Land-Use Planning and Natural Resource Rights: The Alberta Land Stewardship Act

By Bernard J Roth and Rachel A Howie*

Alberta's new Land Stewardship Act is unique regional land-use planning legislation that affects both private and public land in the province. Significantly, the regional plans to be developed will adversely affect, amend and even rescind 'statutory consents' that authorise oil and gas and other natural resource development. The Act applies to major energy resource producing regions including the Eastern Slopes of the Rocky Mountains and the Athabasca oil sands area. Despite an amendment intended to clarify ambiguities concerning takings of property and rights to compensation, uncertainty and public concern remain. This article identifies and assesses these takings and compensation issues. It also looks ahead to potential regulatory issues that these regional plans may pose for resource developers, noting in particular problems concerning potential qualification or removal of water rights and environmental and natural resource development approvals. Again, it addresses issues of statutory interpretation and takings doctrine that may be of interest in other jurisdictions. In the longer run, though the Land Stewardship Act may produce some uncertainty for holders of natural resource interests overall, it may represent an improvement over earlier uncoordinated land-use policy and planning in the province.

Land-use planning legislation often presents classic issues concerning its application to natural resource rights and its interaction with the regulatory legislation that governs the exercise of those rights. Applicability of planning

* Bernard J Roth is a Partner and Rachel A Howie is an Associate at Fraser Milner Casgrain, Calgary, Alberta, Canada. The authors can be contacted by e-mail at, respectively, bernard.roth@fmc-law.com and rachel.howie@fmc-law.com.

processes and land-use plans to pre-existing natural resource rights is the key threshold issue. If application is confirmed, the next issue is whether there is a compensable taking.

In approaching these issues within a particular jurisdiction and legal system, comparative data from other places is often invaluable, whether or not it establishes principles directly applicable in legal analysis. Perspectives from elsewhere can produce new insights, and inform new strategies, and thus have real impact in resolving legal issues. This article, which focuses on Alberta, the province central to Canada's oil and gas industry, is intended to be read in this way. It addresses circumstances of new regional planning legislation that create issues and uncertainties in its application to oil and gas rights and other natural resource interests in the province. In addition, the article considers recent legal developments in Australia concerning water rights that are of interest in assessing takings doctrine in the Canadian context.

The enactment of the Alberta Land Stewardship Act (ALSA)[1] made radical changes to Alberta's land-planning and development law. The ALSA integrates social, economic and environmental planning into a scheme of land-development policy and practice. No such overall land-use framework exists anywhere else in Canada or, apparently, in any other jurisdiction in the English-speaking world.[2] The ALSA gives the provincial government broad and extensive powers over development activities on both public and private lands. These powers are exercised through the creation of regional plans and regulations, which are in the process of being developed.

Public concern over the powers the ALSA gives the Alberta Government to affect property rights resulted in the 2011 introduction in the Alberta legislature of amendments to the ALSA[3] to clarify and, in some cases, condition the exercise of powers that can affect property rights. In issuing the first of seven draft regional plans for public comment, the provincial government has said it will pass Bill 10 before the Draft Lower Athabasca Integrated Regional Plan (the 'Athabasca Plan') and the Proposed Lower Athabasca Integrated Regional Plan Regulations (the 'Proposed Regulations') are finalised.[4] This region includes the Athabasca oil sands area of Northern Alberta.

1 RSA 2000, c A-26.8.

2 Alberta's Ministry of Sustainable Resource Development commissioned a review of other states in English-speaking jurisdictions. The report suggests that no other jurisdiction was found, at least among those investigated, that had comprehensive and integrated policies and practices implementing an overall land-use framework: see UMA/Aecom, Alberta Land Use Framework: *Jurisdictional Review of Land Use and Land Management Policy, Final Report*, prepared for Alberta Sustainable Resource Development (October 2007).

3 Alberta Land Stewardship Amendment Act, Bill 10, First Reading, 1 March 2011.

4 Government of Alberta, 'Draft Lower Athabasca Integrated Regional Plan Regulations Summary', available online at: www.landuse.alberta.ca/RegionalPlans/LowerAthabasca.

This article sets out the background to land planning in Alberta prior to the ALSA. A brief summary of the ALSA follows. The article goes on to analyse two types of practical issues that may have an impact on development approvals. The first relates to impacts on existing approvals and the uncertainty around the consequences of adversely affecting activities carried out under such approvals. The second addresses how the ALSA may affect the process and certainty of obtaining regulatory approvals in the future.

Land-use planning prior to the ALSA

Background

Land-use planning is not new to Alberta. The development of private land has been regulated by local governments throughout Alberta's history. This regulation has generally been limited to zoning and development approvals, geographically confined within municipal boundaries. Primary responsibility for the development of private lands has rested with local governments. However, there has always been some level of participation by the provincial government either directly, through Cabinet, or indirectly, through provincial government boards or agencies. The degree of provincial involvement in private land-use planning has varied through a series of major changes to land-use planning over the years. Prior to 1995, there was significant provincial involvement, or at least the potential for provincial involvement, in municipal land-use planning matters. This control could be exercised pursuant to the creation of regional plans by regional planning commissions. Significant adjudicative and dispute resolution powers were then held by what was the Alberta Planning Board. As part of a provincial policy of fiscal austerity beginning in the mid-1990s, the provincial government relinquished much control over local planning, leaving it almost exclusively to municipal governments.[5]

The situation with respect to public or provincial Crown lands, which comprise approximately 63 per cent of the land in Alberta, has been significantly different.[6] Public lands planning in Alberta dates back to 1948 when, as a result of the Leduc oil discovery, which launched the province's oil industry, the province was divided into two colour-coded areas: Green Areas and White Areas. These terms reflect, respectively, public lands

5 For a summary of the history of Alberta land planning law and practice, see Frederick A Laux, *Planning Law and Practice in Alberta*, 2nd edn (Toronto: Carswell Thompson Professional Publishing, 1996), Chapter 1.

6 Alberta Government, Department of Environmental Protection, *Alberta State of the Environment Comprehensive Report* (Edmonton: 1995), 3.

and settlement lands. The Green Area was to be managed with a view to 'forest production, watershed protection, fish and wildlife management and recreation'.[7] The White Area consisted of the mostly settled areas in the central, southern and Peace River areas. Other uses in the White Area included agricultural purposes, as well as soil, water and fish and wildlife conservation.[8] This designation of Green and White Areas, dividing the province into two broad regions, has remained to the present day and continues to shape land planning in Alberta.[9]

Following this broad divide, which recognised that certain activities were better suited to some types of land, Alberta created the Integrated Resource Planning (IRP) programme, beginning in the late 1970s.[10] For over 30 years, land-planning policy in Alberta was orchestrated through the IRP programme carried out under the authority of the Public Lands Act, which, at the time, '[authorised] the Minister of Environmental Protection to administer public land in Alberta'.[11]

The first policy under the IRP programme related to the Eastern Slopes region.[12] In order to solidify the planning programme in the Eastern Slopes, and looking to manage development with conservation and tourism, the Government introduced *A Policy for Resource Management of the Eastern Slopes* (the 'Policy') in 1977. The Policy was primarily designed 'to ensure that public lands and resources in the Eastern Slopes were protected, managed or developed according to a philosophy of integrated resource management'.[13]

---

7 Government of Alberta, *Land Use Framework* (Edmonton: Government of Alberta, 2008), 6, available online at: www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf (LUF).

