

SUBMISSION TO THE SELECT SPECIAL COMMITTEE FOR REAL PROPERTY RIGHTS IN ALBERTA



**Submitted by the Alberta Grazing Leaseholders Association
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Alberta's grazing leaseholders sink significant investment into managing their leases. This includes initial procurement costs, annual rent, municipal property taxes and all costs related to improvements on the lease such as fencing, tree and brush clearing and water development to meet their legislated requirements. For many producers their grazing leases are what make their operations viable and therefore play a critical supporting role in their livelihood.

It needs to be emphasized at the outset that Alberta's grazing lease system predates the creation of Alberta. It was a key element of the Canadian government's settlement and economic development policies for the prairies that was also focused on stewardship and preservation of the grass resources. The Grazing Lease instrument continues to be a critical element of Alberta's beef industry and demonstrated tool of successful land stewardship.

HISTORICAL CONTEXT

Origins

The current form of the Alberta Grazing Lease dates back to 1881. In that year, the *Dominion Lands Act*, 1876, 39 Vict. c. 19, and Dominion Order in Council, No. 803, vested in the holders of Crown grazing leases strong tenure rights in an effort to stimulate investment in the cattle industry and promote environmental stewardship of the grass resources.

In the early 1880s, the Canadian government was under pressure to honour its commitments to Indigenous peoples under *Treaty 7* which had been signed in 1877. That Treaty obligated the government to supply food. The native buffalo herds which had been the primary food source had been largely eliminated due to overharvesting. In an effort to attract investment to increase the number of cattle to avert starvation of the Indigenous population, the government created a lease tenure system that allowed for ranches as large as 100,000 acres with 21-year renewable lease terms. The historical records show that "security of tenure" was a core objective of the new system.¹

Canadian Grazing Lease System Designed to Avoid American Mistakes

It also needs to be understood that our grazing lease system was developed in the context of the "range wars" and environmental degradation that were occurring on the Great Plains of the United States of America in the period of 1866 through 1885. It is well documented that Canada's elected officials of this era were acutely aware of the problems on the Great Plains of the United States and wanted to implement a better system here in Canada.²

It is helpful to explain what was occurring in the United States during that period given its influence on our current system. Grazing leaseholders do not want this government to inadvertently recreate the environmental policy disaster that has been famously described by Garret Hardin in his study of the late 19th century US public land grazing policies: see Garrett Hardin's seminal article, "The Tragedy of the Commons", published in 1968 in the journal *Science*.

The story begins with the American Civil War and the southward advances by the Union Army in 1863, eventually cutting off the Confederate supply lines across the Mississippi

¹ David H. Breen, "The Canadian Prairie West and the Ranching Frontier: 1874 – 1924," (Ph.D. Thesis, University of Alberta, 1972), Rutherford Library, Special Collections, University of Alberta, Edmonton.

² *ibid*

River. For years prior, America's largest cattle herd was in Texas. When the cattle could no longer be moved east to supply the Confederate Army, the Texas herd grew unchecked until the war's end in 1865 where the cattle numbers reached over 5 million.³

The American ranchers and investors decided to move large herds north onto the public grasslands on the Great Plains of what is now Oklahoma, Kansas, Nebraska, Colorado, Wyoming, the Dakotas and Montana. The end of the Civil War brought a sharp increase in the demand for meat in the growing industrialized cities of the US east and midwest. The Great Plains presented an abundance of free grass and a connection to the eastern railways.

In the period of 1866 to 1885, the United States had an "open range policy". The United States Supreme Court in *Buford v. Houtz*, 133 U.S. 320 (1890) at page 326 declared that:

. . . public lands of the United States, especially those in which the natural grasses are adapted to the growth and fattening of domestic animals, shall be free for the people who seek to use them where they are left open and unenclosed. [Emphasis added]

The effect of the open range policy was that whichever rancher could get his cattle to the grass first, got the grass. This led to intense competition for the grass resources. At the same time, the US sheep herd was also increasing. Not only was there fierce competition among the cattle ranchers there was also conflict with the sheep herders. This led to literal range wars, killings, poisoning of water sources, and more; all of which was later depicted in classic Hollywood western movies.⁴

Canada and Security of Tenure

Back in Canada, Senator Cochrane and Sir John A. McDonald were debating how to avoid the range wars and environmental degradation occurring in the United States while at the same time creating sufficient security of tenure to attract the investment needed for a viable cattle industry.

