



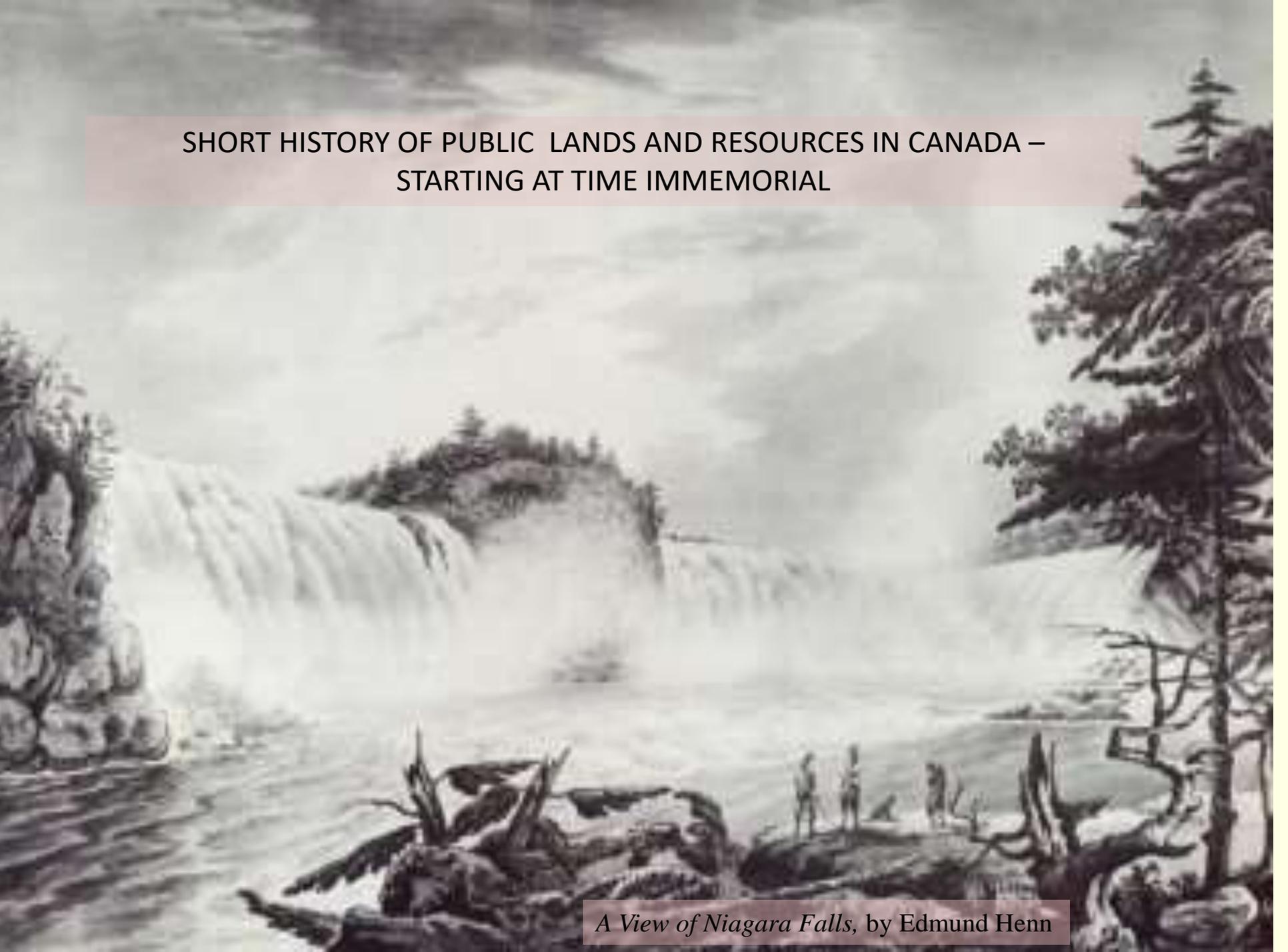
Canadian Institute of Resources Law

SATURDAY MORNING AT THE LAW SCHOOL

These slides prepared by Arlene Kwasniak, for Saturday Morning at the Law School, October 29, 2016, Lecture: ***How Public are Public Lands***- Lecturers, Professors Arlene Kwasniak and Alastair Lucas

- **Public lands and resources are lands and resources (oil, gas, water, forests, air etc.), that are owned by a government, now the Federal, or a Provincial, or Territorial government**
- **This “ownership” may be subject to property and other interests or rights, such as Aboriginal, public, or private sector**
- **This section of the talk looks the evolution of public lands and resources in Canada from when there were no public lands to roughly to where we are today**

SHORT HISTORY OF PUBLIC LANDS AND RESOURCES IN CANADA –
STARTING AT TIME IMMEMORIAL



A View of Niagara Falls, by Edmund Henn

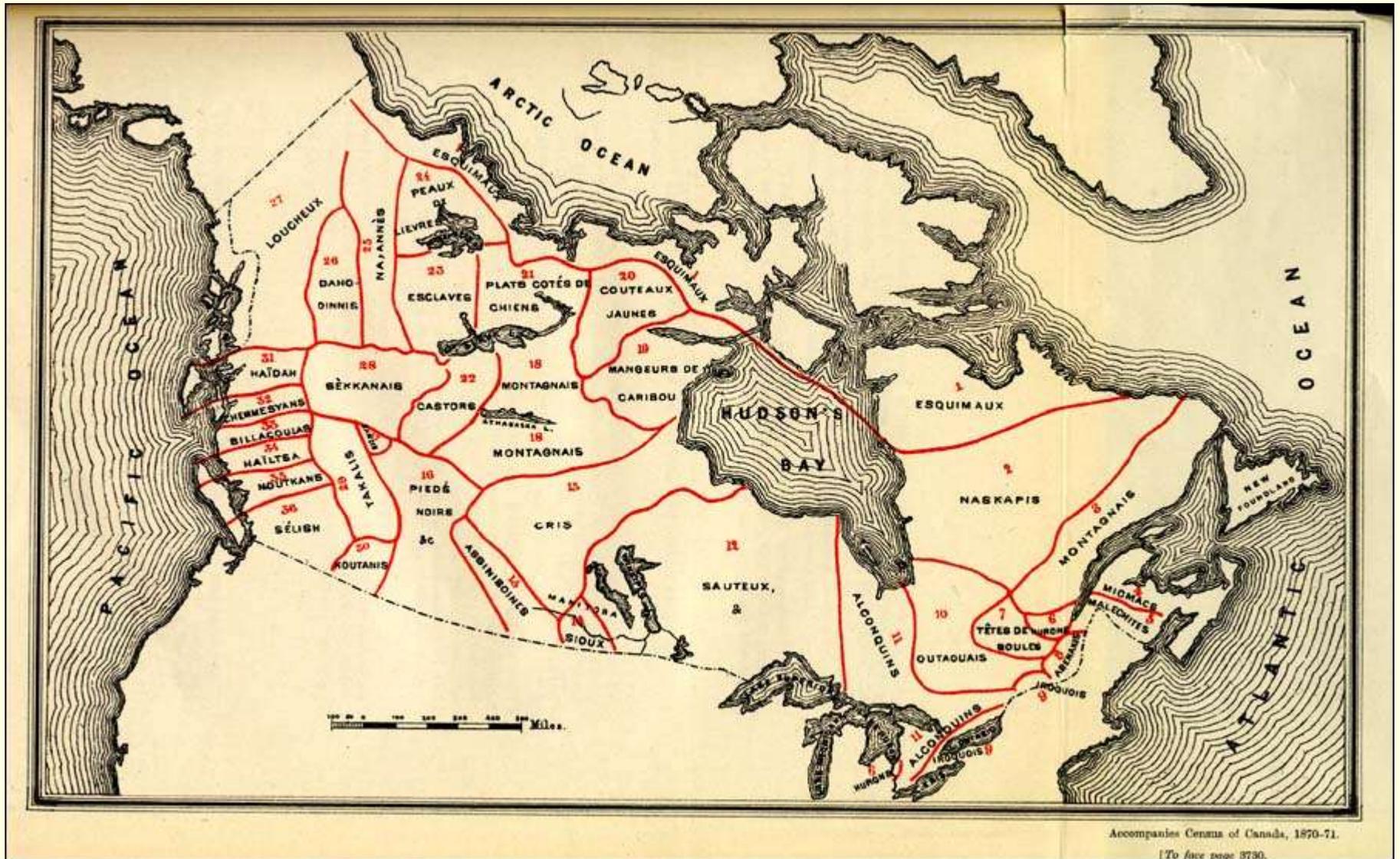


Pre- European settlement, Canada is home to numerous Aboriginal communities



Paul Kane

Pre-European contact there were about 500,000 indigenous people in Canada, 12 major language groups, numerous different cultures, manners of subsistence, and discrete traditional territories with tribal laws and customs.