8 Alberta Sustainable Resources Development, Geo-administrative, Green/White Areas, available online at: www.srd.alberta.ca/MapsFormsPublications/Maps/ResourceDataProductCatalogue/Geoadministrative.aspx.

9 See *ibid* and the sample image of the areas at Alberta, Ministry of Sustainable Resource Development, Geo-administrative, Green/White Areas maps, available online at: www.srd.alberta.ca/MapsFormsPublications/Maps/ResourceDataProductCatalogue/images/Green_white.jpg; see also the LUF, note 7 above, 10.

10 See the LUF, note 7 above, 6.

11 Alberta, Ministry of Sustainable Resource Development, *Integrated Resource Plan, Fort McMurray – Athabasca Oil Sands: Subregional Integrated Resource Plan* (Edmonton: Government of Alberta, 2002), 6, available online at: www.srd.alberta.ca/ManagingPrograms/Lands/Planning/documents/IntegratedResourcePlan-FortMcMurrayAthabascaOilSandsSubregional-2002.pdf (Fort McMurray IRP). This was likely to be similar to the wording of section 11 of the current version of the Public Lands Act, RSA 2000, c P-40: 'The Minister may by order classify public land and declare the use for which the Minister considers different classes to be adaptable.'

12 See the LUF, note 7 above, 7.

13 Steven M Kennett and Monique M Ross, 'In Search of Public Land Law in Alberta' (January 1998) *Canadian Institute of Resources Law Occasional Paper* #5 at 22 (CIRL #5).

Five years later, in 1984, the Government revised the Policy under the same name.[14] The preface to the 1984 edition stated:

> '*A Policy for Resource Management of the Eastern Slopes*, published in 1977, provided for a range of opportunities in the region in keeping with the provincial social, economic and environmental goals of the day. Since its introduction, the policy has served as the regional base for an active program and more detailed sub-regional planning designed to deliver the benefits of the area to all Albertans.
>
> …
>
> The 1984 revision is intended to reflect the realities of the economic situation in Alberta, and to provide for the maximum delivery of the full range of values and opportunities in this important region. Given the high scenic and recreation values of the area, particular emphasis is placed on the need for the development of a strong tourist industry in the region during the next two decades. Such development must rely heavily on the private sector for success.
>
> The policy presents the Government of Alberta's resource management policy for the public lands and resources within the region. It is intended to be a guide to resource managers, industry and publics [*sic*] having responsibilities or interests in the area rather than a regulatory mechanism.'[15]

Notably, the 1984 revision of the Policy was more geared towards tourism and less focused on resource development (possibly a symptom of the then economic and political climate), but the Policy still stated that the Government was looking towards a policy of integrated resource management.[16] The revised Policy was implemented with a view to recognising provincial goals for the various resource sectors. It was a:

> '… framework for developing more detailed regional resource objectives. The provincial goals outlined here [including, *inter alia*, wildlife, water management, recreation, timber, agriculture, fisheries and mineral resources] are those that are relevant to the Eastern Slopes and apply only to public lands and resources. They are only part of a much larger picture. Provincial social, economic and environmental goals will greatly influence the achievement of the resource objectives.

14 Government of Alberta, *A Policy for Resource Management of the Eastern Slopes, Alberta* (1984), available online at: www.srd.alberta.ca/ManagingPrograms/Lands/Planning/documents/IntegratedResourcePlan-APolicyForResourceManagement-EasternSlopes-1984.pdf (Eastern Slopes Policy).

15 *Ibid*, iii.

16 *Ibid*, 4.

> However, as the Eastern Slopes is a very large area and one which is important to many of the social, economic and environmental aspects of life in Alberta, the achievement of the regional resource objectives is important to the province as a whole.'[17]

During the late 1970s, 1980s and 1990s, IRPs consisted of regional plans, such as the Policy for the Eastern Slopes, along with subregional and local-level plans under the general rubric of the provincial plan.[18] The Eastern Slopes Policy in particular called for the development of detailed subregional and local management plans.[19] The regional plan for the Eastern Slopes included items such as regional objectives, regional land-use zones and comments on how to implement integrated resource planning. Two of the most recent IRPs are the Fort McMurray–Athabasca Oil Sands Subregional Integrated Resource Plan (2007)[20] and the Sustainable Resource Development Standard Recommendations to Municipal Subdivision Referrals (2002).[21] Each of these outlines certain goals for the respective regions with regard to development.

Some criticisms of the IRP programme were that it was based on a multiple-use philosophy.[22] This philosophy is a normative approach in land planning that reflects the view 'that public lands have a variety of values and can simultaneously meet the needs of many users'.[23] It is notable because existing development or extraction activities were allowed to continue under the Eastern Slopes Policy, subject to the regulatory system.[24] Preparation and approval of detailed subregional and local plans was time-consuming, resulting in development occurring before land use could be determined at the policy level. Since existing development was permitted to continue, 'once the rights to extract and develop various resources [had] been allocated, the consideration of alternative uses of the land and the selection of "best use" zones' became restricted.[25] There was no mechanism within these IRPs to revisit the permits and dispositions that had been previously made so as to plan what should occur in a specific area at a comprehensive, cumulative-effects level.

---

17 *Ibid*, 2.

18 CIRL #5, see note 13 above, 23.

19 See the LUF, note 7 above, 6.

20 Fort McMurray IRP, see note 11 above.

21 Government of Alberta, *Sustainable Resource Development Standard Recommendations to Municipal Subdivision Referrals* (2002), available online at: www.srd.alberta.ca/ManagingPrograms/Lands/Planning/documents/IntegratedResourcePlan-SRDRecommendMunicipalSubdivisionReferrals-2007.pdf.

22 CIRL #5, see note 13 above, 23.

23 Steven A Kennett, 'New Directions for Public Land Law' (January 1998) *Canadian Institute of Resources Law Occasional Paper #4* at 10, available online at: http://dspace.ucalgary.ca/bitstream/1880/47208/1/OP04Directions.pdf (CIRL #4).

24 Eastern Slopes Policy, see note 14 above, 13.

25 CIRL #5, see note 13 above, 23.

Analysis of the ALSA

New directions

When compared to previous land-planning initiatives in Alberta, the ALSA is different in three fundamental respects. First, it creates what can be called 'super-legislation' through the creation of regional plans that must be adhered to by provincial decision-making bodies. The ALSA does not actually change the way in which the law relating to land planning and land use is administered in Alberta, but it makes other provincial laws and regulations subordinate to its regional planning provisions. The same agencies and boards still exist with arguably the same mandates;[26] however, those mandates have been changed to include responsibility for implementation of the ALSA. Secondly, the ALSA represents a move towards an integrated ecosystem management philosophy of land planning and further away from previous multiple-use planning. Finally, the ALSA integrates public and private land and applies to both, whereas previous schemes, for example the IRP, differentiated between the two.

