

# Strategic Planning for Energy Development in Canada

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## I. Introduction

The National Energy Board (“NEB”),<sup>1</sup> an independent quasi-judicial federal agency that regulates inter-provincial and international electricity transmission lines and oil and gas pipelines,<sup>2</sup> has reported that Canada has “vast energy resources.”<sup>3</sup> Abundant hydroelectric resources account for the majority of electricity generation, particularly in the provinces of “Quebec, [British Columbia], Manitoba, Newfoundland and Labrador and the Yukon.”<sup>4</sup> Specifically, in 2012, 57% of national electricity production was from hydroelectricity, 15% from natural gas, 9% from coal, 10% from nuclear, 4% from oil, 4% from wind, and 2% from a combination of solar and biomass. In fact, 62% of Canadian electricity generation capacity in 2012 was from renewables.<sup>5</sup> Non-hydro renewables (wind, solar, and biomass) were the fastest-growing generating source in Canada between 2008 and 2012, with an annual growth rate of 16%.<sup>6</sup> In both Canada and the United States, “on a percentage basis, non-hydro renewables such as wind, solar, and biomass have been the fastest growing source of generation.”<sup>7</sup> From “2005 to 2012, wind and solar generation increased sevenfold in the United States, and generation

from non-hydro renewables almost doubled in Canada.”<sup>8</sup> In *Canada’s Energy Future 2013: Energy Supply and Demand Projections to 2035*, the NEB forecasts that additional wind development will make the most significant contribution to non-hydroelectric renewable electricity growth during the projection period to 2035.<sup>9</sup>

Alberta, the largest oil producing jurisdiction in Canada, has some wind farms and available wind resources for additional wind energy development. However, a significant investment over decades in the existing coal and natural gas electricity generation infrastructure, combined with abundant coal and natural gas reserves, has discouraged substantial additional development of provincial wind resources.

Renewable energy sources represent a growing proportion of the energy mix in Alberta. Notwithstanding the fact that Alberta’s economy, like Texas and Wyoming, is largely driven by hydrocarbon development, limited hydroelectric, solar, and biomass projects have developed in the province along with substantial wind energy production on private lands.<sup>10</sup> As of November 2013, hydroelectricity accounted for 6.4% of electricity production, wind 7.9%, and biomass approximately 3%.<sup>11</sup> Furthermore, renewable energy projects account for twenty-nine out of the seventy-two planned electricity generation projects currently under development.<sup>12</sup> In addition, industry has proposed 9,400 megawatts (“MW”) of thermal power and more than 3,000 MW of renewable power for future development.<sup>13</sup>

Alberta has a deregulated and more complex electricity system, structured differently than in other provinces such as Ontario, which has promoted renewable energy development on a larger scale than Alberta. In 1996, following California’s lead, Alberta became the first province in Canada to move

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1. Created under the National Energy Board Act, R.S.C. 1985, c. N-7 (Can.).  
2. TAYMAZ RASTGARDANI, ENERGY SECURITY FOR CANADA: A COMPARISON OF SELF-SUFFICIENCY AND CONTINENTAL STRATEGIES 18 (2007), available at <http://summit.sfu.ca/system/files/iritems1/8312/etd3199.pdf>.  
3. NAT’L ENERGY BD., CANADA’S ENERGY FUTURE 2013: ENERGY SUPPLY AND DEMAND PROJECTIONS TO 2035 ix (2013), available at <http://www.neb-one.gc.ca/clf-nsi/rnrgynfmutn/nrgyfrpt/nrgyfrtr/2013/nrgyfrtr2013-eng.pdf> [hereinafter NEB CANADA’S ENERGY FUTURE 2013].  
4. *Id.* at 63.  
5. *Id.* at 65.  
6. *Id.* at 67.  
7. *Id.* at 10.

8. *Id.*  
9. *Id.* at 67.  
10. Oil sands investment will total hundreds of billions of dollars over the next twenty-five years. The province has not yet created a wind leasing regime on provincial public lands, unlike British Columbia and Ontario. *Alberta’s Oil Sands—Economic Benefits*, GOV’T ALTA., <http://oilsands.alberta.ca/economicinvestment.html> (last visited May 30, 2014); see also ALLAN INGELSON & RYAN KALT, INT’L RES. INDUS. AND SUSTAINABILITY CTR., WIND FARMS ON ALBERTA CROWN LANDS? (2010).  
11. *Electricity Statistics*, GOV’T ALTA., <http://www.energy.alberta.ca/Electricity/682.asp> (last visited May 29, 2014).  
12. As of November 2013. *Id.*  
13. *Id.*

away from a traditional vertically integrated utility system to a market-based and deregulated system. The Electric Utilities Act,<sup>14</sup> which first heralded this new system, required utilities to unbundle into three new functions—generation, transmission, and distribution.