Aboriginal First Nations

Our Own Names & Locations



This map is the most comprehensive ever created of the First Nations of Canada. It utilizes the original and true tribal names for each Nation, and shows where each Nation was originally, before contact with Europeans. It includes the names of the Nations who survived this incursion, as well as those that did not, honoring the memory of those who have fought tenaciously to hold on to their homelands. It is a visual reminder of those who have called this land home since time immemorial, creating a sense of pride for First Nations people, and a better understanding for the non-Native public. To Aboriginal First Nations peoples, this land will always be our ancestral homeland.



- Slides marked * courtesy of History of Canada at [pppst.com](http://canada.pppst.com)
<http://canada.pppst.com/history.html>

Earliest known explorers were the Vikings from Northern Europe* Evidence of early settlements in what is now Newfoundland and Labrador (around 1000)

The Viking Voyages



Approximate years of Viking voyages*

“Public” lands begin to take form

- Viking settlements abandoned and it was 500 years before further (known) European exploration
- Next round was by European explorers seeking a route westward across the Atlantic to Asia (for trade goods – spices, silk, jewels, etc.)
- Christopher Columbus, on behalf of Spain, was the first, but he hit Americas and inaugurated a period of European exploration and eventually competing colonization of the “New World”
- John Cabot, on behalf of England, reached Vinland in 1497 and
 - renamed it Newfoundland
- Giovanni da Verrazano, on behalf of France, established French claims to land in Canada in about 1524.
- Jacques Cartier, on behalf of France, in 1534-42, explored the St. Lawrence River that led to the founding of the colony of New France.



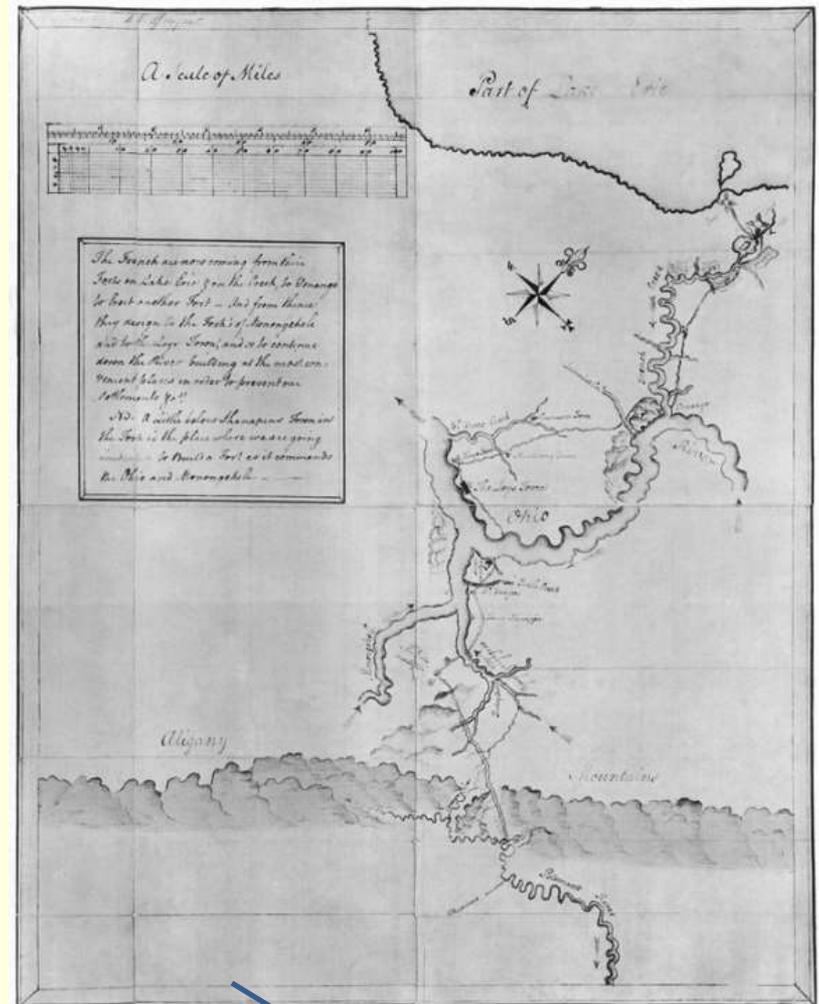
Charles II grant to the Hudson's Bay Company –

- British formed the HBC in 1670 for trading in the Hudson Bay in North America and the HBC acted as a *de facto* government
- Britain had claimed territorial rights over land within the Hudson Bay drainage area, and in 1670 Charles II granted the HBC Rupert's Land to facilitate trade between North American and Britain.



POLITICAL AND CULTURAL CONFLICTS

- Late 1600's to middle 1700's conflicts among the British and French developed over land – both claimed areas - and over control of the fur trade.
- Resulting war in North America was part of a world wide conflict, the Seven Years' War, (1756-63), which split Europe into two coalitions – one lead by England and one by France. Conflicts largely concerned contests over colonization and trade.
- North American war was known as the French and Indian War, since the Huron Indians fought for the French against the British.



General George Washington's map and note on the French coming.

French and Indian war (1756-1763) French and some North American Indians against the British)



Conference between the French and Indian Leaders – *Emile Vernier*

British won and the French conceded its territories



After the Seven Years War.

**Aboriginal peoples uprising –
attempted to drive out British
soldiers and settlers**

**October 7, 1763, Britain's King
George III issued the Royal
Proclamation of 1763 to help
stabilize relations with the
Aboriginal peoples North
America.**



Royal Proclamation of 1763

- Any lands that had not been ceded or purchased were “reserved for the Indians”
- Reserved lands only could be acquired through a treaty making process
- Royal Proclamation often cited as the basis or evidencing the basis of an aboriginal title to land.