Regional plans – 'super-legislation'

Prior to the ALSA, the 'allocation, use and management of public land and resources (eg forests, lands for agricultural, recreational or tourism uses, minerals, water) [were] governed by a wide variety of statues and regulations'.[27] This included legislation that governed public land (the Public Lands Act[28]), along with legislation more focused on surface and subsurface resource extraction and conservation such as the Coal Conservation Act,[29] the Energy Resources Conservation Act,[30] the Forests Act,[31] the Forest and Prairie Protection Act,[32] the Forest Reserves Act,[33] the Mines and Minerals Act,[34] the Oil and Gas Conservation Act,[35] the Oil Sands Conservation Act,[36]

26 With the exception of a few significant changes to the Public Lands Act, which create a formal appeal procedure.
27 CIRL #5, see note 13 above, 7.
28 RSA 2000, c P-40.
29 *Ibid*, c C-17.
30 *Ibid*, c E-10.
31 *Ibid*, c F-22.
32 *Ibid*, c F-19.
33 *Ibid*, c F-20.
34 *Ibid*, c M-17.
35 *Ibid*, c O-6.
36 *Ibid*, c O-7.

the Pipeline Act,[37] the Surface Rights Act[38] and the Water Act.[39] Within these statutes, there were provisions for the protection of privately held land. Other legislation provided for the maintenance of parkland, including legislation such as the Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act,[40] the Provincial Parks Act[41] and the Wildlife Act.[42]

This legislation was not replaced or repealed by the ALSA. These statutes still exist to govern public land, land use and resources in the province. However, the Act unifies the principles by which decisions relating to land, land use and resources are made. Included within the ALSA is a list of consequential amendments requiring virtually every statute touching on matters of land and resources to mention the regional land plans created under the ALSA and then to recognise the supremacy of such regional land plans.

From a regulatory or administrative perspective, the ALSA creates an overlay in the form of regional plans that must be followed throughout the province from the date when the plans are implemented. This is unique to the ALSA. Previous Alberta attempts at land management had not been given the force of law.

The use of regional plans, and subregional and issue-specific plans, is similar to what was being established in the IRPs such as the Eastern Slopes Policy. Notably, the IRPs were designed with a view to outlining the various land and resource management goals for a particular area based on an assessment of that area.

'These assessments:

- Include the resource, physical and biological characteristics and social values within a planning area.
- Identify objectives for long-term management of the area to promote responsible use of the land in the future.
- Describe the type of activities that are compatible with this land and resource management direction. For example, public land may be designated for recreation, grazing, oil and gas, forestry or other uses.'[43]

37 *Ibid*, c P-15.
38 *Ibid*, c S-24.
39 *Ibid*, c W-3.
40 *Ibid*, c W-9.
41 *Ibid*, c P-35.
42 *Ibid*, c W-10.
43 Alberta, Ministry of Sustainable Resource Development, 'Integrated Resource Plans', available online at: www.srd.alberta.ca/ManagingPrograms/Lands/Planning/IntegratedResourcePlans.aspx.

A move towards ecosystem management

Ecosystem management is an approach to land planning that 'recognizes the importance of the products and services provided by public lands, but views them "within a broader ecological and social context"'.[44] This is not a scientific or technical process. Advocates of the ecosystem management approach recognise that such areas for focus are 'human constructs designed to capture ecological processes and relationships that are deemed to be important'.[45]

The ALSA, which is based on the seven regional plans, each of which corresponds to a major watershed in the province, attempts to look at land use in a comprehensive manner based on an ecological guidepost – the seven major provincial watersheds. This represents a fundamental theoretical shift in the way that land management and planning have been approached in the province.

The Land Use Framework (LUF), which the ALSA was designed to implement, notes:

> 'Cumulative effects denotes the combined impact of past, present and reasonably foreseeable human activities on a region's environmental objectives.
>
> …
>
> Cumulative effects management recognizes that our watersheds, airsheds and landscapes have a finite carrying capacity. Our future well-being will depend on how well we manage our activities so that they do not exceed the carrying capacity of our environment.'[46]

Regulation of public and private land

While certain IRPs purported to apply to both public and private land, and both provincial and municipal land, they remained policies that required cooperation between government departments and with local governments for their implementation.

The LUF states:

> 'The Government of Alberta will support and encourage stewardship of private lands in Alberta through the development of applicable incentives and market-based instruments. The government will also consider new funding opportunities at the municipal level for stewardship and conservation initiatives on private lands.'[47]

---

44 CIRL #4, see note 23 above, 16 citing Winifred B Kessler et al, 'New Perspectives for Sustainable Natural Resources Management' (1992) 2(3) *Ecological Applications* 221 at 222.

45 CIRL #4, see note 23 above, 17.

46 See the LUF, note 7 above, 31.

47 *Ibid*, 33.

This will take place through the various policy tools, such as voluntary conservation easements, conservation directives, stewardship units, conservation offsets and transfer of development credit schemes that will be implemented. A majority of these schemes are voluntary and will require a landowner's agreement to participate.

The Government will be able directly to interfere with private land through conservation directives. A conservation directive is one of the most robust policy tools introduced under the ALSA. Conservation directives are created by a regional plan and designate certain areas of land for protection or for a specific use. They are not a voluntary election by the landowner but a mandatory directive from the Government through the regional plan to set aside land for conservation. As part of the regional planning process the Lieutenant Governor-in-Council (LGIC) (the provincial cabinet) may require a list to be prepared of areas that are candidates for a conservation directive.[48]

Section 37 of the ALSA states:

'(1) A regional plan may permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values by means of a conservation directive expressly declared in the regional plan.

(2) A conservation directive must

(a) describe the precise nature of the conservation directive, its intended purpose and the protection, conservation, management or enhancement that is the subject of the conservation directive;

(b) identify or prescribe a means of identifying the parcels of land that are the subject of the conservation directive.

(3) A conservation directive does not constitute an estate or interest in land.'

Unlike previous attempts at land management in Alberta, the ALSA, through its various regional plans, will directly affect municipalities and will take precedence over any conflicting goals in municipal plans. For example, the 2009 Calgary Metropolitan Plan (CMP) states that it is a 'required element of the South Saskatchewan Regional Plan, which fits into the Provincial Land Use Framework'.[49]

48 The ALSA, see note 1 above, section 51(1)(f).

49 Calgary Regional Partnership, 'Calgary Metropolitan Plan: As Revised and Approved at the June 19, 2009 CRP General Assembly', available online at: www.calgaryregion.ca/crp/media/57225/crp%20cmp%20final.pdf at 2.