The second step towards deregulation occurred in 2001 when Alberta adopted a full retail access scheme.<sup>15</sup> As a result, all electric energy is purchased and sold through a “power pool” managed by the Alberta Electric System Operator (“AESO”).<sup>16</sup> The AESO functions as a clearinghouse for all electricity entering or leaving the Alberta Interconnected Electric System.<sup>17</sup> It determines an hourly spot price that fluctuates depending on the different electricity products and accompanying rates available.<sup>18</sup> Deregulation without a doubt adds to the complexity of facilitating more renewable energy electricity development than does the traditional vertically integrated utility system.<sup>19</sup> Due to the variability in wind power,<sup>20</sup> more system reserve balancing is required in Alberta than in other provinces that have significantly more hydroelectric development, such as British Columbia.<sup>21</sup>

In stark contrast to provinces such as British Columbia, Ontario, and Quebec, which have abundant hydroelectric resources, most of Alberta’s electricity is generated from fossil fuels. Coal and gas account for more than 80% of electricity generation in Alberta.<sup>22</sup> The province creates the largest volume of greenhouse gas (“GHG”) emissions within Canada, and, in 2003, the Alberta Government adopted the Climate Change and Emissions Management Act<sup>23</sup> that requires major industrial facilities in the province to reduce their GHG emissions. One important element of the provincial government strategy in response to climate change is financial support for the development of carbon capture and storage (“CCS”) facilities.<sup>24</sup> The provincial government has invested \$2 billion to develop four pilot test facilities in gov-

ernment/industry partnerships,<sup>25</sup> and the first CCS facility at an oil sands operation will open in 2015.<sup>26</sup>

Why is Canada facilitating increased natural gas consumption, reducing coal-fired generation, and planning for additional wind and solar electricity during the next two decades? The response stems from international concerns about climate change, including those expressed by Canada’s largest trading partner, the United States. In response, the government of Canada signed the Copenhagen Accord in 2009 and has agreed to reduce its GHG emissions by 17% of the 2005 level.<sup>27</sup> In 2005, Canada was responsible for approximately 2% of global GHG emissions.<sup>28</sup> The NEB anticipates that federal regulations adopted in Canada in 2012 that limit carbon dioxide emissions will prompt a steady decline in coal-fired electricity generation in Canada.<sup>29</sup>

In the Canadian federal state, a better integrated approach to land use planning and energy development will promote more sustainable development. Part II explains the constitutional framework for land use planning and energy projects and the legislative powers of the federal and provincial governments in the federal state. Part III discusses the repeal of the 1992 Canadian Environmental Assessment Act and the creation of a new federal environmental assessment system that emphasizes process efficiency to facilitate quicker approvals of major oil and gas pipeline projects and mining projects. Part IV considers the strategic approach of the provincial government of Alberta under the Alberta Land Stewardship Act to land use planning for the largest fossil fuel projects in Canada, including open pit oil sands mines, in response to international criticism from environmental groups about the negative environmental, social, and cultural impacts from the mega-projects. Part V considers the property rights of farmers, ranchers, and other private land owners in response to an innovative act that contemplated the acquisition of private lands for major energy infrastructure projects through the creation of energy corridors, years before such projects would be announced. Lastly, Part VI offers a brief conclusion that suggests a better integrated and uniform approach to land use planning and energy development in Canada can promote more sustainable development.

## II. Provincial and Federal Jurisdiction Over Energy Development and Land Use Planning

In Canada, there is a lack of a coordinated and integrated approach to land use planning for energy development between the federal and provincial governments. The nation’s federal structure creates complex and somewhat decentral-

14. Electric Utilities Act, S.A. 2003, c. E-5.1 (Can. Alta.).

15. *Id.*

16. *Id.* § 18. AESO does not hold any transmission assets and serves as an independent and central agency that provides open access to the Power Pool and electrical grid, i.e., the Alberta Interconnected Electric System. *Id.* §§ 9(5), 18. “The Power Pool is a short-term electricity market [that provides] access for generators, distributors and consumers” by establishing market prices for electricity across the province. Terra Nicolay, *Regulation by Any Other Name: Electricity Deregulation in Alberta and the Power Purchase Arrangements*, 29 J. ENERGY & NAT. RESOURCES L. 45, 60 (2011).

17. See INT’L ENERGY AGENCY, ENERGY POLICIES OF IEA COUNTRIES: CANADA 2009 REVIEW 195 (2009).

18. *Id.*

19. See Randolph Seibold, *The Road to Renewable Energy in Alberta, Canada*, RENEWABLEENERGYWORLD.COM (Jan. 30, 2014), <http://www.renewableenergyworld.com/rea/news/article/2014/01/the-road-to-renewable-energy-in-alberta-canada>.

20. Ryan Prescott & G. Cornelis van Kooten, *Economic Costs of Managing an Electricity Grid With Increasing Wind Power Penetration*, 9 CLIMATE POL’Y 155, 156 (2009).

21. *Id.* at 166. Provinces, such as British Columbia, use wind power more efficiently because they have much larger hydropower capacity, so water can be stored in reservoirs and released to generate electricity when there is no available wind power. *Id.* at 158.

22. *Electricity Statistics*, *supra* note 11.

23. Climate Change and Emissions Management Act, S.A. 2003, c. C-16.7 (Can. Alta.).

24. Press Release, Gov’t of Alta., *Alberta Surges Ahead With Climate Action Plan—\$2 Billion Invested in Carbon Capture and Storage; \$2 Billion in Public Transit* (July 8, 2008), [available at](http://alberta.ca/release.cfm?xID=23960039FB54D-CC21-7234-31C3E853089A1E6C) <http://alberta.ca/release.cfm?xID=23960039FB54D-CC21-7234-31C3E853089A1E6C>.