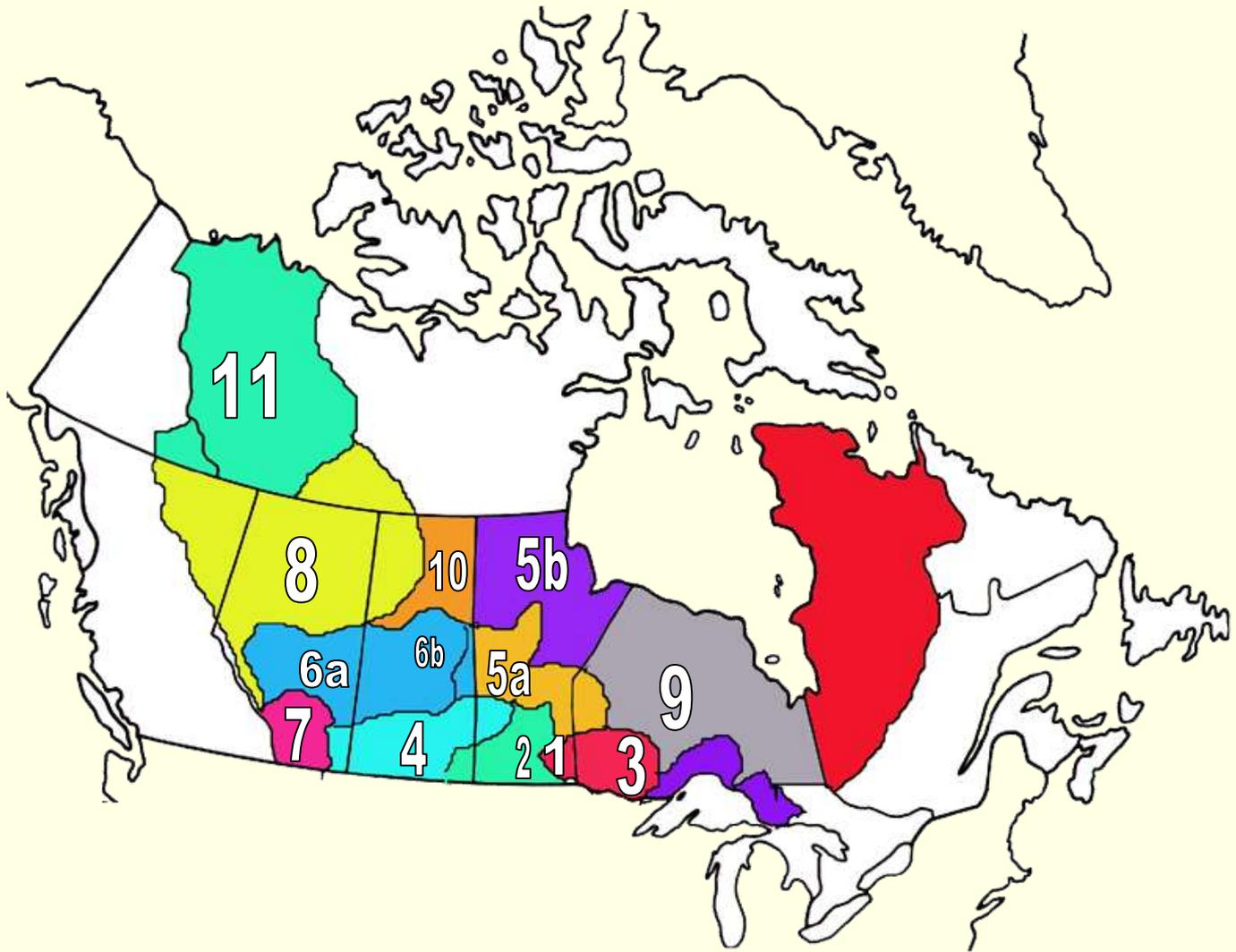
TREATIES

- **The way of acquiring indigenous people's Aboriginal title to land and associated Aboriginal rights**
- **Intended to extinguish pre-treaty aboriginal rights/title to ceded land, subject to treaty terms and understanding of terms**
- **Made in exchange for reserve land interests and rights and promises and protection**
- **Rights include the rights to carry out traditional activities (hunting, fishing, trapping, others) on ceded traditional lands - These may be public lands.**

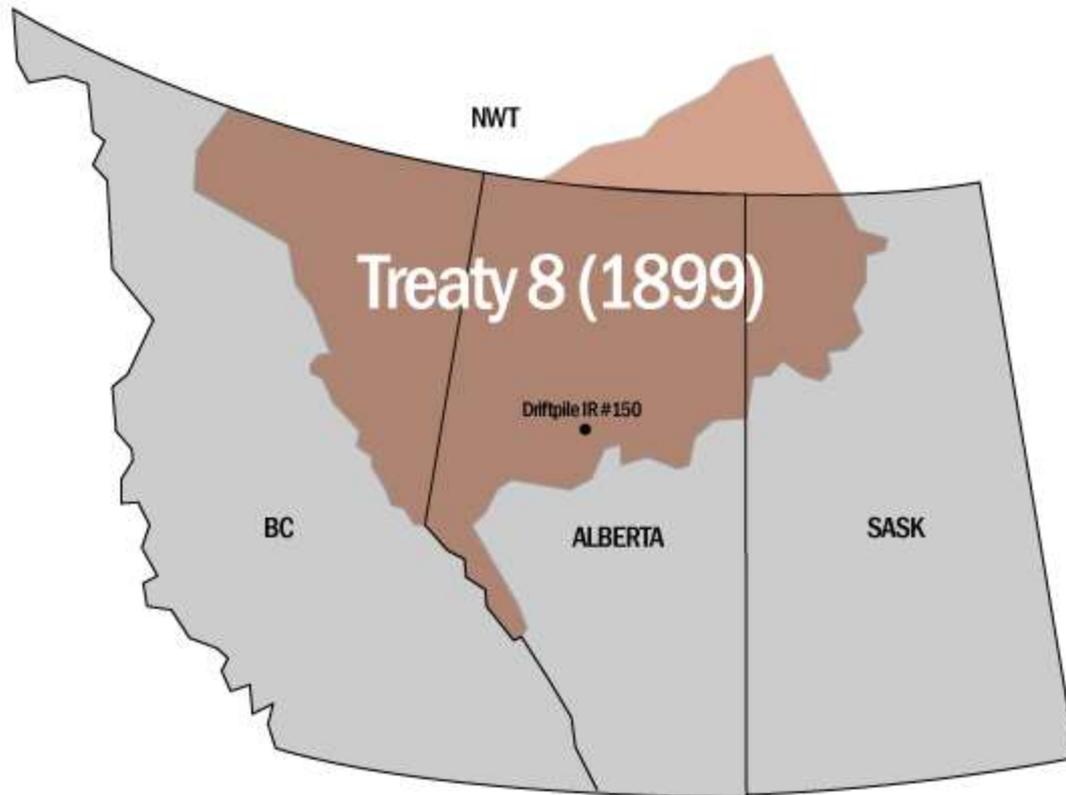
- **The numbered treaties, or Treaties One through Eleven, were the result of the post Confederation expansion of Canada into the western territories formerly controlled by the Hudson's Bay Company.**

