or AUC decision in an incorrect forum (rule against collateral attack). This principle applies not only to circumstances related to acquiring the right to use land that the courts have ruled on many times - the principle equally applies to surrender or termination of the right to use land (depending on the legal instrument relied on to acquire a land right in the first instance). No operator decides terms and conditions of land use.

Pursuant to the provisions of Section 36 of the *Surface Rights Act*, collection of unpaid "rent" by the province cannot occur until after termination of the right of entry

When a *profit a prendre* or surface right of entry terminate, the well or facility must be abandoned (in the case of well plugged, in the case of a facility decommission and removed) by law (it's mandatory). Well licensees and the Alberta Energy Regulator are ignoring laws confirmed by the judiciary.

LEGISLATIVE CHANGES REQUIRED

Which authority makes key decisions of tenure associated with right of entry order decisions must be clarified. This is because hearings are being improperly denied to those who request them. Applicants for right of entry orders improperly argue (perhaps fraudulently so) that the AER has conducted a hearing and made decisions binding on the Board when such is patently not the case

The wording of Section 36(5)(b) of the *Surface Rights Act* is ambiguous, causing misinterpretation of what rights survive failure of an operator (as defined in S. 27 of this Act) to pay a rate of annual or other periodic (ongoing) compensation to an "owner" or "occupant" of the land surface. Clarification is required that is consistent with mandatory activity abandonment requirements.

As identified by the School of Public Policy, the need to apply every year for "recovery of rentals" is repetitive, causes unnecessary Board backlog, and must be eliminated - an unacceptable potential for injustice exists.

Operators make compensation offers in decreasing amounts to landowners and occupants because the drafters of the *Surface Rights Act* used common sense and assumed offers would increase, not decrease, each time an offer is refused.

PROCEDURAL CHANGES REQUIRED

- **Obviously the Board must make procedures for handling applications from landowners for compensation for damages arising from entries pursuant to Section 101 of the *Oil and Gas Conservation Act* or Section 28 of the *Pipeline Act* made by any person.**

ALTERNATIVES TO 'RENTAL RECOVERY'

Board Overload Reduction through Administrative Justice

The perfunctory review of the problem of Surface Rights Board backlog by the , School of Pubic Policy failed to consider what parties may and may not hold well licenses. Transfers of well licenses when required by law eliminates backlog.

Not just anyone may apply for or hold a well licence (or a facility or pipeline licence for differing reasons) in Alberta. There are prerequisites being widely ignored, which are clearly set out in the *Mines and Minerals Act* and the *Oil and Gas Conservation Act*. When circumstances materially change, the AER must review and amend well licenses by law to ensure that all licenses are held by "entitled" and "eligible persons or corporations. This is simply not being done, which is the main cause of Board backlog related to Section 36 so-called "recovery of rental" applications filed yearly with the Board by landowners. A related problem is AER Directive 006, aspects of which purport to block transfers of well licenses after a reclamation certificate has been issued. The offending aspect of Directive 006 is inoperative to the extent that it is inconsistent with the prevailing *Oil and Gas Conservation Act*, Section 9 of which confirms priority of this Act over any Directive.

In order to be eligible to apply for or to hold, or to continue to hold, a well licence, one must meet the eligibility provisions of Section 16(1) of the *Oil and Gas Conservation Act.*

All well licensees must possess and maintain a right to access related minerals (petroleum and natural gas) to be 'entitled' to hold a well licence or continue to hold a well licence. When a mineral lease expires or terminates on its terms, including for reasons of non-payment of royalties or other fees to the registered owner of the substances being accessed, produced, or disposed of, the related well licence must be transferred. This requires cooperative efforts between Alberta Energy and the AER when the minerals are owned by Her Majesty in Right of the Province of Alberta. There is a simple, expedient procedure set out in Section 16(2) of the *Oil and Gas Conservation Act* to determine whether a party is entitled to hold a well licence and for applicable remedies when a licensee is no longer so entitled.

Pursuant to the provisions of Section 20 of the *Oil and Gas Conservation Act,* all applicants for, or holders of, well licenses must meet eligibility requirements.

A corporation that is not in good standing under the *Business Corporations Act* may not apply for, hold, or continue to hold a well licence. A corporation that fails to emerge from bankruptcy proceedings is not in good standing. The Alberta Energy Regulator is not managing well licence transfers as required by law, which in turn is causing backlog at the Board. Licenses should be transferred to parties that can pay the landowner a rate of ongoing compensation that is commensurate with actual damages and losses.