25. *Id.*

26. Dan Healing, *A Quest to Cut Emissions—Shell Moving Ahead on Carbon Capture*, CALGARY HERALD, Sept. 6, 2012, at D1, [available at](http://www2.canada.com/calgaryherald/news/calgarybusiness/story.html?id=955c1568-f7cd-4ddd-ac4b-5574a76a71d6) <http://www2.canada.com/calgaryherald/news/calgarybusiness/story.html?id=955c1568-f7cd-4ddd-ac4b-5574a76a71d6>. The first CCS project is designed to capture more than one million tonnes of carbon dioxide per year.

27. ENV’T CAN., CANADA’S EMISSIONS TRENDS 14 (2011).

28. *Id.* at 13.

29. NEB CANADA’S ENERGY FUTURE 2013, *supra* note 3, at 10.

ized oversight of land use planning and energy development. Due to Canada's constitutional framework, provincial governments regulate most of the energy development in southern Canada and play a much larger role in land use planning for energy projects than the federal government.<sup>30</sup> Canada is a federation that incorporates ten provinces and three territories.<sup>31</sup> The Canadian Constitution provides for the allocation of exclusive "heads of power" between the federal government and provincial governments.<sup>32</sup> Section 92(5) of the Constitution Act, 1867 provides provincial governments with the power to regulate the management and sale of provincial public lands, including timber and wood and other natural resources thereon.<sup>33</sup> Other sources of provincial constitutional authority to regulate energy projects include municipal institutions (section 92(8)); local, municipal, and provincial revenue (section 92(9)); and the enumerated enforcement powers (section 92(15)).<sup>34</sup> In addition, section 92A of the Constitution Act, 1982 confers on each provincial legislature the exclusive authority to make laws in relation to the "development, conservation and management of non-renewable natural resources and forestry resources in the province . . . and . . . [the] development, conservation and management of sites and facilities in the province for the generation and production of electrical energy."<sup>35</sup> The courts have also "recognized provincial legislative authority deriving from rights of ownership or proprietary rights over natural resources."<sup>36</sup> Under section 92(10), the provinces have jurisdiction over "local works and undertakings," and section 92(13) gives them jurisdiction over "property and civil rights."<sup>37</sup> Therefore, most energy projects are reviewed and regulated by provincial governments. When taken together, "these sources of legislative power provide the provinces with a strong constitutional basis for an extensive range of regulatory initiatives."<sup>38</sup>

The federal government, on the other hand, has the right to regulate federal lands in national parks, where oil and gas exploration is prohibited or other Federal Reserve lands as well as all resources on these lands (e.g., timber, water, range, wildlife, and mines and minerals).<sup>39</sup> The relevant "heads of power" that the federal government has available to regulate energy development and land use planning include protection of water and fisheries resources; trade and commerce;<sup>40</sup>

navigation and shipping;<sup>41</sup> seacoast and inland fisheries;<sup>42</sup> matters that regard Indians and lands reserved for Indians;<sup>43</sup> criminal law;<sup>44</sup> extra-provincial works and undertakings;<sup>45</sup> the implementation of international treaties between Canada and other countries;<sup>46</sup> and the broad-based legislative power for the peace, order, and good government of Canada.<sup>47</sup> The residual power found in the peace, order, and good government clause and, in particular, its "national concern" branch, has long been considered a promising foundation for increased federal regulation in the land use and environmental area.<sup>48</sup> The federal government is currently focusing on monitoring national emissions from coal, natural gas, and hydroelectric generating facilities with projects necessitating review under the Canadian Environmental Assessment Act, 2012 ("CEAA 2012"), once production capacity reaches 200 MW.<sup>49</sup> In Canada, when the constitutional power of the federal government or a provincial government to regulate land use planning or an energy project is challenged, a court such as the Supreme Court of Canada may decide that the matter falls within the power of either the federal or provincial government. In interpreting the jurisdiction over the subject matter, courts will characterize the essence or pith and substance of the legislation to determine the constitutional validity of an act. If the essence of a law provides for provincial authority over subject matter that falls under federal jurisdiction, or vice versa, then the court will declare the law to be *ultra vires*.<sup>50</sup> Courts can strike down any federal or provincial law that deals with subject matter not allocated to the appropriate government.<sup>51</sup> As a result, when jurisdiction is unclear, courts may (1) allocate the matter to exclusive federal or provincial jurisdiction; (2) recognize both federal and provincial jurisdiction for parts of the matter under the *double aspect* doctrine, whereby the federal jurisdiction will prevail in the event of a conflict due to the doctrine of *paramountcy*; or (3) in case neither federal or provincial jurisdiction is clear, recognize residual federal jurisdiction. However, as the powers enumerated in the Constitution are not exhaustive, Canadian courts have the responsibility to determine jurisdiction in accordance with interpretive rules that have evolved over the years.<sup>52</sup>

30. See INT'L ENERGY AGENCY, *supra* note 17, at 9, 30–31.

31. *Id.* at 27.

32. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 58 (U.K.) reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

33. *Id.* § 92(5).

34. *Id.* § 92.