Complexity and confusion

The ALSA creates a new Land Use Secretariat (the 'Secretariat'), headed by a Stewardship Commissioner, as part of the provincial civil service – ostensibly independent of any government department.[50] A new ministerial portfolio of Stewardship Minister is created and is given some control over the Secretariat.[51]

The Secretariat is responsible for the initiation and administration of planning processes leading to the preparation of regional plans for submission to the LGIC.[52] Either the LGIC or the Stewardship Minister can appoint Regional Advisory Councils (RACs) for planning regions.[53] The Secretariat will then incorporate RACs into the planning and consultation process for the purposes of providing advice to the LGIC on proposed regional plans. The approval and amendment of regional plans originally fell within the absolute and unfettered discretion of the LGIC.[54] The LGIC had no obligation to appoint RACs and, if appointed, no obligation to follow or even consider the advice provided.[55] The intent of the ALSA was to make regional planning a purely political and legislative function in order to avoid any obligations of administrative fairness that could subject regional planning to review by the courts. Public reaction to the ALSA forced the Government to reverse course completely. Bill 10 repeals and replaces section 5, making public consultation mandatory before a regional plan can be adopted or amended. Further, the Government will have to lay a regional plan or amendment before the legislature before it becomes effective.

As discussed above, in the event of conflict between the provisions of the ALSA and other provincial legislation, the ALSA prevails.[56] Further, all statutory consents (eg, approvals, licences, permits, etc) of local governments, provincial departments, agencies and administrative bodies or tribunals must be reviewed and made to conform with the ALSA and its regulations.[57] In the event of alleged non-compliance, enforcement is left to the sole discretion of the Stewardship Commissioner who can apply to the courts to compel compliance. Individual rights to initiate enforcement proceedings

50 See note 1 above, sections 57–58.

51 *Ibid*, section 63(3). In addition to these powers, Bill 10 creates a new section 57.1, which allows the Stewardship Minister to issue directives to the Stewardship Commission and the Secretariat.

52 The ALSA, see note 1 above, section 58.

53 *Ibid*, section 52.

54 *Ibid*, section 4.

55 *Ibid*, section 5.

56 *Ibid*, section 17(4).

57 *Ibid*, section 21.

are expressly precluded. All that individuals can do is register complaints with the Stewardship Commissioner, who has no obligation to pursue them.[58]

There are legal ramifications in the event that rights and interests are adversely affected. The ALSA expressly acknowledges this for certain types of interests: section 9(2) of the ALSA directs that a regional plan may:

> '(h) authorize expropriation by the Crown under the *Expropriation Act*, including expropriation of mines and minerals;
>
> (j) establish conflict resolution processes for any dispute, conflict or matter requiring resolution, including mediation, facilitation, conciliation, regulatory negotiation or arbitration under the *Arbitration Act*;'[59]

From a takings perspective, the above provision is in accordance with the law of Alberta. When title to land is taken through a direct expropriation, the process provided under the Expropriation Act applies, including the process for determining compensation.

The ALSA expressly acknowledges entitlement to compensation in certain cases of indirect expropriation. The Act states in section 36: 'A title holder whose estate or interest in land is the subject of a conservation directive has a right to apply for compensation in accordance with this Division.' 'Title holder' is, however, defined in paragraph 2 (gg) to exclude certain significant interests:

> '(iii) a disposition as defined in the *Mines and Minerals Act*,
>
> (iv) a unit agreement as defined in the *Mines and Minerals Act*, or
>
> (v) a contract under section 9(a) of the *Mines and Minerals Act*.'

The intent behind the exclusion was not clear. If it was intended to exclude compensation for conservation directives that adversely affect the rights of Crown mineral (including oil and gas) lessees, a clear and unequivocal provision denying any right to compensation would have been required.

Section 19, as originally drafted, limited compensation where actions were taken in accordance with a regional plan as follows:

> '19 No person has a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done in or under a regional plan except either
>
> (a) as expressly provided for under Part 3, Division 3 [ie s 36 quoted above], or
>
> (b) as provided for under another enactment.'

58 *Ibid*, section 18.

59 *Ibid*, section 9(2).

It is unlikely that this provision would have excluded any right to compensation. First, the Expropriation Act[60] is another enactment that, pursuant to section 19 of the ALSA, provides for compensation. Secondly, the common law on expropriation and compensation would still apply.

Section 3 of the Expropriation Act clearly provides statutory authority to take any interest or holding of land:

> 'When an authorizing Act permits or authorizes an expropriation of land, the expropriating authority may, unless the authorizing Act expressly otherwise provides, acquire any estate required by the expropriating authority in the land and may, unless the authorizing Act expressly otherwise provides, acquire any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land.'

An 'owner', the individual entitled to compensation, is defined at section 1(k) to include:

> '(i) a person registered in the land titles office as the owner of an estate in fee simple in land,
>
> (ii) a person who is shown by the records of the land titles office as having a particular estate or an interest in or on land,
>
> (iii) any other person who is in possession or occupation of the land,
>
> (iv) any other person who is known by the expropriating authority to have an interest in the land, or
>
> (v) in the case of Crown land, a person shown on the records of the department administering the land as having an estate or interest in the land;'

While the ALSA takes priority over the Expropriation Act,[61] it should not have prevented the Expropriation Act from functioning.

Bill 10 seeks to allay public concerns about the ALSA's impact on property rights. It starts by qualifying the purposes provisions in section 1(1) with the following statement: '… the Government must respect property and other rights of individuals and must not infringe on the rights except with due process of law and to the extent necessary for the overall general public interest.'

Bill 10 goes on to repeal and replace section 19, restating it with a provision written in positive rather than negative terms:

> '19 A person has a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done under a regional plan

60 RSA 2000, c E-13.

61 See the ALSA, note 1 above, section 17(4).

(a) as provided for under section 19.1,
(b) as provided for under Part 3, Division 3, or
(c) as provided for under another enactment.'

Section 15 of the ALSA outlines the binding nature of regional plans, but limits the right to bring any action in the courts.[62] Section 15 states:

'15(1) Except to the extent that a regional plan provides otherwise, a regional plan binds
(a) the Crown,
(b) local government bodies,
(c) decision makers, and
(d) all other persons.
(2) Subsection (1) is given effect, if at all, only
(a) by the provisions of the regional plan itself,
(b) in accordance with another enactment, or
(c) as a result of an order of the Court of Queen's Bench under section 18.
(3) Subject to subsection (5), subsection (1) does not
(a) create or provide any person with a cause of action or a right or ability to bring an application or proceeding in or before any court or in or before a decision maker,
(b) create any claim exercisable by any person, or
(c) confer jurisdiction on any court or decision maker to grant relief in respect of any claim.
(4) For the purposes of subsection (3), a claim includes any right, application, proceeding or request to a court for relief of any nature whatsoever and includes, without limitation,
(a) any cause of action in law or equity,
(b) any proceeding in the nature of certiorari, prohibition or mandamus, and
(c) any application for a stay, injunctive relief or declaratory relief.'