ALBERTA ENEGY REGULATOR REFORM

The AER must follow the simple legislated procedure in Section 16(2) of the *Oil and Gas Conservation Act* whenever it is formally requested to do so by any party (Albertan).

The AER refuses to conduct well license review proceedings (called reconsideration), which are a remedy at law that any landowner not being paid compensation annually (or periodically) is entitled by law to apply for and receive.

The AER clearly believes in error that its decision makers possesses no jurisdiction to decide matters of tenure, where the judiciary including the Supreme Court of Canada has clearly decided otherwise. The author has documentary evidence of this. Reform at the AER is required because Supreme Court decisions are clearly binding on all Canadians - *including all AER employees.*

Errors made by the AER (or AUC) compound-they lead to or cause inherent errors mirrored in right of entry orders. When the Board issues right of entry orders when it should not do so by law, landowners are induced into signing agreements when they should not be doing so, erroneously believing that the Board may issue a right of entry order if the parties fail to reach agreement.

Enforcement of laws that govern use of land by the AER is more or less non-existent. This results in under compensation of landowners.

- **There are many other problems at the AER, including as official investigators have found the AER does not follow law, its own rules, and operates in a "culture of fear". There are countless reasons for AER reform including protection of property rights and human life itself.**

APPENDIX

School of Pubic Policy, University of Calgary,

OWED LANDOWNERS: THE STATUS OF ORPHAN WELL RENTAL RECOVERY IN ALBERTA

ENERGY & ENVIRONMENTAL POLICY TRENDS

April 2020

OWED LANDOWNERS: THE STATUS OF ORPHAN WELL RENTAL RECOVERY IN ALBERTA

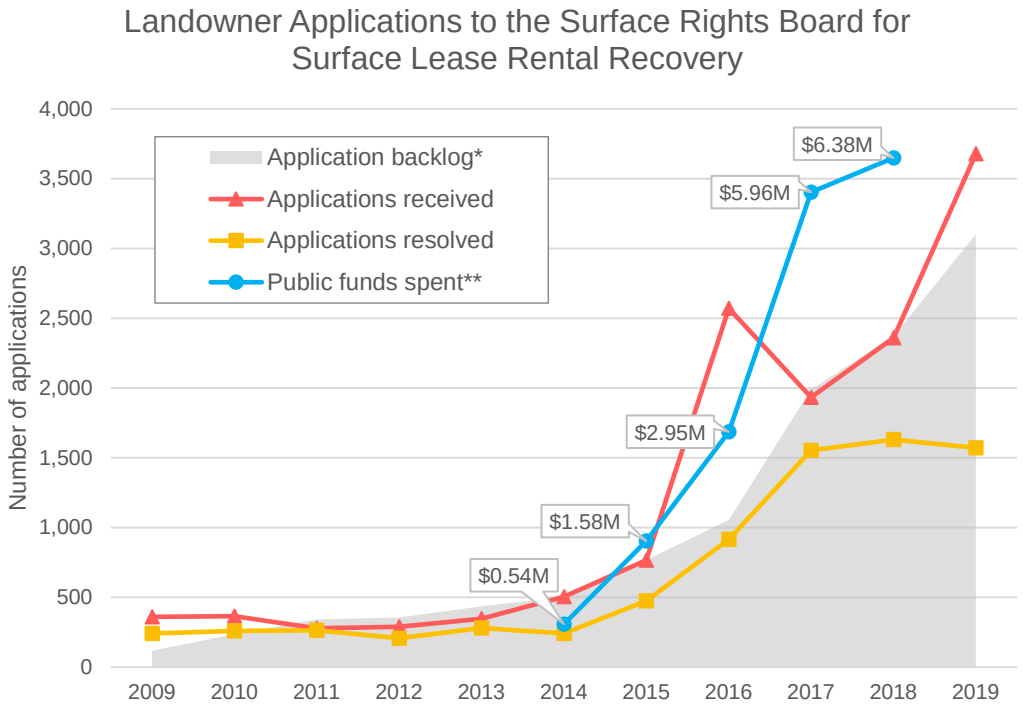
On April 2nd, Alberta's Legislative Assembly passed Bill 12, intended to address the province's orphan well problem. In this Policy Trends, we look at one of the lesser-known impacts of the problem: unsustainable pressure on the system meant to compensate Albertans with orphan wells on their land. Will changes under Bill 12 help alleviate this pressure and ensure landowners are protected?