35. JAMIE BENIDICKSON, ENVIRONMENTAL LAW 38 (4th ed. 2013) (citing Constitution Act, 1867 § 92A(b–c)).

36. *Id.* at 38–39.

37. Constitution Act, 1867, §§ 92(10), (13).

38. BENIDICKSON, *supra* note 35, at 39.

39. Constitution Act, 1867, § 92(5).

40. *Id.* § 91(2). Federal authority in connection with this head of power, and in connection with international agreements, has also failed to provide broad support for federal initiatives in the environmental area. Courts have historically interpreted the trade and commerce power in a restrictive manner that permits federal regulation of international and interprovincial, but not intra provincial, trade. BENIDICKSON, *supra* note 35, at 34–35 (citing Labatt Breweries v. Canada (AG), [1980] 1 S.C.R. 914 (Can.)).

41. Constitution Act, 1867, § 91(10).

42. *Id.* § 91(12).

43. *Id.* § 91(24).

44. *Id.* § 91(27).

45. *Id.* § 92(10)(a).

46. *Id.* § 92(1)(c).

47. *Id.* § 91.

48. BENIDICKSON, *supra* note 35, at 35 (citing R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401 (Can.)).

49. Regulations Designating Physical Activities, SOR/2012-147 § 2 (Can.).

50. See Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, 27 (Can.).

51. Constitution Act, 1867, §§ 91–93.

52. This has occurred in environmental protection, which is not allocated to any specific level of government. The Supreme Court of Canada has decided that legislative responsibility for environmental protection is shared by both levels of government, provided that the exercise of power by each level is related to a head of power expressly allocated to that level under the Constitution. Alternatively, the court may decide that neither level of government has exclusive jurisdiction over the subject matter. In such a case, the court can apply the *double aspect* doctrine, which means that both levels of government can legislate certain aspects of that matter. For instance, the Alberta Government may pass legislation regulating water pollution since the provinces have the

### III. Changes in 2012: A New Federal Environmental Assessment Regime for Energy Development That Undermines Strategic Land Use Planning for Major Energy Infrastructure Projects

In 1992, the federal government adopted the Canadian Environmental Assessment Act, modeled after the U.S. National Environmental Policy Act of 1969,<sup>53</sup> but the main legislative workhorse, administered by the Federal Department of the Environment (“Environment Canada”), for proposed energy project planning is the CEAA 2012.<sup>54</sup> Environment Canada coordinates environmental policies to preserve and enhance Canada’s environment and to conserve the nation’s natural resources, and is the main federal department responsible for regulating GHG emissions.<sup>55</sup> Within the energy context, another important department is Natural Resources Canada (“NRC”), the leading federal department responsible for the development and implementation of federal energy and mining policies to “enhance the responsible development and use of Canada’s natural resources and the competitiveness of Canada’s natural resources products.”<sup>56</sup> The federal energy policy administered by NRC reflects the following three fundamental principles:

1. The jurisdiction of provincial governments regarding energy and land use planning must be respected;
2. Competitive markets are the most efficient at regulating energy prices and energy commodity trading and ensuring an innovative system to satisfy the nation’s energy supply needs; and
3. The federal government will intervene on a targeted basis in the energy trading process to ensure that energy policy objectives are attained regarding public health, safety and the environment.<sup>57</sup>

The federal government significantly changed its strategic planning environmental assessment (“EA”) regime for energy

projects in 2012.<sup>58</sup> A report by the Canadian Commissioner of the Environment and Sustainable Development released in fall 2009 highlighted problems with the former Canadian Environmental Assessment Act (“CEAA 1992”) based on a review of EAs conducted between 1995 and 2008.<sup>59</sup> The Commissioner identified longstanding issues with the coordination of federal government departments and agencies in the EA process and concluded that project screenings were problematic.<sup>60</sup> Scoping decisions<sup>61</sup> by responsible authorities had been challenged in court, causing delays in the EA process.<sup>62</sup> Moreover, disagreements relating to scoping often resulted in multiple assessments.<sup>63</sup> The report noted that assessing cumulative effects in the federal EA process represented a challenge and that the Canadian Environmental Assessment Agency (“CEA”) had not fully established and undertaken a quality assurance program as required by amendments to the CEAA 1992 in 2003.<sup>64</sup>

In November 2011, then federal Natural Resources Minister Joe Oliver<sup>65</sup> announced that Canada must streamline the environmental review process to avoid delaying major energy and mining projects.<sup>66</sup> The minister reported that approximately \$500 billion worth of energy and mining projects in Canada were anticipated over the next decade, and that the government needed to create the right conditions for those investments to occur, including an efficient regulatory regime.<sup>67</sup> The minister noted that delays had arisen in the EA process due to “the involvement of a multitude of government agencies and departments—overseeing dozens of laws and regulations—that are involved in reviewing almost every major construction project in the country, as well as minor ones.”<sup>68</sup> Government concern about delays in the approval of major infrastructure projects prompted the creation of a new federal EA regime. After limited public consultation,<sup>69</sup> CEAA 1992 was repealed in 2012 and replaced with CEAA

58. Canadian Environmental Assessment Act, 2012, §§ 21–23.

59. OFFICE OF THE AUDITOR GEN., 2009 REPORT OF THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEV. TO THE HOUSE OF COMMONS 4–5 (2009), available at [http://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200911\\_00\\_e\\_33195.html](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200911_00_e_33195.html).

