

# NEWSLETTER

## The Freehold Owners Association (“FHOA”)

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March 15, 2010

## THE PROPERTY RIGHTS OF FREEHOLDERS

This issue of your newsletter focuses on the property rights of individual freehold owners and how these rights are being eroded.

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### Protecting Property Rights

At common law, the rights to the subsurface oil and gas to which freehold mineral owners hold title are real property to the same extent as the surface overlying our mineral rights. As such, freehold mineral owners share the same fundamental concerns as surface owners with respect to protecting property rights.

Alberta surface owners face significant challenges in protecting their property rights. This has been abundantly demonstrated by the ongoing dispute over construction of a new power transmission line between Edmonton and Calgary.



But the challenges faced by surface owners pale in comparison to those faced by freehold mineral owners in protecting their property rights.

One can see and touch the surface and threats to surface owners’ property are therefore relatively easy to identify. Furthermore, once a legitimate threat is identified, it is relatively easy for surface rights owner advocacy groups to gain public support because the majority of citizens own surface rights in one form or another and can relate.

Freehold mineral rights can’t be seen or touched and freehold owners typically have no training or experience in subsurface oil and gas reservoirs, field operations or administrative law. Consequently, it is exceedingly difficult for freeholders to recognize situations where their property rights are threatened by the actions of industry operators, legislators or regulators. Even if a threat is identified, gaining the public sympathy and support typically needed to cause those responsible to address the situation is challenging. Complex technical issues not easily understood by the general public are usually involved and, because most citizens don’t own freehold mineral rights, the public has difficulty relating to the problems faced by freeholders.

Legislators have recognized the power imbalance between individual surface owners and energy companies. Quasi-judicial boards have been put in place which provide individual surface owners who have disputes with energy companies recourse outside the costly judicial

process. In Alberta both the Surface Rights Board and the Energy Resources Conservation Board (the “ERCB”) make Appropriate Dispute Resolution (“ADR”) services available to surface owners.

Freeholders who have disputes with energy companies have no access to ADR services and there is no ‘Subsurface Rights Board’ for freehold mineral owners. The ERCB takes the position that it has no jurisdiction to become involved in property rights disputes between freehold mineral owners and energy companies. According to the ERCB, such disputes belong in the courts.

Very few individual freehold owners have the financial resources or intestinal fortitude to take on a powerful energy company in a court of law. In result, the recourse of freeholders whose property rights are damaged by an energy company is very limited.

The recourse of freehold mineral owners in situations where the actions of legislators or regulators damage their property rights is even more limited. The following quote from a recent unanimous Supreme Court decision (*Authorson v. Canada* (2003), 2 S.C.R. 40) says it all:

*The prohibition, “Thou shalt not steal,” has no legal force upon the sovereign body. And there would be no necessity for compensation to be given.”*  
(Emphasis added by the Court)

In 1791, the Fifth Amendment to the Constitution of the United States was passed. This amendment provides that “no person ... shall be deprived of life,

*liberty, or property without due process of law nor shall private property be taken for public use without just compensation."*

Many scholars attribute the accomplishments of American society during the 18<sup>th</sup> and 19<sup>th</sup> century to the wisdom of the country's founding fathers in protecting the property rights of its citizens. Two centuries later, the protection of property rights has been enshrined in the constitutions of most modern democracies.

Section 7 of the Canadian Charter of Rights and Freedoms, passed in 1982, provides that "*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*"

Why does the Charter contain no specific provision requiring compensation for private property taken for public use? Is Canada a modern democracy or a third world backwater?

Both Liberal and Conservative federal governments have made attempts to amend the Charter to provide protection for private property but these attempts have in all cases been thwarted by that particular Canadian phenomena - provincial obstructionism!

### **Property Rights Erosion**

What can you do if you discover today that your property rights were damaged as a result of something done by an energy company prior to March 15, 2000? In Alberta, nada! And if you discover that your lessee has neglected to pay you proper royalties for 30 years, you can only recover for the most recent 10 years!

The 10-year ultimate bar to legal actions in the 1999 Alberta Limitations Act encourages unscrupulous energy companies to breach the terms of their lease agreements with freeholders in complex technical situations where the freeholder is unlikely to discover the breach. Thousands of unsatisfied offset obligations in Alberta are a case in point.

This legislation has not only damaged the property rights of thousands of freeholders it has encouraged behaviour that is contrary to accepted social mores.

What can you do if your mineral rights are included in a municipal annexation? Residential or industrial development of the surface overlying your mineral rights benefits the surface owner, the developer and the municipality but destroys the value of your mineral rights by preventing drilling. At common law, compensation must be paid when the state expropriates property unless the expropriation is done pursuant to a statute allowing expropriation without compensation. Canadian courts have found the same principles apply to 'de facto' expropriation where the actions of the state effectively destroy the value of property. But this doesn't do the typical freeholder who can't afford litigation much good.

What can you do if an energy company drills and produces a well on the other side of your fence line immediately adjacent to your mineral rights and thereby drains your valuable property rights? Nada! In 2006, over the objections of FHOA and in contravention of the fundamental principle of correlative rights, the ERCB changed the target areas for gas wells to encourage the drilling of wells on the north and east fence lines of sections.

And what if your government passes legislation effectively stating that coal bed methane ("CBM") is natural gas beneath Crown lands but something else beneath freehold lands? The combination of this legislation and the ERCB's target area changes has resulted in Crown lands being drilled up for CBM in preference to freehold lands throughout Alberta with many of the wells on freeholders' fence lines.

Individual freehold owners cannot afford to litigate these issues and many others that impact their property rights. Freeholders need an association with the financial strength to represent their interests.

It is time that a portion of the freehold mineral tax collected by the Province of Alberta was flowed back to FHOA. It is

time that the Charter was amended to protect private property.

### **Tax Time**

It's that time again. If you received production royalties from your mineral rights you are entitled to deduct your royalty share of any mineral tax you paid on production.

### **Donations, E-Mail Addresses & Lease Terms**

The response to our January newsletter seeking donations to be matched under the Community Spirit Program, e-mail addresses to save FHOA mailing costs and lease terms to post on our web site pursuant to our grant from the Growing Forward Program has been gratifying. We thank those of you who have contributed. Maps showing royalty rates and caps on deductions have now been posted to our web site ([www.fhoa.ca](http://www.fhoa.ca) - 'What FHOA Can Do For You').

### **FHOA AGM & Seminar**

The association's annual general meeting will be held on Saturday, April 17, 2010 in the Crossroads Church, 32<sup>nd</sup> Street and Highway 2, Red Deer County, Alberta. The meeting will be followed by lunch (\$10.00) and a seminar in the afternoon. FHOA directors Keith Wilson and David Speirs will discuss property rights and their erosion. The leaders of each of Alberta's major political parties have been invited to attend and address the issue. At this point, the leader of the Wildrose Alliance has accepted our invitation. A question and answer session will follow the talks.

On behalf of the board of directors,  
Else Pedersen, President

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