They rejected the open range land policies of the United States. Instead, the 1881 Canadian grazing lease system was designed to create a lease of real property at common law based on the Australian model.⁵ From 1882 to 1886 hundreds of thousands of acres of Crown grasslands were placed under Crown Grazing Lease and Alberta's cattle industry came into being.

Transfer from Canada to Alberta

In 1905, Alberta became a province. However, the Crown lands including the grazing lease system continued to be administered by the Government of Canada in Ottawa. It was not until the "1930 Natural Resources Transfer Agreement" and related amendments to the *Constitution Act of 1867*, that ownership and control of Crown lands was transferred from Canada to Alberta.

³ Gary D. Libecap, *Locking up the Range: Federal Land Controls and Grazing*, (Cambridge: Ballinger, 1981), 9. William Voigt, *Public Grazing Lands: Use and Misuse by Industry and Government*, (New Brunswick: Rutgers University Press, 1976), 22; Ray A. Billington, *Westward Expansion: A History of the American Frontier*, 4th ed. (New York: MacMillan Publishing Co. 1974), 583.

⁴ Ora B. Peake, *The Colorado Range Cattle Industry*, (Glendale: Arthur H. Clark Company, 1937), 68. Ernest S. Osgood, *The Day of the Cattleman*, (Chicago: University of Chicago Press, 1964), 187.

⁵ H.S. Robert, *History of Australian Land Settlement, 1788 - 1920*, (Melbourne: Macmillan Co. of Australia 1968) at 184, 194-5. See also, Breen, *supra*, at 20 n. 56. Under the Australian system, livestock owners were permitted to lease large portions of Crown land for a term of years. For a summary of the Australia laws respecting grazing leases see B.A. Helmore, *Law of Real Property in New South Wales*, (2d) (Sydney: The Law Book Company, 1966) at 525.

The Alberta government carried forward the Crown grazing lease system from the *Dominion Lands Act* into the *Provincial Lands Act*, which was later renamed the *Public Lands Act*.

GRAZING LEASES AS A LEASE OF REAL PROPERTY AT COMMON LAW

The current *Public Lands Act* ("PLA") does not explicitly state whether a grazing lease creates a leasehold interest in real property at common law. Early versions of the PLA, however, expressly dealt with these points. From 1949 through 1966, the PLA contained the following provisions:

98. The holder of a lease may bring and maintain actions for trespass committed at any time during the currency of the lease.

141. (1) The sale or lease of land, unless the sale or lease has been forfeited, revoked or cancelled, entitles the person to whom it was issued and any person lawfully claiming by, through or under him, to take, occupy and use the land and to hold possession of it to the exclusion of any other person, and to bring and maintain actions for trespass committed on the land. [Emphasis added]

In 1966, the PLA was rewritten; the language was modernized, and the overall Act was consolidated.

The main sections of the current PLA dealing with grazing leases state:

Grazing lease

102(1) The director may in accordance with this Part lease public land for a term not exceeding 20 years for the purpose of grazing livestock when, in the director's opinion, the best use that may be made of the land is the grazing of livestock.

(1.1) Notwithstanding subsection (1), the director may in accordance with this Part

(a) lease public land in a heritage rangeland for a term not exceeding 30 years, or

(b) amend any lease granted under subsection (1) in a heritage rangeland to extend the term to one not exceeding 30 years and to include other terms and conditions, if the lease is for the purpose of grazing livestock and the director is satisfied that ongoing grazing of livestock is essential for maintaining the grassland ecology and ensuring the effective management and lasting protection of the heritage rangeland.

(2) A lease under this Part shall be called a grazing lease.

(3) The area of land leased under this Part shall not exceed an area sufficient to graze 600 head of cattle, unless, in the opinion of the director, a larger area can be leased without adversely affecting the interests of other farmers or ranchers residing in the vicinity of the leased land. [Emphasis added]

RSA 2000 cP-40 s102; RSA 2000 c34(Supp) s14; 2009 cA-26.8 s91(51),(52)

...

Residence

106(1) The director may grant an ancillary lease to a grazing lessee of a parcel of public land not exceeding one quarter section in area on which the lessee may reside and erect the buildings the lessee requires to conduct the lessee's operations.