However, Bill 10 adds a new section 15.1, which provides a process for redressing 'compensable takings', now defined to mean 'the diminution or abrogation of a property right, title or interest *giving rise to compensation in law or equity*'.[63] These concluding words suggest that section 15.1 creates new procedural rights, including a direct recourse to the courts. But it is likely that there is no substantive change to what was compensable in law or equity prior to the ALSA. Bill 10 makes similar provision for those who

62 *Ibid,* section 15(3)(a).
63 Emphasis added.

hold other types of property interests by amending section 11(2) to add a new paragraph (c), which applies when statutory consents are affected by the ALSA. If statutory consents are to be affected the Designated Minister under the ALSA must:

> '(c) give reasonable notice to the holder of the statutory consent of any proposed compensation and the mechanism by which compensation will be determined under any applicable enactment in respect of any effect on or amendment or rescission of the statutory consent.'

Like the new section 15.1, this provision seems to be procedural in nature, if one accepts the interpretation that the ALSA was not intended to deny any compensation for impacts on property rights that existed prior to its enactment. However, prior to the ALSA there was no clear test for determining when compensation was owed for impacts on the use and development of land.

The key to obtaining compensation at law or in equity is proving that a government action is expropriatory. There is case law addressing the position of a Crown lessee in a situation analogous to the imposition of a conservation directive. In *The Queen v Tener*,[64] the Supreme Court of Canada dealt with a claim of expropriation made in respect of a Crown-granted mineral interest. The surface of the area over which the interest was held was incorporated within a provincial park. Regulation of the park became more stringent over the years to the point that the interest holder was denied access to the mineral interest. The Supreme Court held unanimously that the denial of access to the park constituted expropriation. It was not unanimous, however, regarding the nature of the expropriation. The Court was in agreement that the Crown granted interest constituted a *profit à prendre*, but the minority judgment of Justice Wilson held that denial of access resulted in the merger of the profit with the fee, thereby extinguishing the *profit à prendre*.[65] The result, in Justice Wilson's view, was full expropriation of the Crown-granted interest, which she would have directed be cancelled on payment of compensation.

Justice Estey, speaking for the majority, held that the expropriation was only partial. He stated: 'The denial of access to these lands occurred under the Park Act and amounts to a recovery by the Crown in part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow.'[66]

The result was that the Crown-granted interest still existed and compensation for the expropriation had to account for the contingency

64 [1985] 1 SCR 533.
65 *Ibid*, 542.
66 *Ibid*, 563.

that, at some point, the interest holder may gain access to the minerals.[67] Both Justice Wilson and Justice Estey agreed that the interest holder's loss was a result of a gain or benefit accorded to the Crown. In Justice Wilson's judgment, the value of Crown estate had been enhanced because the profit reserved on the grant had been extinguished. Although Justice Estey's judgment maintained the continued existence of the Crown-granted interest, he still concluded that the Crown benefited because its land (the park) had an enhanced value.[68] Justices Wilson and Estey also agreed that the Crown could not rely on a condition in the interest granted that the grant was 'subject to the laws for the time being in force'. Regarding this possibility, Justice Estey stated: 'It can hardly be (and it was not) argued that the proviso in the grant authorized a compulsory taking without compensation for the purposes unrelated to the regulation of mining to the respondents' minerals.'[69]

Thus, Crown-granted interests would appear to be entitled to compensation in the event that the value of their interest is affected significantly by a conservation directive, despite being excluded from the definition of 'title holder'.

Entitlement to compensation is less clear for the holders of statutory consents that are affected by regional planning. The ALSA anticipates adversely affecting such approval holders, providing as follows:

'11(1)For the purpose of achieving or maintaining an objective or a policy of a regional plan, a regional plan may, by express reference to a statutory consent or type or class of statutory consent, affect, amend or extinguish the statutory consent or the terms or conditions of the statutory consent.

(2) Before a regional plan includes a provision described in subsection (1), a Designated Minister must

(a) give reasonable notice to the holder of the statutory consent of the objective or policy in the regional plan that the express reference under subsection (1) is intended to achieve or maintain, and

(b) provide an opportunity for the consent holder to propose an alternative means or measures of achieving or maintaining the policy or objective without an express reference referred to in subsection (1), including, if appropriate, within a regulatory negotiation process referred to in section 9(2)(j).'

67 *Ibid*, 565.

68 *Ibid*.

69 *Ibid*, 554.

Regulatory negotiation can include mediation and arbitration. It is difficult to conceive of such a right without a remedy. If all that was intended by section 11 were rights to procedural fairness or natural justice, there would be no purpose in 'negotiation'. Negotiation, mediation and arbitration only make sense if substantive rights and remedies are involved.

Statutory consents are integral to land use and land value. Significant investments in land and related business enterprises are made in reliance on such regulatory approvals. To the extent that they are cancelled or materially changed, the value of the land and any associated business enterprise can be affected materially. Determining the point at which impacts on rights and interests become serious enough to warrant compensation on account of an indirect taking is an extremely difficult exercise. In *Canadian Pacific Railway v Vancouver (City)*,[70] the Supreme Court of Canada was faced with a situation where the alleged expropriation did not involve a change to the status quo, but rather enforcement of the current status of the land. The claimant, Canadian Pacific Railway Company, claimed compensation from the City of Vancouver for its inability to use a right of way over a portion of an abandoned rail line for residential and commercial development as a result of a new zoning by-law. Under the by-law, Canadian Pacific could still use the rail line for railway operations. Chief Justice McLachlin for the Court held:

> 'CPR argues that at common law, a government act that deprives a landowner of all reasonable use of its land constitutes a *de facto* taking and imposes an obligation on the government to compensate the landowner.
>
> For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property
>
> …
>
> In my view, neither requirement of this test is made out here.
>
> First, CPR has not succeeded in showing that the City has acquired a beneficial interest related to the land. To satisfy this branch of the test, it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to the property suffices. Thus, in *Manitoba Fisheries*, the government was required to compensate a landowner for loss of good will. See also *Tener*.
>
> …
>
> Second, the by-law does not remove all reasonable uses of the property. This requirement must be assessed "not only in relation to the land's

70 2006 SCC 5.

> potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put": see *Mariner Real Estate*, at p. 717. The by-law does not prevent CPR from using its land to operate a railway, the only use to which the land has ever been put during the history of the City. Nor, contrary to CPR's contention, does the by-law prevent maintenance of the railway track. Section 559's definition of "development" is modified by the words "unless the context otherwise requires". Finally, the by-law does not preclude CPR from leasing the land for use in conformity with the by-law and from developing public/private partnerships. The by-law acknowledges the special nature of the land as the only such intact corridor existing in Vancouver, and expands upon the only use the land has known in recent history.'[71]

The application of this test for expropriation is likely to result in a finding that any maintenance of the status quo due to a regional plan would not be expropriatory and therefore would not be compensable. If a landowner is prevented from subdividing and developing land currently held as ranch land or farmland because of a regional plan that is looking to mitigate cumulative effects of land use and development, it is likely that the landowner has not experienced a taking. While the Government, or at least the public, will arguably be obtaining a beneficial interest in preserving the undeveloped land, there has been no removal of all reasonable uses for the property. As Chief Justice McLachlin suggested, this second requirement does not mean that the landowner must be able to use land for the highest or most lucrative use. Rather, this is a finding that looks to the 'nature of the land and the range of reasonable uses to which it has actually been put'.[72]

For many interests in land, there is no reasonable use in the absence of a statutory consent or approval. The *Tener* case[73] is an example. Mineral ownership is useless if surface access is denied. In the case of specific-use lands, if a statutory consent is withdrawn to continue the activity being carried out on the land, the land becomes valueless. For example, for lands held pursuant to dispositions under the Public Lands Act,[74] and potentially subject to significant investments in improvements, if an approval to conduct the activity is cancelled, the land can be made valueless or, potentially, a liability because it may be held subject to reclamation obligations.