Animated slide is by Robert White and Robert J. Benoy

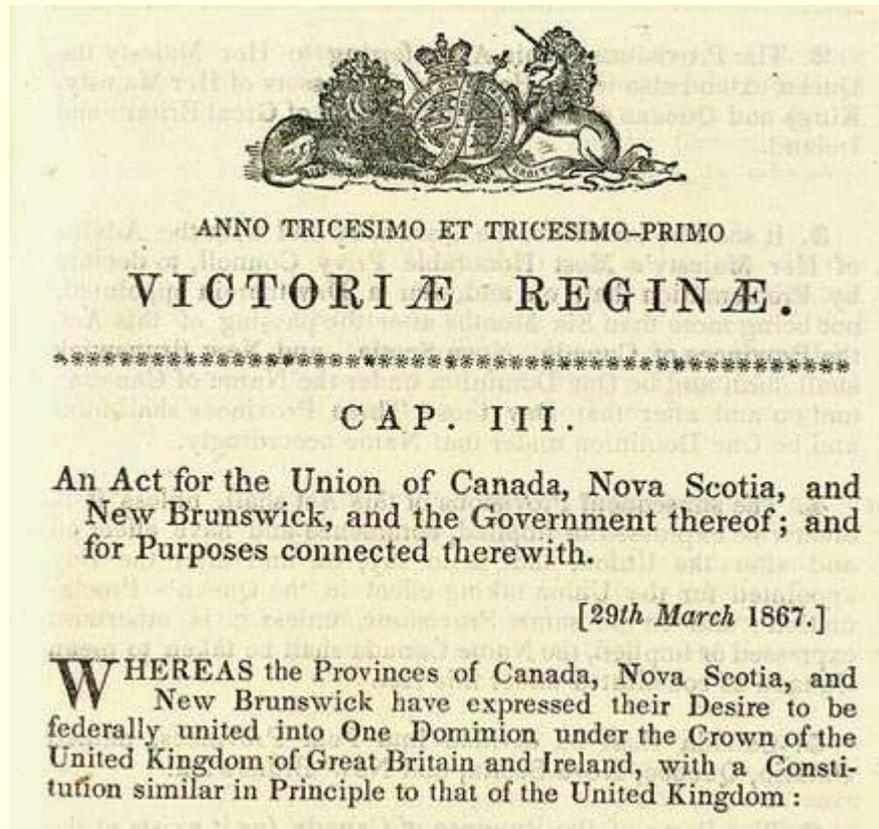
The Numbered Treaties



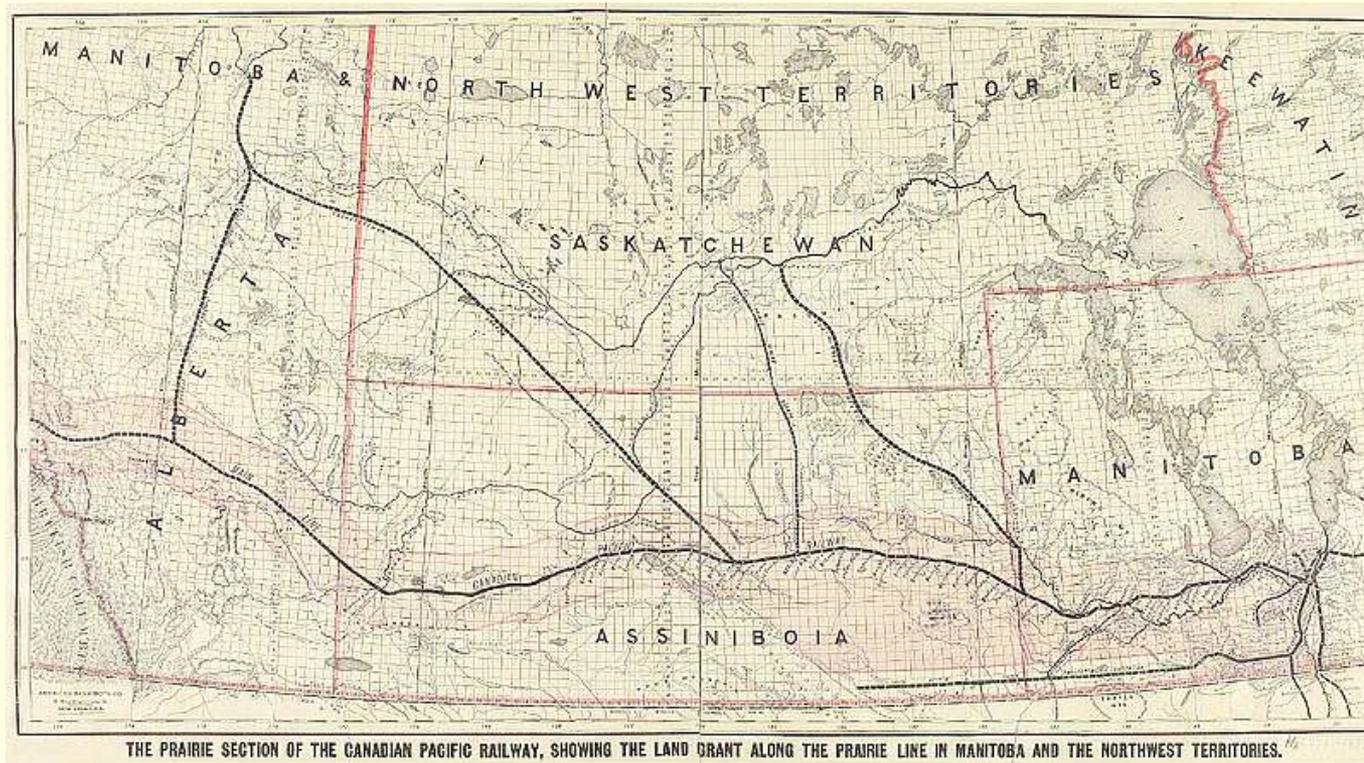
Traditional lands may cover extensive areas - e.g. Treaty 8 covers 840,000 square km



- 1864 - the Charlottetown Conference. Which was the first step toward Confederation.
- 1867 – Confederation of the British colonies in North America under the *British North America Act*, as the Dominion of Canada. Original provinces were Quebec, Ontario, Nova Scotia, and New Brunswick. Original provinces received their public lands and resources.



- 1870 Manitoba joins Confederation (quelling the Métis Red River Rebellion) (*Canada withholds public lands and resources*)
- 1873 British Columbia joins and in 1874 PEI joins.
- Canadian Pacific Railway – 1881 Government paid \$25 million, and granted 25 million acres of land out of public lands. The land the CPR received was alternating sections not already sold in the 40 km belt on both sides of wherever the track passed. (Government adopted an American system of land grants to subsidising railway construction)



Obviously the CPR was interested in attracting settlers to the west.

1873 TTT-2296-

The Canadian Pacific Railway

MANITOBA

AND The North West TERRITORIES OF CANADA

W. C. VAN HORNE, General Manager, Montreal.
 J. H. McTAVISH, Land Commissioner, Winnipeg, Man.
 C. DRINKWATER, Secretary, Montreal.

CANADIAN PACIFIC RAILWAY

AMENDED LAND REGULATIONS.

The Company now offers lands within the Railway Belt along the main line at prices ranging from

\$2.50 per Acre

UPWARDS,

with conditions requiring cultivation. A rebate for cultivation of from \$1.25 to \$2.50 per acre, according to price paid for the land, allowed on certain conditions.

The Company also offers lands without conditions of settlement or cultivation.

The Reserved Sections

Along the Main Line as far as Moose Jaw, that is, the sections within one mile of the Railway, are now offered for sale on advantageous terms, but only to parties prepared to undertake their cultivation within a specified time.

The Highly Valuable Lands in Southern Manitoba, allotted to the Company under the Railway Act, have been transferred to the Canada North West Land Company, to whom tendering purchasers must apply. These include lands along the Southwestern Branch of the Canadian Pacific Railway, which will be completed and in operation this season, to Gorka on the International Boundary, and Woodward to Pembina Mountain; also lands in the District of the South, Pelican and Whitewater Lakes, and Moose Mountain.

Terms of Payment,
CANADIAN PACIFIC RAILWAY LANDS.

Purchasers may pay one-eighth in cash, and the balance in five annual instalments, with interest at six per cent. per annum in advance.

Parties purchasing without conditions of cultivation will receive a deed of conveyance at time of purchase, if payment is made in full.

Payments may be made in Land Grant Bonds, which will be accepted at six per cent. premium on their par value and accrued interest. These bonds can be obtained on application at the Bank of Montreal, Montreal; or at any of its agencies.

For Prices and Conditions of Sale and all information with respect to the purchase of the Railway Company's Lands, apply to

JOHN H. McTAVISH, Land Commissioner, Winnipeg.

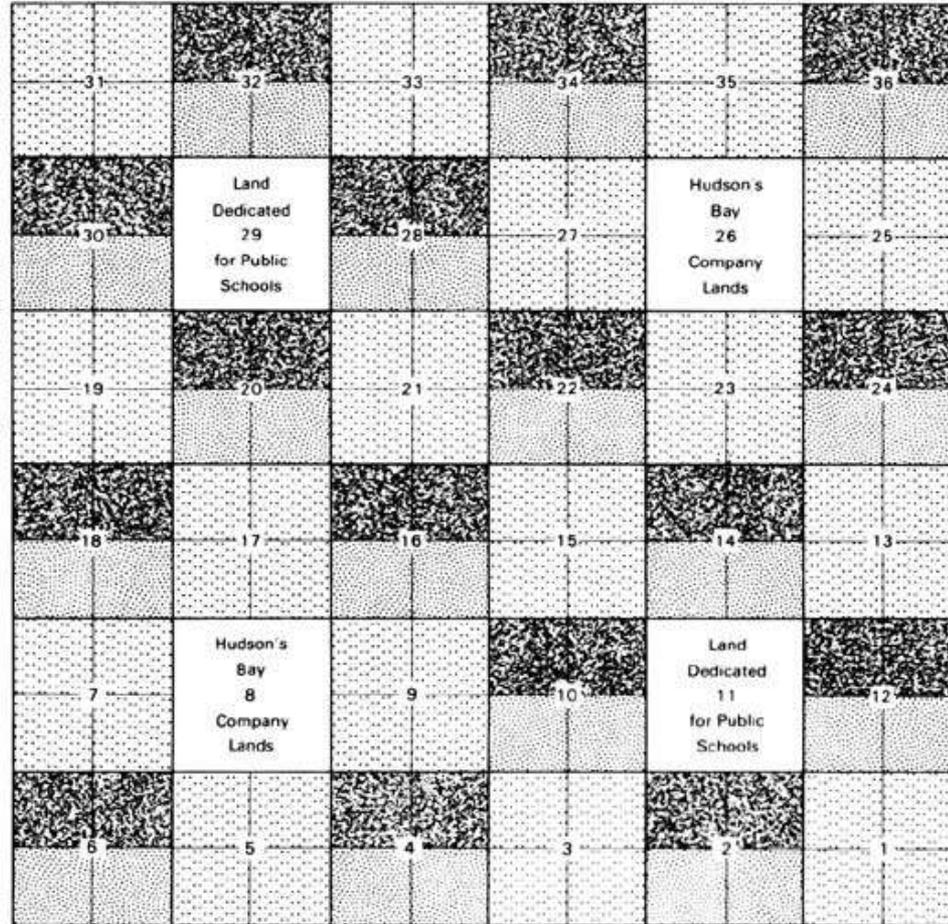
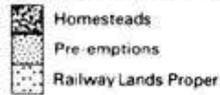
By order of the Board,
CHARLES DRINKWATER,
 Secretary.

MONTREAL, Jan. 24, 1891.