60. *Id.* at 5 (explaining that screenings were problematic as their determination of environmental effects was weak and responsible authorities conducted little public participation).

61. Scoping occurs at an early stage of an EA to frame the EA and determine what it will address. In particular, scoping determines which environmental, social, and cultural impacts from the energy project and the associated issues are likely to be important, and how these impacts and issues will be included in the terms of reference for the project and be evaluated. KEN S. HANNA, ENVIRONMENTAL IMPACT ASSESSMENT—PRACTICE AND PARTICIPATION 10–11 (2d ed. 2009).

62. *Id.*

63. *Id.*

64. *Id.* (assessing cumulative effects requires identifying the incremental effects on the environment that may occur as a result of the combined influences of various actions).

65. Joe Oliver is now Canada’s Minister of Finance.

66. Shawn McCarthy, *Ottawa Wants to Streamline Environmental Reviews*, GLOBE & MAIL (Nov. 28, 2011, 6:50 PM), <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ottawa-wants-to-streamline-environmental-reviews/article4201668/> (last updated Sept. 6, 2012, 11:07 AM).

67. *Id.*

68. *Id.*

69. The federal government engaged in limited consultation on these regulations and sought feedback from proponents of projects and industry associations, in

jurisdiction to legislate for the protection of property and civil rights. The federal government may also pass legislation regulating water pollution that interferes with fish habitat as it has the jurisdiction to regulate inland and coastal fisheries. If the *double aspect* doctrine applies, then both the provincial and federal laws operate concurrently. Should conflict occur between the operation of the laws, Canadian courts, applying the doctrine of federal *paramountcy*, will recognize the standing of the federal law and declare the provincial law to be inoperative to the extent that it conflicts with the federal law. Thirdly, the courts may conclude that the Constitution confers neither exclusive jurisdiction nor shared jurisdiction over a matter. As the federal government is provided with the power to regulate residual matters, such a matter will fall under federal jurisdiction.

53. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

54. Canadian Environmental Assessment Act, 2012, S.C. 2012, ch. 19, § 52(4) (Can.).

55. See ENV’T CAN., THE 2012 PROGRESS REPORT OF THE FEDERAL SUSTAINABLE DEVELOPMENT STRATEGY 112 (2013), available at [http://www.ec.gc.ca/ddsd/23E4714E-B774-4CC5-9337-F87B01556727/2012\\_Progress\\_Report\\_ofthe\\_FSDS.pdf](http://www.ec.gc.ca/ddsd/23E4714E-B774-4CC5-9337-F87B01556727/2012_Progress_Report_ofthe_FSDS.pdf).

56. *About Us*, NAT. RESOURCES CAN., <http://www.nrcan.gc.ca/department> (last visited May 27, 2014).

57. *Energy Policy*, NAT. RESOURCES CAN., <http://www.nrcan.gc.ca/energy/energy-resources/15903> (last updated May 5, 2014).

2012. The main objectives of the 2012 federal EA process, as adopted under the omnibus budget implementation bill C-38—the Jobs, Growth & Long-term Prosperity Act—are to (i) promote investment in the energy and mining sectors by increasing efficiency in the federal EA process, (ii) promote increased cooperation and coordinated EAs between the federal and provincial governments, and (iii) ensure that EAs are completed in timely manner.<sup>70</sup>

To simplify the federal process, section 15 of CEAA 2012 designates three specific federal agencies—the NEB, the Canadian Nuclear Safety Commission (“CNSC”), and the CEA—to manage the EA process.<sup>71</sup> CEAA 2012 and other new regulations<sup>72</sup> have prompted significant change in the federal EA process. Energy projects automatically subject to an EA include designated projects involving activities that are regulated by the NEB, CNSC, and CEA. Other projects may require an EA based on the outcome of the screening procedure. In addition, under section 14(2), the federal Minister of the Environment has the discretion to require an EA. Pursuant to CEAA 2012, sections 2(1) and 84(a), and the Regulations Designating Physical Activities, the federal government has created timelines to expedite the energy project review and approval process for screening projects, including the following for EAs managed by the CEA:

- Section 8(2) – the CEA may require additional information from the proponent within ten days after receiving the project description;
- Section 9(c) – the CEA invites the public to provide comments within twenty days after posting the project description on the Internet site; and
- Section 10 – within forty-five days after online posting, the CEA must conduct the screening and post its decision on the Internet.<sup>73</sup>

In addition, within 365 days after the day on which the notice of the commencement is posted on the Internet, a decision has to be made with respect to the designated project.<sup>74</sup> This time limit does not include the interval needed to collect information or undertake a study.<sup>75</sup> The Minister of the Environment may refer an EA to a review panel if it is in the public interest. Under section 38(1), within sixty days after posting the notice of commencement of the EA, the Minister of the Environment must terminate an EA by a review panel if the panel fails to submit its report within the prescribed time limit.<sup>76</sup> Under section 38(3), within twenty-four months after referring an EA to a Review Panel, the

Minister of the Environment must issue a decision regarding the designated project.<sup>77</sup>

The factors to be considered in the environmental assessment of energy projects under section 19 of the CEAA 2012 include the following:

- Purpose of the proposed project,
- Environmental effects (including malfunctions and accidents scenarios) and their significance,
- Public comments,
- Mitigation measures,
- Requirements for the follow-up program,
- Alternative means of carrying out the project, and
- Results of relevant studies and any other relevant matters.<sup>78</sup>

The definition of an interested party for proposed energy projects in CEAA 2012 is now determined by the responsible federal government authority: either the NEB for inter-provincial and international electricity transmission lines and hydrocarbon pipelines, the CNSC for proposed nuclear plants, or the CEA for energy projects that not assigned to either the NEB or the CNSC.<sup>79</sup> An interested party is limited to a person who is directly affected by the carrying out of the designated project or a person who has relevant information or expertise.<sup>80</sup>

Section 32 of CEAA 2012 provides the federal Minister of the Environment with the power to decide whether a provincial process would be an appropriate substitute to avoid two EAs.<sup>81</sup> The provincial process must be carried out by the government of a province, or any agency or body established under a provincial EA act. However, under section 33, the Minister of the Environment must not approve a substitution if (1) the project activity is regulated under the National Energy Board Act or the Nuclear Safety and Control Act and is under the responsible authority of either the NEB or the CNSC, (2) the project includes activities that are linked to the federal authority, or (3) the Minister has referred the EA to a review panel.<sup>82</sup>

With regard to public participation, section 24 provides that the responsible authority must ensure the public has an opportunity to participate in the EA process.<sup>83</sup> CEAA 2012 restricts the “environmental effects” to be considered in EAs.<sup>84</sup>

discordance with the longstanding practice to consult broadly with the public on regulations and changes to the federal EA process.

70. Canadian Environmental Assessment Act, 2012, § 4(1).

71. *Id.* § 15.

72. Prescribed Information for the Description of a Designated Project Regulations, SOR/2012-148 § 1 (Can.); Regulations Designating Physical Activities, SOR/2012-147 (Can.); Cost Recovery Regulations, SOR/2012-146 § 1 (Can.).

73. Canadian Environmental Assessment Act, 2012, §§ 8(2), 9(c), 10.

74. *Id.* § 27(2).

75. *Id.* § 27(6).

76. *Id.* § 38(1).

77. *Id.* § 38(3).

78. *See id.* § 19.

79. *See id.* §§ 2(2), 15.

80. *Id.* § 2(2).

81. *See id.* § 32; *see also* ALLAN INGELSON, INT’L ASS’N FOR IMPACT ASSESSMENT, THE NEW CANADIAN ENVIRONMENTAL ASSESSMENT ACT 4 (2013), available at <http://www.iaia.org/conferences/iaia13/proceedings/Final%20papers%20review%20process%2013/The%20New%20Canadian%20Environmental%20Assessment%20Act.pdf?AspxAutoDetectCookieSupport=1>.

82. Canadian Environmental Assessment Act, 2012, § 33; INGELSON, *supra* note 81, at 4.

83. Canadian Environmental Assessment Act, 2012, § 24.

84. *Id.* § 5.

With respect to aboriginal residents, any change that occurs in Canada that may affect the health, socio-economic conditions, heritage, and current use of lands/resources for traditional purposes are to be considered. Review of the Prescribed Information for the Description of a Designated Project Regulations reveals that there is no requirement to describe changes that may affect non-aquatic species at risk under the federal Species at Risk Act.<sup>85</sup> In addition, CEEA 2012 has removed the requirement to consider the effects on terrestrial species and the requirement to include in the description of designated projects some information relating to the terrain, water bodies, air, and vegetation that may be impacted by an activity.<sup>86</sup>

In summary, since July 2012, a new federal EA regime applicable to designated energy projects is in force. CEEA 2012 limits the number of projects subject to an EA to those described in the Regulations Designating Physical Activities.<sup>87</sup> The information that must be provided by the proponent is contained in the Prescribed Information for the Description of Designated Project Regulations.<sup>88</sup> CEEA 2012 additionally creates specific timelines for decisions to be made to minimize delays in the review of energy projects.<sup>89</sup> The Act creates responsibilities for three main federal regulators—the NEB, CNSC, and the CEA—to manage the federal process.<sup>90</sup> With regard to proposed energy projects, changes to the EA process include fewer EAs with a narrower scope, shorter timelines for decisions,<sup>91</sup> fewer federal agencies and departments involved in the EA process,<sup>92</sup> more discretion in the decision making process,<sup>93</sup> a smaller number of persons that may have “interested party” status,<sup>94</sup> and increased federal government willingness to substitute the federal EA process with provincial EAs.<sup>95</sup> Logically, the focus on more rapid approval of energy projects will undermine the strategic planning value of federal EAs for major energy infrastructure projects in mitigating environmental, social, and cultural impacts.