(2) The term of any lease granted pursuant to subsection (1) commences and expires on the same dates that the term of the lessee's

grazing lease commences and expires, and if the grazing lease is cancelled the ancillary lease is thereby terminated.
RSA 2000 cP-40 s106;2009 cA-26.8 s91(51)

Legal Meaning of the Term “Lease”

Leases have existed in our legal and economic systems for centuries. In addition to being used to facilitate the creation of legal rights in land, leases are the primary legal instrument through which Alberta has created a market and economic conditions to support resource development. Alberta’s Crown minerals are leased to energy companies; not sold. A lease creates a leasehold interest. A leasehold interest signifies the existence of a landlord-tenant relationship. In *Anger and Honsberger Law of Real Property*, a landlord-tenant relationship is described as follows:

The relationship of landlord and tenant is created by a contract express or implied [a lease], by which one person is possessed with an interest in real property, and who is called the landlord or lessor, confers on another person, called the tenant or lessee, the right of exclusive possession of the real property or some part of it for a period of time which is definite or can be made definite by either party, usually in consideration of a periodical payment or rent either in money or its equivalent.

Characteristics of a Lease Contract

Leases typically have standard features with standard phrases. For example, leases normally include:

- name of the parties and often use the terms ‘lessor’ and ‘lessee’;
- self-describe the agreement as being an “indenture”;
- contain a granting clause describing the property being leased;
- set out the term (duration) of the lease;
- specify the rent to be paid; and
- details re renewals.

All these features are present in the current Crown Grazing Lease contract. The current Grazing Lease contract self describes as a lease, identifies the parties (including the rancher as being the ‘lessee’) and sets a term. The current Crown Grazing Lease contract contains a granting clause and includes the payment of ‘rent’. It also includes the provisions for renewal.

In short, the language used throughout the Crown Grazing Lease contract is classic “lease” wording for creating a lease of real property at common law.

SECURITY OF TENURE

Recognizing leases in common law is necessary in the grazing lease system for security. In Alberta, leaseholders bear the costs of improvements on grazing leases. This includes fences, water developments, tree or bush clearing and anything else required for them to meet their legislated requirements for stewardship.

Security of tenure, part of which is the lease being recognized in common law, builds a level of confidence for the leaseholders whereby a return of investment in the land will be realized. This builds true incentive for good stewardship into the system with very little capital investment on the part of government

In short, a security of tenure model creates a system to ensure continual exemplary stewardship. Leaseholder ranchers given security of tenure will manage the land as their own; investing in the adaptive management and stewardship to maintain and increase the health of the rangeland in perpetuity. Security of tenure fosters a

commitment to sustainable working landscapes that is lost if leaseholders are concerned the grazing disposition will be rescinded or not renewed.

RECOGNIZING PROPERTY RIGHTS OF STATUTORY CONSENTS

Statutory consents, including grazing dispositions, have value. They can be bought, sold, and borrowed against. Grazing leaseholders pay the property taxes on their leases. These facts stand as evidence that grazing dispositions are property. As mentioned, many cattle operations rely on the grazing lease instrument to ensure the viability of their operations. They are a vital part of and a contributor to the sustainability of the beef industry in Alberta and also the sustainability of large contiguous ranges of grassland.

There have been many examples where a statutory consent has been amended and the holder of the statutory consent has suffered damages or losses. It is commonly seen whereby the government decreases the size of grazing dispositions arbitrarily, sometimes eventually to the point of non-existence. In these cases, compensation is not guaranteed and access to the courts is denied. This undermines the security of the property right, thus also undermining the security of business in Alberta.

RECOMMENDATION: That this government honor the intent of the grazing lease instrument in Alberta and enshrine property rights for grazing leases in legislation, once again including but not limited to amendments to the *Public Lands Act* and the *Alberta Land Stewardship Act*.

CONCLUSION:

Grazing dispositions have been present in Alberta since 1881 and have helped ensure that Alberta's rangelands are maintained and provide all the benefits of a healthy, functioning, natural ecosystem. Alberta Environment and Parks works to manage Crown lands by working with grazing disposition holders to ensure appropriate stewardship principles to sustain the health and productivity of rangelands, assuring that these lands provide a broad suite of services to all Albertans.

Grazing disposition holders undertake a significant stewardship role on public lands; they are responsible for maintaining rangeland health and serve to both protect and maintain environmental values. The extensive experience and knowledge of grazing disposition holders is an important resource in ensuring the health of the rangelands. Crown lands under grazing disposition have benefitted from the intergenerational knowledge of its stewards, and the succession of those stewards depends on security.

As much as in any country in the free world, Alberta property owners are at the mercy of uncontrolled greed, jealousy, envy, injustice, moral decay, and big government want. Private property rights are a fundamental and necessary condition if people are to be prosperous and free. Private ownership induces an attitude of stewardship. Continued stewardship of Crown land in Alberta is reliant on the recognition of property rights in grazing leases and legislation supporting it.