- 1869/70 - Canada acquires Rupert's Land from the HBC (included what is now Alberta) Canada in exchange for £300,000 and 2.8 million hectares of land in the prairie provinces (including subsurface mines and minerals)

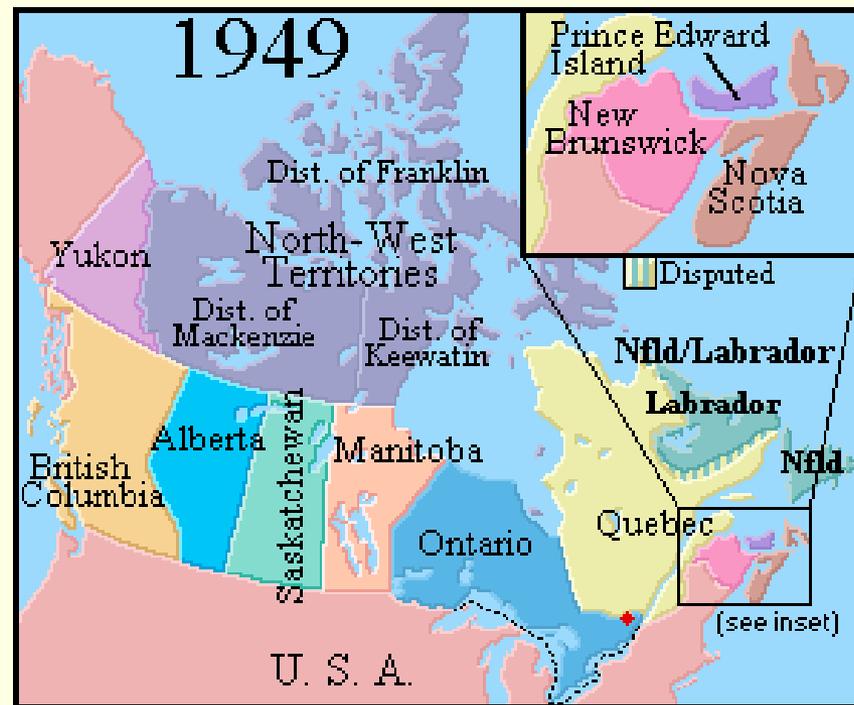


“Showing the Distribution, respectively, of Free Grant, Pre-emption, and Railway Lands proper, in each Township in the several Belts lettered A, B, C, D, and E.”



Ref. Diagram H accompanying P. C. O. No. 1422 of October 9th, 1879.

- 1905, Alberta and Saskatchewan join Confederation (*Canada withholds public lands and resources – just like for Manitoba*).
- In 1949 Newfoundland and Labrador join Confederation.



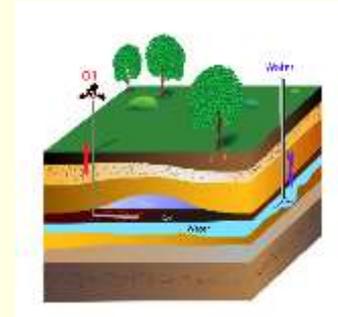
Dominion Lands Act

- 1872 DLA provided for public land management and dispositions,
- Dispositions included grants for homesteading – 160 acres for settling land
- Rules for harvesting timber, hay, and for mining on public lands
- DLA authorized *grazing leases*; although the DLA required leased land by open to homesteading, in practice, public rangeland was not.
- Grazing leaseholds could be up to 100,000 acres of public land for up to 21 years, at 1 cent an acre a year.



About 19,000 square kilometres of public land in Alberta set aside for grazing

Dominion Lands Act (and subsequent legislation) Government reserved or claimed ownership of natural resources



***Gold, silver, iron, copper, coal and other Mines and Minerals –
Order in Council under DLA 1887***



Wildlife – under the Wildlife Act



***Water and Beds and
Shores – North-west
Irrigation Act 1894***

Succession of public land legislation

- *Dominion Lands Act, Northwest Irrigation Act until – 1930*
- 1930 – Transfer of public lands and natural resources to the Prairie Provinces (*Natural Resources Transfer Agreement*)
- *Provincial Lands Act and Water Resources Act* take over after NRTA
- Changed to the *Public Lands Act, Water Act*
- Specific legislation for some resources (oil and gas, other mines and minerals legislation, forestry)
- Federal legislation for retained federal lands, e.g. *National Parks Act*

Figure 1. Alberta's Green Area and White Area.



White and Green Areas of Alberta

White Area	Green Area
<ul style="list-style-type: none"> • Settled lands 	<ul style="list-style-type: none"> • Forested lands
<ul style="list-style-type: none"> • Covers about 39 per cent of Alberta 	<ul style="list-style-type: none"> • Covers about 61 per cent of Alberta
<ul style="list-style-type: none"> • Three-quarters privately owned – by more than 1.7 million individual title holders (50,000 own or use most of the land for agriculture) 	<ul style="list-style-type: none"> • Nearly all publicly owned
<ul style="list-style-type: none"> • Primarily in the populated central, southern and Peace River areas 	<ul style="list-style-type: none"> • Primarily in northern Alberta, some in the mountains and foothills
<ul style="list-style-type: none"> • Main land uses: settlements, agriculture, oil and gas development, tourism and recreation, conservation of natural spaces, and fish and wildlife habitat 	<ul style="list-style-type: none"> • Main land uses: timber production, oil and gas development, tourism and recreation, conservation of natural spaces, watershed protection, and fish and wildlife habitat
<ul style="list-style-type: none"> • Authority to set regulations and make decisions is primarily with municipal governments on private land and with the provincial government on public land 	<ul style="list-style-type: none"> • Authority to set regulations and make decisions is primarily with the provincial government



What would our public lands be like if history had followed different paths? Would there be Aboriginal nations with expansive land title? Would we be primarily Scandinavian, French? What if the treaty process never happened, or was different? What if government retained more, sold off more, public lands? What if rangeland policy were different – would the the ecologically valuable rangeland we have in southern Alberta all have been homesteaded?

- Public lands policy and decisions today – can be just as significant crossroads.

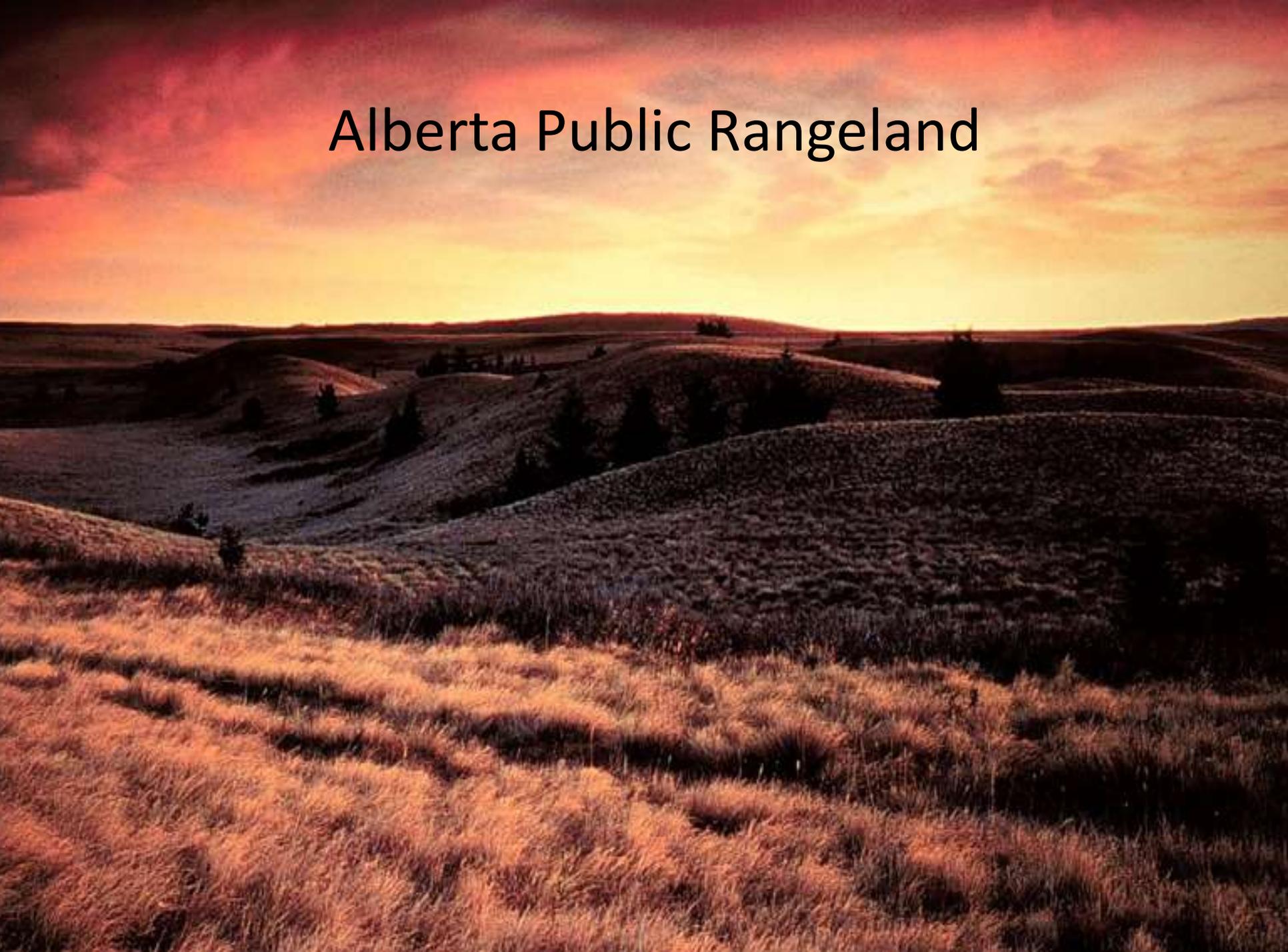
PRIVATE PROFIT FROM PUBLIC LANDS AND RESOURCES



SHOULD THERE BE LIMITATIONS?