Water licences provide a good example of a type of statutory consent or approval that can be changed so as to have a profound impact on the value

71 *Ibid*, paras 29–32, 34.

72 *Ibid*.

73 See note 64 above.

74 See note 28 above.

of land and any associated business. In Alberta, the Provincial Crown owns all water resources and issues statutory consents permitting the diversion and use of its water for specified purposes under the Water Act.[75] Historically, the most common use was for agriculture. Without access to water, certain lands become worthless. Likewise, water for industrial use can be integral to the value of land. Without access to water, an oil sands mineral lease has no value. If the water rights are curtailed or cancelled, is there any entitlement to compensation? Does it matter what the reasons were for curtailment? If the water is given back to the environment, as opposed to being reallocated to another user, should that make a difference?

The High Court of Australia recently had to address these issues in the case of *ICM Agriculture Pty Ltd v The Commonwealth of Australia*.[76] New South Wales ('the State') had water legislation similar to Alberta. Water priority was determined by 'first in right, first in time'. However, the State had amended its 1912 legislation a number of times over the years to address severe water shortages. These amendments gave the State significant powers to curtail licensed water use, far more so than anything contained in the Alberta Water Act. In 2000, the 1912 licensing system was entirely replaced by new water legislation that was later used to replace the plaintiffs' groundwater bore licences with a new system of aquifer access licences, reducing the volume of water they could access by between 60 per cent and 70 per cent. The State cancelled the plaintiffs' bore licences as a result of an agreement with the federal government (the 'Commonwealth'). To get federal funding, the Commonwealth required the State to cancel the plaintiffs' 1912 water licence in order to recover water that had been over-allocated. The funding agreement between the Commonwealth and the State made limited compensation available to the plaintiffs. The plaintiffs sued the Commonwealth pursuant to section 52(xxxi) of the Australian Constitution, which required that acquisition of property by the Commonwealth be on 'just terms'. It was conceded that the *ex gratia* payments offered to the plaintiffs did not meet the standard of just terms in the event that the Court were to find that there had been an 'acquisition' of 'property'.[77]

There were two majority judgments delivered. Both found that, even if the bore licences constituted 'property', there had been no acquisition. The first majority judgment concluded that it was unnecessary to decide whether the water bore licences were intended under the creating statute to be defeasible because:

75 See note 39 above.

76 [2009] HCA 51 ('ICM Agriculture').

77 *Ibid*, para 7.

> '… whatever the proprietary character of the bore licences, s 51(xxxi) speaks, not of the "taking", deprivation or destruction of "property", but of its acquisition... the groundwater… was not the subject of private rights enjoyed by [the plaintiffs]. Rather… it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. The State exercised that power from time to time by legislation imposing a prohibition upon access to and use of that natural resource, which might be lifted or qualified by compliance with a licensing system. The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an "acquisition" by the State in the sense of s. 51(xxxi). Nor can it be shown that there has been an acquisition in the necessary sense by other licensees or prospective licensees. They have at best the prospect of increasing or obtaining allocations under the new system… .'[78]

The second majority judgment came to the same conclusion, expressing their theory reasons as follows:

> 'It may readily be accepted that the bore licences that were cancelled were a species of property. That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so. It must also be accepted, as the fundamental premise for consideration of whether there has been an acquisition of property, that, until the cancellation of their bore licences, the plaintiffs had "entitlements" to a certain volume of water and that after cancellation their "entitlements" were less. Those "entitlements" were themselves fragile. They could be reduced at any time, and in the past had been. But there can be no *acquisition* of property unless some identifiable and measurable advantage is derived by another from, or in consequence of, the replacement of the plaintiffs' licences or reduction of entitlements. That is, another must acquire "an interest in property, however slight or insubstantial it may be".
>
> The only possible recipient of an advantage in this matter is the State. Did it derive some advantage from replacing the bore licences or reducing water entitlements?'[79]

The majority decisions did not discuss the common law of expropriation. The judgments are based on the wording of, and case law interpreting,

78 *Ibid*, per French, CJ, Gummow and Crennan JJ at paras 81, 83, 84 and 86.

79 *Ibid*, per Hayne, Kiefel and Bell JJ at paras 147–148.

Australia's federal Constitution.[80] The starting point, however, for the minority judgment of Justice Heydon was the common law. He had no difficulty finding that the cancelled bore licences constituted 'property'. Bore licencees, he said:

> '… were persons who in some cases had paid consideration for a transfer; in all cases had paid fees; in all cases were entitled to rely on the licences as increasing the value of their land; in many cases were obliged, in order to maintain the licences, to sink bores; in many cases relied on the licences as having sufficient practical content to justify investment by sinking bores, introducing and maintaining equipment capable of extracting water from those bores, developing surface irrigation channels, and buying overhead sprinkler systems (in the case of the first two plaintiffs, $7.5 million worth); in many cases had used the licences as security for loans; and in that respect had dealt with lenders who were entitled to have relied in good faith on the continuation of the licences. … Even if the powers conferred by licence conditions could extend beyond scarcity, fair distribution and environmental considerations, they could not extend so widely as to give New South Wales officials an uncontrolled discretion to reduce allocations at will.'[81]

On the issue of whether there had been an acquisition of this property by the State, Justice Heydon rejected the Commonwealth Solicitor General's argument that the water rights could be modified or extinguished on the basis that it is simply a reduction to what is available. He cited three grounds:

1. *Control*. '… The expropriation caused it [New South Wales] to regain complete control over water resources, namely the difference between the actual allocations under the bore licensees' entitlements and the allocations under the aquifer access licences.'[82]
2. *Liability*. The extinguishment of the bore licencees' rights relieved the State of its liability to ensure that the licencees' ability to receive and use the water was not interfered with unlawfully. This amounted to an acquisition of property by the State.

80 Anglo-Canadian common law forbidding expropriation without just compensation arguably provides greater protection than constitutional protection of property. Anglo-Canadian courts may have less hesitation in finding compensable expropriation because at common law, Parliament can always disclaim liability to compensate for compensation by express wording in legislation. Where the requirement to pay compensation is accorded constitutional protection and the last word as to whether to pay compensation rests with the courts, there appears to be a greater hesitance to find a compensable expropriation. For a similar conclusion in comparing American takings law to the Anglo-Canadian law of expropriation, see Bernard J Roth, 'NAFTA, Alberta Oil Sands Royalties, and Change: Yes We Can?' (2009) 46 *Alta Law Rev* 335 at 353, note 81.

81 ICM Agriculture, see note 76 above, paras 207–208.

82 *Ibid*, paras 232, 234 and 235.