#### IV. Landscape Level Planning for Energy Project Development

The only Canadian province that has adopted legislation for landscape level planning is Alberta.<sup>96</sup> This approach ties into integrated landscape management (“ILM”) which is intended to overcome “fragmentation and incrementalism in decision-

making that present virtually insurmountable obstacles to cumulative effects management across much of Canada and other jurisdictions” globally.<sup>97</sup> The objective of ILM is to “set and achieve landscape-scale objectives over appropriate spatial and temporal scales.”<sup>98</sup> Alberta’s first efforts towards landscape planning were prompted by criticism of the case-by case incremental approval process for large oil and gas projects, including large open pit oil sands mines, and the significant landscape impacts.<sup>99</sup>

In response to a significant expansion in its oil sands industry, the Alberta government created two statutes—the Alberta Land Stewardship Act<sup>100</sup> and the Land Assembly Project Area Act<sup>101</sup>—for strategic land use planning. In 1977, strong demand from the United States for Alberta’s oil and natural gas resources, including resources from an area in western Alberta known as the Eastern Slopes of the Alberta Rocky Mountains, prompted land use conflicts and concerns about protecting the quality of the environment in an area regarded as an “extremely important watershed region.”<sup>102</sup> The Alberta government responded by introducing the Policy for Resource Management of the Eastern Slopes, with the principal objective of ensuring “that all public lands and resources in the Eastern Slopes are protected, managed or developed according to a philosophy of integrated resource management.”<sup>103</sup> This purpose involved the regional allocation of resources through the use of a broad regional plan, which defines the goals, priorities, and “what resource objectives might be met in the different parts of the region.”<sup>104</sup> The policy identified “watershed management” as the highest land use priority in Alberta, although recreation and tourism were also regarded as “extremely important.”<sup>105</sup>

Decisions regarding public land allocation and use were to be made through an Integrated Resource Planning (“IRP”) system,<sup>106</sup> described as a “cooperative and comprehensive approach to decision-making on resource uses,”<sup>107</sup> which included involvement of the public.<sup>108</sup> In 1984, the policy was revised “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.”<sup>109</sup> The revision placed particular emphasis on the need to harness the tourism potential of the region.<sup>110</sup> But the IRPs had no legal status. The planning process was not

85. Species at Risk Act, S.C. 2002, c. 29, § 58 (Can.).

86. Canadian Environmental Assessment Act, 2012, § 2.

87. Regulations Amending the Regulations Designating Physical Activities, SOR/2013-186 (Can.), available at <http://www.gazette.gc.ca/rp-pr/p2/2013/2013-11-06/html/sor-dors186-eng.php> (setting out a finite list of activities which may be considered “designated projects” subject to environmental assessment under CEEA 2012 (as defined in section 2(1)).

88. Canadian Environmental Assessment Act, 2012, § 8(1).

89. *Id.* § 27(2)–(7).

90. *Id.* §§ 15(a)–(b), 48, 54(1)–(4).

91. *Id.* § 4(f).

92. *Id.* §§ 14(4), 15(b).

93. *Id.* §§ 52–53.

94. *Id.* § 2.

95. *Id.* § 4(c).

96. ALTA’S FIRST NATIONS, CONSULTATION GUIDELINES ON LAND MANAGEMENT & RESOURCE DEVELOPMENT (Nov. 14, 2007), available at [http://www.aboriginal.alberta.ca/documents/First\\_Nations\\_Consultation\\_Guidelines\\_LM\\_RD.pdf](http://www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LM_RD.pdf).

97. STEVEN A. KENNETT, CAN. INST. OF RES. LAW, INTEGRATED LANDSCAPE MANAGEMENT IN CANADA: GETTING FROM HERE TO THERE vii (2006).

98. *Id.*

99. *Id.* at 13–23.

100. Alberta Land Stewardship Act, S.A. 2009, c. A-26.8 (Can. Alta.).

101. Land Assembly Project Area Act, S.A. 2009, c. L-2.5 (Can. Alta.).

102. The Eastern Slopes is considered an “extremely important watershed region” due to its natural resources, which include fresh water, wildlife, forests, and fossil fuels. GOV’T OF ALTA., A POLICY FOR RESOURCE MANAGEMENT OF THE EASTERN SLOPES 1 (1984), available at <http://esrd.alberta.ca/lands-forests/landuse-planning/documents/IRP-PolicyEasternSlopes-Oct2013.pdf>.

103. *Id.*

104. *Id.* at 4.

105. *Id.*

106. *Id.*

107. *Id.* at 19.

108. *Id.* at 5.

109. *Id.* at iii.

110. *Id.*

well-developed and lacked transparency and adequate funding, resulting in “uneven coverage and a failure to update IRPs systematically.”<sup>111</sup> After approximately two decades, the system was abandoned,<sup>112</sup> but, as described below, a new land use and resource management system has emerged.

The IRP system was based on a multiple-use approach, one that has “dominated public lands management throughout North America.”<sup>113</sup> The approach is directed to address conflicts between different land uses, arising from interactions between different land users. It aims to encourage “complementary uses” of lands and to “balance competing uses in order to maximize aggregate benefits.”<sup>114</sup> Despite these laudable objectives, the approach has been much criticized. Robert Nelson, an economist from the U.S. Department of the Interior, stated:

Although the principle of multiple use is sometimes said to provide an actual basis for making decisions, most students of public land management have concluded that it is in fact amorphous and offers little substantive guidance. Multiple use management is really management by agency administrative discretion in response to individual proposals. The lands managed under multiple use can be considered the public-land equivalent of the industrial or unrestricted zones commonly found in municipal zoning ordinances.<sup>115</sup>

Steven Kennett has criticized the use of this approach in Alberta for allowing “relatively unfettered discretion of public land managers” and being incongruous with democracy and the rule of law.<sup>116</sup> He notes that, “[i]n its pure form,” the multiple-use approach seeks the “satisfaction” of the needs of the moment and lacks “clear guidance” for addressing conflicts between different uses, which results in “*ad hoc*” and “unprincipled” decisions.<sup>117</sup> With this approach, there is a lack of clear legal guidance for exercising discretion. The “practical effect is to tilt the playing field, in favour of certain interests and values.”<sup>118</sup> As a result, the land use approach in the Alberta has changed to take the form of project-specific considerations, without regard to cumulative effects and the broader goals of land use management.