Alberta Public Rangeland

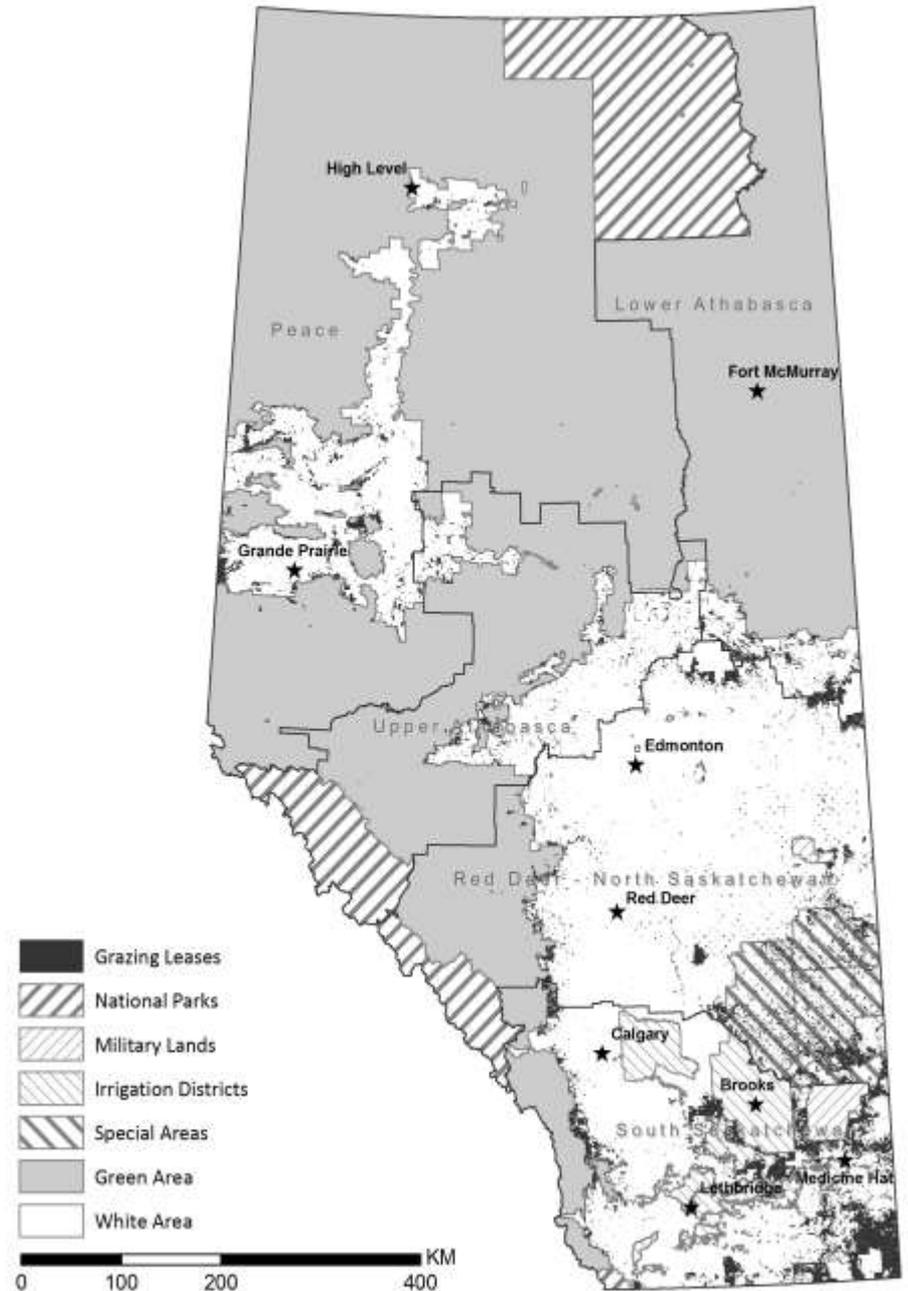




1879 Cattle ranch
near Calgary on
public land –est.
by the federal
government

- Regulation of public Land livestock grazing in Alberta goes back to 1881, under the *Dominion Lands Act*
- Currently public lands grazing is regulated under Part 4 of the *Public Lands Act* which enables government to lease an area of public land, usually no larger than sufficient to graze 600 head of cattle, for a term not exceeding 20 years, when, the “best use that may be made of that land is the grazing of livestock” (102(1)).

- Over 5 million acres Alberta public land is under grazing leaseholds, primarily in the White Area of the province
- About 5700 G leases total
- Average size of a public lands grazing lease is 876 acres, ranging from a quarter section to multiple sections
- Government receives \$4 million annually from the leases, which averages out to \$702 a lease (Auditor General's report July 2015)



- Oil and gas exploration and development occurs on over half of the areas of public land where there are grazing leases.
- For decades there have been issues/controversy over compensation to grazing lessees paid by companies to explore and recover minerals.



Financial watchdog 'flabbergasted' at foregone grazing lease dollars

 **MATT MCCLURE, CALGARY HERALD**
More from Matt McClure, Calgary Herald

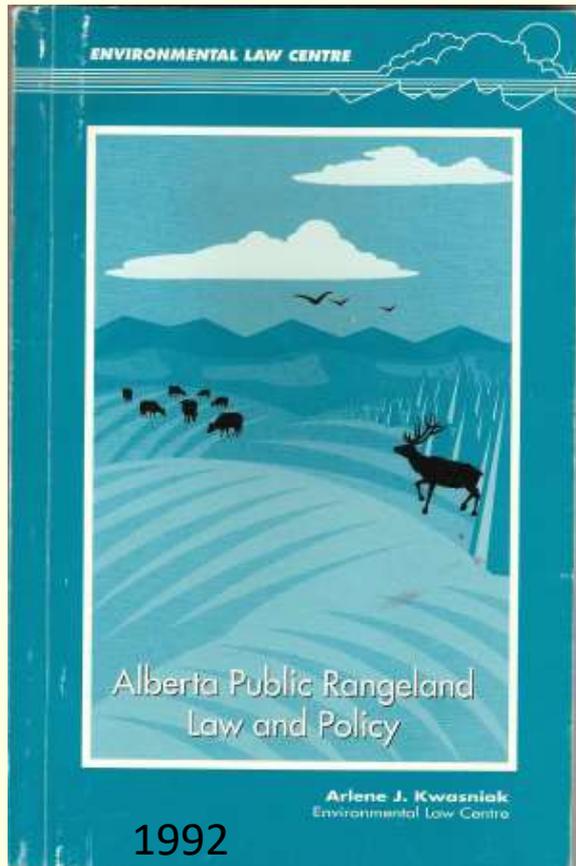
Published on: July 7, 2015 | Last Updated: July 8, 2015 1:11 PM MDT



ALTERNATIVE MODELS OF COMPENSATION ON ALBERTA'S CROWN GRAZING LEASE LANDS

Stacey O'Malley, Alicia Entem, Eran Kaplinsky and W.L. (Vic) Adamowicz1 -- 2015

** Note: much of this PP is based on this ALI Report*



Research revealed that the Canadian Association of Petroleum Landmen in 1989 issued a report to the Alberta Government asking it to review levels of compensation paid to Grazing lessees for surface disturbances.

- Public Land grazing lessees (GLs) receive annual compensation from a O & G operators for adverse effects from exploration and development on public rangeland grazing leasehold.
- Compensation is determined through privately negotiated agreements.
- Government receives a rental fee for grazing rights but does not share as landowner in the compensation paid by the O & G operators to the GL holders.
- Surface Rights Board under the *Surface Rights Act* requires O & G operators to get the consent of the owner or occupier of the land surface before accessing the surface of private or public land; if no private agreement the SRB can make a right of entry order and set compensation to occupant and owner.
- GLs are considered occupants under the SRA, and are entitled to compensation for interference with their rights under public land grazing leases.
- Operators and GLs typically reach private agreements.