3 *Contingent benefits*. To the extent that expert estimates and predictions of future sustainable aquifer availability are understated, the State will have gained water resources capacity as a result of present water rights extinguishment. This is an acquisition of property by the State.

As suggested above, the Alberta Water Act[83] has not eroded water rights to anywhere near the extent that such rights had been diminished under the 1912 New South Wales legislation prior to their eradication. Alberta's answer to potential water shortages and the remedy for over-allocation was to amend its legislation in 1996 to allow transfer of water rights, which, until that point, were appurtenant to land, subject to a ten per cent holdback for in-stream flow needs. There are also powers in the Alberta legislation to address over-allocation situations for reasons of health, safety and environmental protection. However, if water rights are affected, compensation is expressly provided for.[84]

Unlike the situation in Australia, property rights are not constitutionally protected in Alberta and the Province could expropriate without compensation to remedy any over-allocation issues.[85] There are also a number of less radical options to address over-allocation. Without having an impact on water rights, Alberta energy and environmental regulators would be able to impose water-use efficiency requirements on agricultural, municipal and industrial uses. Further, Alberta could impose user fees or direct taxes on water use or allocation. To this point, Alberta has not taken any of these measures and it is unlikely to do so. Water scarcity is not as pressing in Alberta as it is in Australia. Notwithstanding the merits of taking such approaches, any government would fear the political consequences of doing so.

The ALSA did not take on any water issues. Water rights do not appear to be affected by the ALSA, at least directly. Despite there being considerable differences in the water law of Australia and Alberta, the *ICM* case could be very important to determining the legal consequences that may flow from impacts that regional plans under the ALSA have on statutory consents and approvals. The watered-down water rights of Australia closely resemble environmental, energy and other industrial approvals in Alberta. To the extent that the Alberta Government adversely affects activities undertaken pursuant to such approvals, there may be more than just political consequences. Notwithstanding parliamentary supremacy, the rule of law can make it difficult to change statutory consents.

83 Water Act, RSA 2000, c W-3, section 83.

84 *Ibid*, sections 54(2), 55(2), 71(1)(i), 97(1)(i) and 158.

85 There may still be compensation issues to the extent that Alberta affected the rights of American and Mexican investors under NAFTA: see Roth, note 80 above.

The ALSA Athabasca Regional Plan and Proposed Regulations appear to recognise the importance of property rights. Although the new conservation areas proposed would lead to the cancellation of certain mineral tenures, the Plan acknowledges that compensation will be paid. Further, existing activities appear to have been given some form of grandfathering protection. This protection may be provided by a new section 11(3) in Bill 10.[86] This subsection states:

> '(3) Notwithstanding subsection (1), a regional plan may not affect, amend or rescind
>
> (a) a development permit or an approval in respect of a development, or
>
> (b) an approval for which no development permit is required under a land use bylaw
>
> under Part 17 of the *Municipal Government Act* where the development has progressed to the installation of improvements on the relevant land at the time the regional plans come into force.'

A literal reading of this new provision would only afford protection for statutory consents issued under Part 17 of the Municipal Government Act, but not for other approvals. It is not clear what the justification would be to limit this protection and this may not have been the intent. Section 11(3) of Bill 10 may have affected the transitional provisions of the Proposed Regulations, which state:[87]

> '(b) except as otherwise provided in these regulations, if a statutory consent has been issued and the Lower Athabasca Regional Plan makes the activity in respect to which the statutory consent was issued non-compliant with these regulations, the statutory consent continues in effect in spite of the coming into force of the Lower Athabasca Regional Plan;'

The extent of this grandfathering is tempered by section 47(c), which states:

> '(c) for greater clarification, a non-compliant activity referred to in clause (b) is subject to lawful direction of an official under sections 23, 30, 35 and 40 to a person responsible within the meaning of those sections;'

These sections of the Proposed Regulations are accompanied by footnotes stating that the legal authority to compel compliance of existing operators is not found in the ALSA or its regulation, but in 'home legislation' pursuant to which a statutory consent was issued. For example, note 15 states: 'Authority for these lawful directions will flow from the home legislation under which the official is acting. The official responding will have authority under the *Environmental Protection and Enhancement Act* and other current enactments under the administration of Alberta Environment.'

86 See note 3 above.

87 See note 4 above.

The approach taken by the Proposed Regulation suggests that the ALSA was not intended to create any new powers to affect statutory consents that had been relied on to conduct existing activities. If this was intended as part of the Bill 10 amendments it would be very significant, because 'home legislation' such as the Alberta Environmental Protection and Enhancement Act (EPEA)[88] and the Water Act[89] have conditions and qualifications attached to changing the terms of statutory consents issued under them. The Water Act is subject to the 'first in time, first in right' principle discussed above and section 70(3)(a)(i) of the EPEA requires that adverse effects triggering an amendment cannot have been reasonably foreseeable at the time of issuing an approval.

Sustainability

The multiple-use philosophy was brought into question in the 1990s. The Natural Resources Conservation Board (NRCB) became particularly frustrated when a critical north–south wildlife corridor abutted an area of commercial development so that the corridor's integrity was diminished, resulting in the following comment:

> 'The Board is concerned that the concept of integrated resource management set out in the *Eastern Slopes Policy* and other public lands planning and policy documents may create unrealistic expectations by the public that we can "have it all," particularly where relatively small geographic areas are concerned. … the Board believes that it must be recognized that sustainable development may not be achievable unless integrated resource management is understood to mean that uses may be permitted, but in more discrete areas than have been available in the past; i.e., that certain areas may be designated for certain land uses only and other uses may be prohibited in the same areas in order to protect the natural resource.'[90]

IRPs were criticised as being only policy-based, with no actual legal authority outside the broad direction in the Public Lands Act, which permitted the Government to direct land planning.[91] As a result, the IRPs represented guidelines that required cooperation within the Government and their '(i)mplementation relied on the interdepartmental referral system, which ensured that all agencies responsible for various types of land and resource

88 RSA 2000, c E-12 (EPEA).

89 See note 39 above.

90 Natural Resources Conservation Board, 'Application to Construct Recreational and Tourism Facilities in the West Castle Valley; near Pincher Creek, Alberta', *Decision Report #9201* (December 1993), 10–11.