In Alberta, landowners cannot deny use of their land to mineral rights holders. Instead, financial compensation is intended to keep a landowner's property rights "whole" while their land is temporarily expropriated for resource development. Compensation is meant to be provided as annual surface lease payments made by the oil and gas operator (lessor) to the landowner (lessee).

If a landowner doesn't receive this annual payment, they may apply to the Alberta Surface Rights Board (SRB), a quasi-judicial body, for payment of the rental fee out of the province's General Revenue Fund. They must re-apply each year until transfer or reclamation of the site; the process is time-consuming and an added burden. Where the operator of a well becomes insolvent and no working interest participant remains, it becomes the responsibility of the Orphan Well Association (OWA), and is called an "orphan well". Currently, any landowner with an orphan well on their land must undergo this inefficient SRB process to collect the rental fees owed to them.

In 2018, $6.38 million in public funds was spent to compensate landowners — almost 12 times more than what was spent in 2014.

There is a growing number of orphan wells in Alberta, which means more landowners are applying to the SRB for rental recovery. The number of rental recovery applications jumped from an average of 365 per year over 2004-2014, to 765 in 2015. The number then tripled to 2,570 in 2016, responding (with an expected lag) to significant increases in the number of wells orphaned in 2014 and 2015. As more applications are resolved, the annual total paid to landowners from the General Revenue Fund as a result of SRB decisions increased almost twelve-fold since 2014, reaching $6.38 million in 2018.



Sources: SRB 2009-2017; Government of Alberta 2019.
*Backlog for 2008-2016 is calculated based on applications received and resolved in subsequent years.
**Annual amount (in millions CAD) paid to landowners from the General Revenue Fund as a result of SRB decisions.

Despite faster processing rates, in all years since 2007 the SRB received more rental recovery applications than it resolved, meaning there is a growing backlog. There were an estimated 3,101 rental recovery applications left unresolved at the end of 2018. At the SRB's highest application-resolution rate to-date (1,630 in 2018), it would take almost two years to resolve this carry-over alone, assuming no applications are on hold pending legal stay.

UNIVERSITY OF CALGARY | THE SCHOOL OF PUBLIC POLICY

The School of Public Policy
University of Calgary Downtown Campus
906 8th Avenue S.W., 5th Floor
Calgary, Alberta T2P 1H9

Authors: Victoria Goodday and Braeden Larson
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www.policyschool.ca

In its latest annual reports, the SRB called the boom in applications "an enormous workload for our administrative staff" (SRB 2016) and stated that "[rental recovery] matters will likely continue to be a challenge, particularly if large operators continue to fail" (SRB 2017). The growing backlog translates to longer processing times and delayed payment to landowners. When landowners are not compensated in a fair and timely manner, their rights are not respected and the integrity of Alberta's property rights framework is compromised.

Each year since 2007, the SRB received more rental recovery applications than it resolved, resulting in a growing backlog.

Policy options to address the backlog should be urgently considered. A simple approach could be eliminating the need for landowner re-application, which would require amendment of section 36 of the Surface Rights Act. Bill 12, instead, amends the Oil and Gas Conservation Act and the Pipeline Act to broaden (1) the powers of the OWA and the AER, and (2) how funds collected through the existing industry levy can be used to manage orphan wells.

One change brought about by Bill 12 is that funds collected through the industry orphan well levy can now be used "for the purpose of making payments associated with taking over the management and control of wells or facilities in accordance with the regulations" (Bill 12, section 13). This change may allow the OWA — or another body authorized by the regulator — to pay rentals directly to landowners that have orphan wells on their land. This would free up SRB capacity to deal with the other matters assigned to it, help to ensure landowners are paid in a fair and timely manner, and free landowners of the burden of having to apply for rental recovery every year.

We recommend the Government of Alberta take advantage of this opportunity to better protect the property rights of Albertans.

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The School of Public Policy
University of Calgary Downtown Campus
906 8th Avenue S.W., 5th Floor
Calgary, Alberta T2P 1H9

Authors: Victoria Goodday and Braeden Larson
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