- Table from ALI report – O & G wells on public land grazing leases (and special areas – administered under the *Special Areas Act*).

Table 4. Oil and gas wells on Alberta's Crown land grazing leases (administered by Alberta Environment and Parks [AEP] and Special Areas).

	Alberta Environment and Parks (AEP) Regions					Special Areas	Total (Province)
	Peace	Lower Athabasca	Upper Athabasca	Red Deer - North Saskatchewan	South Saskatchewan		
Total Number (wells)	1,417	1,855	905	5,898	15,868	7,477	33,421
Average Number per Lease (wells/lease)	2	3	1	3	10	5	4.5
Average Number per Acre (wells/acres)	0.002	0.005	0.002	0.006	0.004	0.007	0.005

- ALI reports that revenues to the Province for O and G access disturbances could be \$37 million – \$45 million dollars annually, but instead they are nothing (though Gov't gets royalties, and grazing lease fees from GL).

- ALI report compares Alberta situation to other jurisdictions and scenarios where there is O & G activity on public land where there are grazing dispositions:

Table 5. Comparing features of compensation paid by oil and gas companies for well sites on public land grazing leases, under proposed and current frameworks. Further detail is provided in the narrative.

Jurisdiction/Source	Leaseholder: First Year	Leaseholder: Annual	Government
2015 (current) Government of Alberta	Privately negotiated between grazing leaseholder and oil and gas company	Privately negotiated between grazing leaseholder and oil and gas company (estimate: \$1,500 per year)	Standard royalty fee, prescribed by the Minister for the surface lease ⁵⁸
2015 (current) Government of Saskatchewan	\$500 per wellsite*	Reduction in annual rental fees of \$200 per wellsite, to a maximum of a 30 per cent reduction in annual rental fees, as long as the site is active*	Land under surface lease removed from the grazing lease; developer pays standard lease and rental fees ⁵⁹
MD of Taber (starting February 28, 2016)	\$800 per surface mineral lease*	\$400 per surface mineral lease*	100 per cent of all revenue derived from the surface mineral leaseholder
1998 Proposed: Thurber Report ⁶⁰	\$500 per well site	\$300 per well site, capped at the amount the leaseholder pays in 'yearly agricultural fees' ⁶¹	First year payment and annual rental from the developer
1999 Proposed: Charges Regulation	\$500 per acre or part thereof for wellsites (the document states that a "site" is typically 4 acres)	\$300 for first 1-3 sites; \$200 for next 4-10 sites, \$100 for over 10 sites, to a maximum of \$5000 per development	\$500 per acre in the first year, and \$300 per acre in subsequent years

* This compensation amount is paid to the leaseholder by the government (as landowner), rather than directly from the industrial operator.

AB, so if 10 wells, \$15,000 a year to lessee

SK, wellsite land removed from GL, O&G operator negotiates comp with Gov.

Tax Recovery lands transferred by AB to MD of Taber, MD made its own rules

MLA Agricultural Lease Review Committee – (Tom) Thurber Report

Proposed reg under the *Agricultural Dispositions Amendment Act* . 1999 – passed but never proclaimed.

- *In addition – if a GL is “sold” – transferred to another party – the proceeds go to the GL.* See CBC article *Alberta Grazing Lease Program under Review* (July 16, 2015) <<http://www.cbc.ca/news/business/alberta-grazing-lease-program-under-review-1.3151396>>sites



Alberta public land leased by ranchers for grazing their livestock. (Peter Maloff Re/Max)

The lease for the public land in this picture is for sale. There are 1,134 acres of rangeland that can support 166 grazing cattle per month. The leaseholder must maintain the land, fence it, control the weeds and pay the municipal taxes.

The annual lease amount is less than \$600, the taxes are less than \$700. The asking price for the lease is \$265,000. When the lease is sold, the proceeds will go to the selling leaseholder, not the province.

RUMINATIONS ...

- What are the Government's obligations to Albertans and future generations to better ensure that the Province gets fair treatment and return for uses of public lands?
- What is the relationship between the ability to make private revenues off of public lands and the preservation of the ecological values being sustained through generations?
- What revenues should dispositions holders be entitled to make off of public assets – should it be limited to the benefits related to the reasons for the disposition?
- When does “compensation” become profit?
- What are Government's obligations to the O & G industry regarding compensation for disturbances? To Grazing Lessees? What is fair compensation for compensation and disturbances?
- Should compensation for O & G access and disturbances be funnelled back into public land restoration and conservation?
- Others ...

Public Access to Public Lands



Pic from Alberta Wilderness Association

website<<https://albertawilderness.ca/issues/wildlands/public-lands/>>

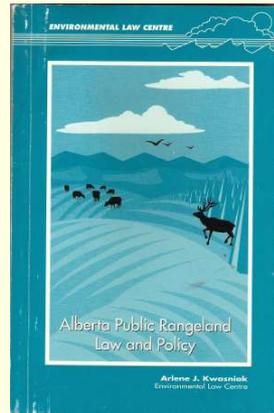
The right to public recreational access on Alberta public lands



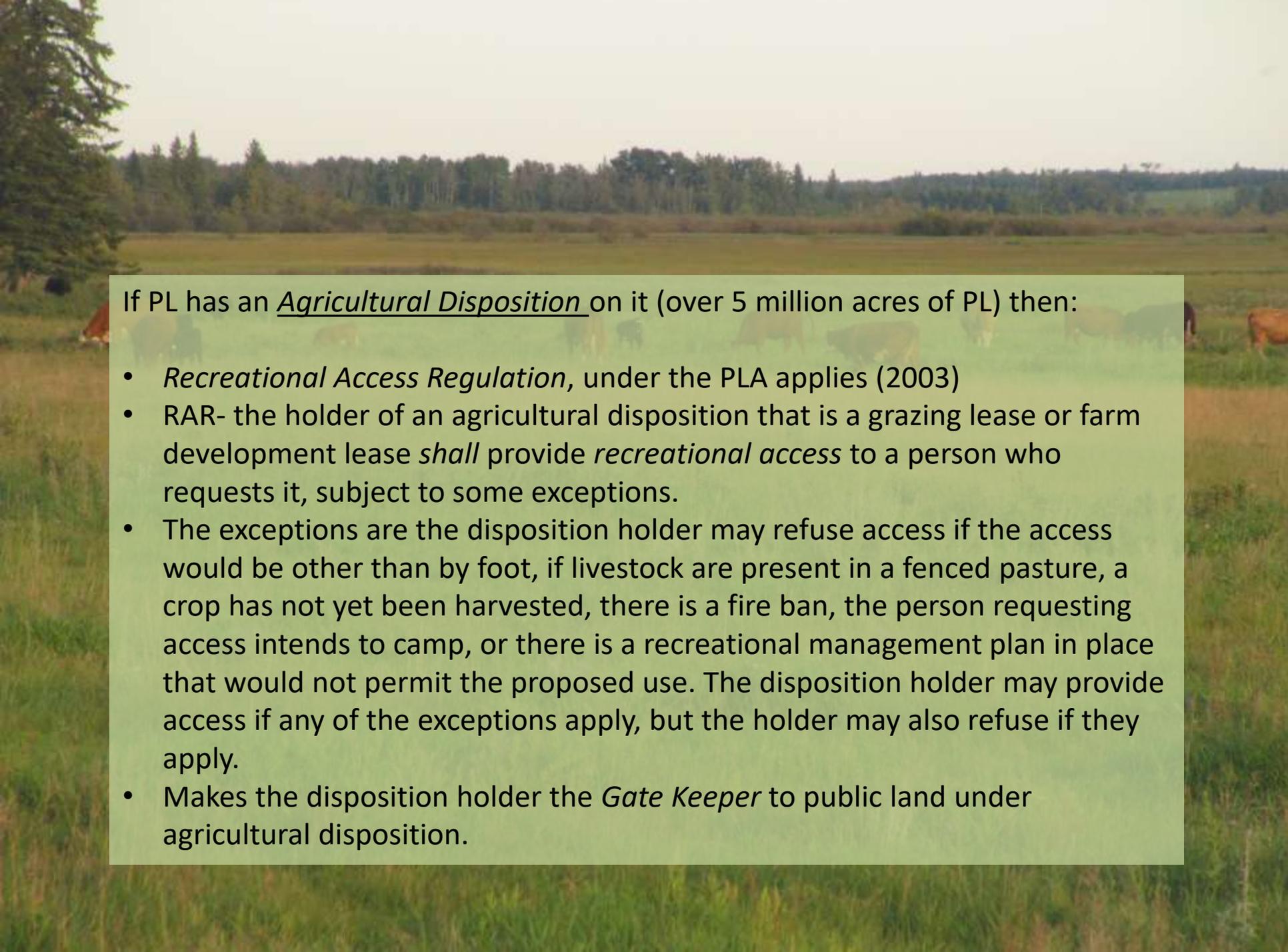
The right to public recreational access on Alberta public lands— not so clear