91 CIRL #5, see note 13 above, 25.

management activities had an opportunity to review applications for development or dispositions'.[92]

This criticism of IRPs was not entirely fair. The Eastern Slopes Policy, for example, had an impact on development. Although not legally binding on the Energy Resources Conservation Board (ERCB), which, like the NRCB and the Alberta Utilities Commission, also has the power to override local planning laws,[93] IRPs were given considerable weight in determining the public interest. The Eastern Slopes Policy formed the basis for the ERCB's refusal to allow sour gas development in the Whaleback region of the Rocky Mountains, despite its huge resource potential, which otherwise would have clearly been in the public interest to develop. The ERCB reasoned:

> 'The Board accepts the views presented that the Whaleback area has had a long history of multiple and highly-valued use for ranching, hunting, recreation, and wildlife. The area also appears to have significant value for native traditional uses. Although various forms of disturbance have occurred, such as seeding of pasture areas with non-native species and the development of off-road vehicle trails, the Board believes that the overall ecological integrity of the area has also generally been preserved. The question which the Board must address is whether the proposed development of the… well can be carried out in a manner which does not reduce the existing land-use values so significantly that the overall public interest is compromised.
>
> One component of the Board's assessment of this issue has been the land-use guidelines adopted for the area in the IRP. The Board is of the view that its ultimate discretion is not fettered by the guidelines set out in the IRP and notes that the IRP clearly states that it is to be used only as a management guide. At the same time, the Board does believe that it should be cognizant of the IRP in reaching its decisions and can draw from the document valuable insights and direction into the Provincial Government's land-use goals.
>
> The Board notes that the IRP does, as stated by the interveners opposed to the well, set out a series of priorities for resource protection in the region. Furthermore, the IRP appears to give priority to the protection of ecological and wildlife values. As argued by the Whaleback Coalition, this higher level of protection also appears to be echoed in the no net loss of habitat concept and the requirement of no loss of ecological values. The Board does not accept Amoco's argument that these tests need only be applied during the development stage. The Board believes

92 CIRL #5, see note 13 above, 26.

93 Municipal Government Act, RSA 2000, c M-26, section 619.

> that it would not be reasonable to prevent development activity which resulted in either habitat loss or loss of ecological values but allow exploratory activity which had the same effect.
>
> Based on the information supplied at the hearing, the Board is not convinced, despite the efforts of Amoco to reduce drilling and construction impacts, that the requirements of the IRP, as the Board interprets that document, can be met… .'[94]

Even in cases where specific applications were not denied, Alberta regulators used their decisions to influence future applications by creating uncertainty regarding future approvals. An example of this is the land-use conflict between rural residential development and industrial development in the Alberta Industrial Heartland (AIH) to the east of Edmonton in and around the town of Fort Saskatchewan. The province had encouraged industrial development to move into this rural agricultural area to avoid over-concentration of such development in east Edmonton starting in the early 1980s. Unfortunately, because of a lack of coordination between municipal land-development policies and provincial industrial policies, the three counties that encompass the AIH had permitted rural residential development on agricultural lands.

Industrial development and agriculture have a long history of coexistence in Alberta. Although not problem-free, surface-rights compensation has proven more than capable of sorting out the differences between Alberta's agricultural and industrial communities. Similar types of accommodation have also proven reasonably successful in promoting coexistence of industry with the largest group of non-public land interest holders in Alberta – aboriginal peoples. Industrial development, however, does not mix as well with higher population densities. Over a ten-year period, Alberta energy and environmental regulators had to contend with this type of land-use conflict in the AIH. The regulators used persuasion, and subtle threats of rejecting future applications, to advance resolution of this land-use conflict. The Alberta Environmental Appeal Board (EAB) provided an example of this type of persuasion in one of its decisions. It approved a chemical manufacturing plant proposed for a country that had adopted the Industrial Heartland Area Structure Plan. The EAB acknowledged that it deferred to the energy regulator, the Alberta Energy and Utilities Board, which had concluded that there would be no significant increase in the existing land-use conflict in the area.

Nevertheless, the EAB delivered the following admonition:

---

94 Alberta Energy Resources Conservation Board Decision D 94-8, September 1994, at 32–33.

> '... the Board believes that the main resolution that was being sought by these Appellants, and that is likely necessary to achieve any meaningful resolution of this situation, is a fair and equitable resolution of the land use conflict. Notwithstanding the considerable sympathy the Board holds for the Appellants under their circumstances, the powers provided to this Board by the Act do not provide the scope to resolve this land use zoning conflict because that ability does not fall within the powers of the Director [of Alberta's Environment Department].
>
> Despite our lack of jurisdiction to resolve this matter, the Board is compelled to note that a land use conflict that was described by the [A] EUB as "leading to a deterioration of lifestyles" for affected residents remains unresolved more than two and half years later. Long term residents who have experienced increasing encroachment of major industrial developments upon their rural lifestyle now face the reality that their land has been re-zoned for industrial development, thereby restricting their freedom to upgrade their own residential property. On the face of it, this situation appears unfair and inequitable. The Board believes that industrial developers, local government and the provincial government (on behalf of all Albertans), all of whom are major beneficiaries of these industrial developments must find the means to achieve fair and equitable treatment for affected rural landowners. The industrial developers, as the initiators of these projects, should be showing some leadership in moving this process forward and ensuring that it reaches an expeditious conclusion.'[95]

Alberta energy and environmental regulators take both environmental and land-use planning matters into account when considering the public interest. Prior to the ALSA, the environment was not being ignored. However, multiple land-use policies and a lack of coordination between the Alberta Government, local governments and provincial regulatory agencies created considerable uncertainty. It also led to much regulatory litigation before issues were resolved. The land-use conflict in the AIH is one example. There are others.

Commercial oil sands development has been taking place in Alberta since the 1960s. Starting in the mid-1990s, following the resolution of fiscal issues with the provincial and federal government, oil sands activity increased significantly. Cumulative environmental effects became an issue for a number of groups, who did not believe that individual project assessments were adequately addressing their concerns. Industry was also unhappy that cumulative-effects issues were being relitigated in successive regulatory hearings, causing considerable expense and uncertainty in obtaining

95 EAB Decision 04-074-082 D at para 135.

project approvals. The ALSA holds the prospect of creating greater certainty regarding the course of future development by resolving these issues initially in the land-use planning process.

Conclusion

The ALSA is ambitious legislation, which attempts to integrate land-use planning and development policy across the province, covering both private and public lands, and binding local governments and provincial boards and land administrators. Decisions taken in balancing social, economic and environmental interests are political judgments by the Alberta Government. Bill 10 has, however, introduced significantly more administrative law decision-making under the ALSA. The Government will no doubt be held politically accountable for these decisions. There may, however, also be legal consequences in the form of compensation owing to holders of existing legal rights and interests that may be affected by its decisions. Following the Bill 10 amendments, there appears to be greater scope for judicial review of planning decisions taken under the ALSA.

Although the ALSA creates some uncertainty concerning existing rights and interests, notwithstanding Bill 10, it holds the prospect of making the regulatory process more efficient and the results more certain than was historically the case, when land-use plans were subject to a complex hierarchy of local and provincial decision-makers. Even though such plans may not be binding, they could affect regulatory outcomes.

There will be a long period of transition while regional plans are developed and implemented. The ALSA is just the first chapter of a long story that is far from complete.

The ALSA holds broader lessons concerning interaction between land-use planning legislation and natural resource rights. Perhaps the most important lesson is the importance of certainty and clarity in drafting key provisions that define the planning process and its application to natural resource rights – particularly to pre-existing rights. The process of implementing the ALSA will spotlight some of these issues. It will also provide new data about the operation and perhaps the effectiveness of new market-based approaches and instruments such as transfer of development credits and stewardship units. This implementation process deserves close attention by lawyers and policy-makers.