- **Been an issue for decades –**



- **Been an issue for decades –**
- **Government has made steps to clarify – but “rules” are fuzzy and not evenly applied**
- **Can say:**
 - **Depends on the kind of dispositions on the land**
 - **Depends on the designation of the land**



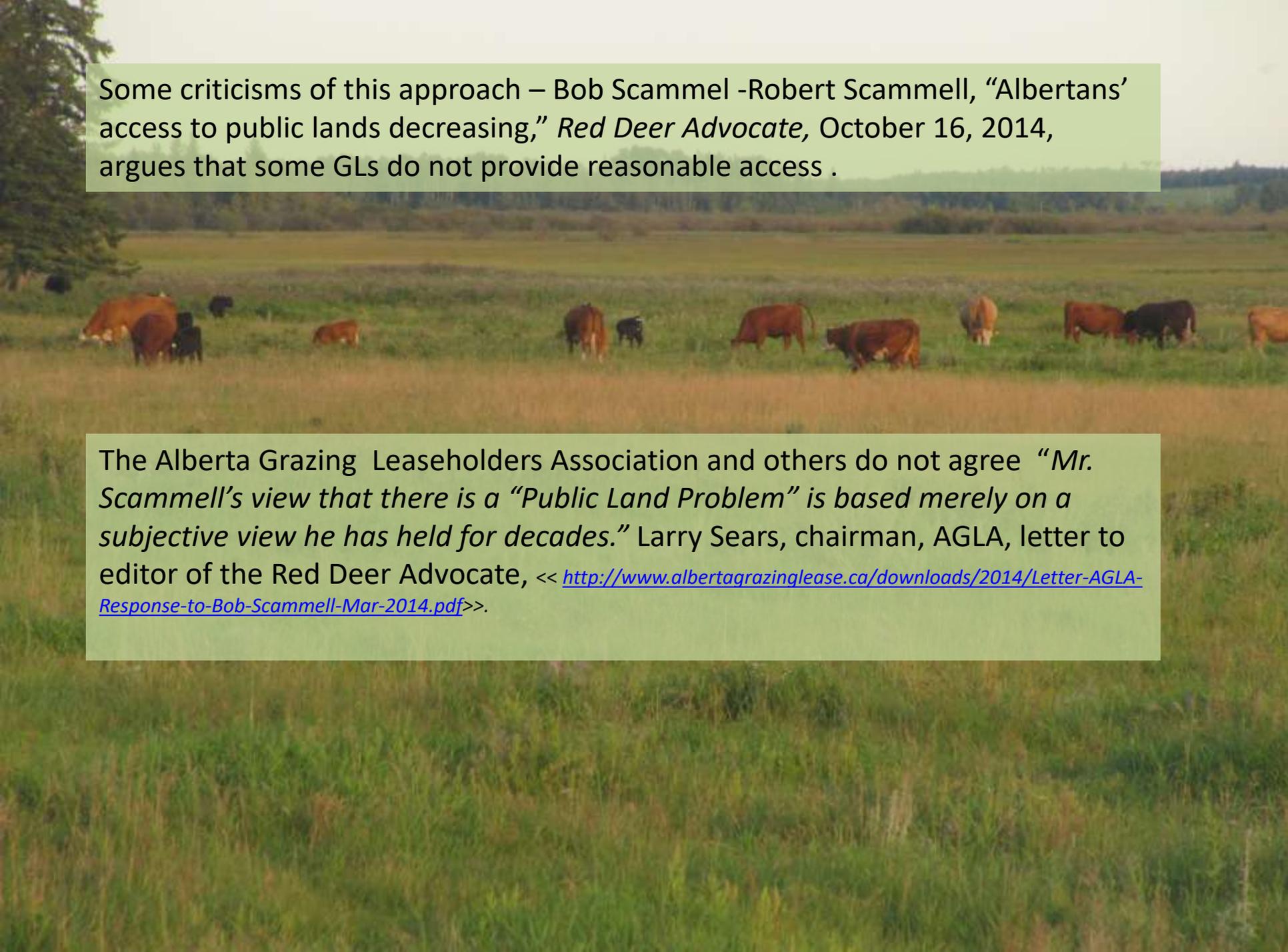
If PL has an *Agricultural Disposition* on it (over 5 million acres of PL) then:

- *Recreational Access Regulation*, under the PLA applies (2003)
- RAR- the holder of an agricultural disposition that is a grazing lease or farm development lease *shall* provide *recreational access* to a person who requests it, subject to some exceptions.
- The exceptions are the disposition holder may refuse access if the access would be other than by foot, if livestock are present in a fenced pasture, a crop has not yet been harvested, there is a fire ban, the person requesting access intends to camp, or there is a recreational management plan in place that would not permit the proposed use. The disposition holder may provide access if any of the exceptions apply, but the holder may also refuse if they apply.
- Makes the disposition holder the *Gate Keeper* to public land under agricultural disposition.

Some criticisms of this approach – Michael Wenig -“Unsteady Ground
Recreational Access on Alberta’s Grazing Lease Land” *LawNow* (2005)

<<<http://www.ucalgary.ca/files/cirl/LawNow2005AugSepMW.pdf>>>

“First, the regulations give leaseholders considerable discretion in deciding how quickly to respond to contacts from persons seeking access; the acceptable proximity of access for hunting to pastures where livestock are grazing; and whether to allow access, and the access conditions, for any of the several scenarios where access is expressly subject to the leaseholder’s permission. The regulations also lack specificity as to the duration of the required notice, response, and dispute resolution process. If disputes do arise, the process may take so long as to have the practical effect of precluding recreational access, at least, unless such access is fully planned weeks or possibly months in advance. And, finally, the regulations do not require SRD officials to consult with the public before setting hunting limits or other kinds of restrictions for recreational access to lease lands ... the new access regime falls short of identifying and clarifying the meaning of the word “public” in the concept of “public lands”.”

A photograph of a herd of cattle grazing in a green field. The cattle are scattered across the field, some facing left and some facing right. The field is lush and green, with some taller grasses in the foreground. In the background, there is a line of trees and a clear sky.

Some criticisms of this approach – Bob Scammell -Robert Scammell, “Albertans’ access to public lands decreasing,” *Red Deer Advocate*, October 16, 2014, argues that some GLs do not provide reasonable access .

The Alberta Grazing Leaseholders Association and others do not agree “*Mr. Scammell’s view that there is a “Public Land Problem” is based merely on a subjective view he has held for decades.*” Larry Sears, chairman, AGLA, letter to editor of the Red Deer Advocate, << <http://www.albertagrazinglease.ca/downloads/2014/Letter-AGLA-Response-to-Bob-Scammell-Mar-2014.pdf>>>.

Other than PL under an agricultural disposition?

- To enter on and occupy PL (for any purpose) need a disposition, or be otherwise authorized under the PLA or regs (s. 20 PLA).
- If there is a disposition, or written authorization, the disposition/authorization will set out entry/use rights.
- Any one may enter *vacant public land for recreational purposes* where vacant public land is a *vacant disposition area*, or is government administered land that is not under a *formal disposition*, subject to some limitations. Public Lands Administration Regulation (PLAR – ss 32-34)
- Limitations for public land other than a *trail* are set out in PLAR section 32(2) – if any of these apply, need an access permit to enter and occupy.
- Limitations for public land that is a trail are set out section 33 – if any of these apply, need an access permit to enter and occupy.
- If the vacant public land is within a *public land use zone*, is a *public land recreation area*, or a *public land recreation trail*, then need to comply with any applicable provisions in PLAR Part 9 Division 1.
- If the vacant public land is within a *wilderness area*, *ecological reserve*, *natural area*, *heritage rangeland*, *forest reserve*, *forest protection area*, or in *Willmore Wilderness Park*, the provisions of the legislation relating to the relevant area prevails in the case of a conflict.

***May I access these
public lands?***