The regulatory system for land and resource use in Alberta, and across much of Canada, has been described as “sectoral fragmentation and unplanned incrementalism.”<sup>119</sup> Sectoral fragmentation means that, while various activities, such as oil and gas development, mining, transportation, forestry, agriculture, and recreation share the same land-

scape, they are frequently managed autonomously.<sup>120</sup> The result is that the decisions regarding each of the resources fail to foster the realization of the broader objectives of overall land use. Incrementalism speaks to “decision-making on a disposition-by-disposition or project-by-project basis, without clear direction regarding longer term, landscape-scale objectives.”<sup>121</sup> That is to say, it fosters decision making that focuses narrowly on the characteristics of individual projects, without consideration of the cumulative effects of each individual project or land use.

In light of the overall increase in GHG emissions from additional oil sands development and processing facilities in the Athabasca area,<sup>122</sup> along with the water and land surface impacts from open pit mines, management of cumulative effects is an important issue that needs to be addressed in Alberta. For example, in 1997, “cumulative effects” was raised as an issue at a provincial energy regulatory hearing at which an application for an oil sands mine was considered.<sup>123</sup> Generally, when reviewing whether to approve applications for drilling oil and gas wells, building pipelines, and constructing oil sands mines, “cumulative effects” is acknowledged as a factor to be considered; however, in light of the complexity of unconventional oil sands development, provincial regulators have been reluctant to deal with the problem. “Cumulative effects” is but one of the issues arising from a fragmented approach to land use planning.

Overall, fragmentation creates many problems. In *Managing Alberta's Energy Futures at the Landscape Level*, Kennett *et al.* have alluded to some of them:

- Multiple activities and decisions are altering landscapes in ways that do not reflect conscious choice (i.e., the “tyranny of small decisions”) and may be undesirable from ecological, social, cultural and economic perspectives.
- Resource management and regulatory processes are inefficient and may increase the risk of conflict . . .
- Institutional fragmentation on sectoral and geographic lines means that decision-makers often focus primarily on a narrow set of interests, issues and impacts—opposed to considering how the landscape-scale implications of multiple activities will determine what

111. KENNETT, *supra* note 97, at 12.

112. STEVEN A. KENNETT & MONIQUE M. ROSS, CAN. INST. OF RES. LAW, IN SEARCH OF PUBLIC LAND LAW IN ALBERTA 21 (1998).

113. STEVEN A. KENNETT, CAN. INST. OF RES. LAW, NEW DIRECTIONS FOR PUBLIC LANDS 10 (1998) (explaining while the approach is accorded explicit legislative recognition in the United States, in Canada, it is found mostly in policies and programs than in statutes).

114. *Id.*

115. SARAH BATES, NATURAL RES. LAW CTR., UNIV. OF COLO. SCHOOL OF LAW, WESTERN LANDS REPORT NO. 3: THE CHANGING MANAGEMENT PHILOSOPHIES OF THE PUBLIC LANDS 22 (1993).

116. KENNETT, *supra* note 113, at 11.

117. *Id.* at 12.

118. *Id.* at 13.

119. KENNETT, *supra* note 97, at 20.

120. *Id.*

121. *Id.* at 21; *see also* STEVEN A. KENNETT ET AL., INST. FOR SUSTAINABLE ENERGY, ENV'T & ECON., MANAGING ALBERTA'S ENERGY FUTURES AT THE LANDSCAPE SCALE 51 (2006).

122. *Athabasca Oil Sands*, NASA EARTH OBSERVATORY, <http://earthobservatory.nasa.gov/Features/WorldOfChange/athabasca.php> (last updated May 15, 2011).

123. Decision 97-13: Application by Syncrude for the Aurora Mine, Application No. 960552, Alta. Energy & Utils. Bd. 15–29 (Oct. 24, 1997), *available at* <http://www.aer.ca/documents/decisions/1997/D97-13.pdf>; *see also* Steven Kennett, *Next Steps for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region*, 96 CAN. INST. RES. L. 1, 1–9 (2006–2007), *available at* <http://dSPACE.ualgary.ca/bitstream/1880/47043/1/Resources96.pdf>; STEVEN A. KENNETT, CAN. INST. RES. L., CLOSING THE PERFORMANCE GAP: THE CHALLENGE FOR CUMULATIVE EFFECTS MANAGEMENT IN ALBERTA'S ATHABASCA OIL SANDS REGION (2007), *available at* <http://dSPACE.ualgary.ca/bitstream/1880/47191/1/OP18Athabasca.pdf>.

ecological and other objectives will in fact be achieved . . .

- Important decision-making processes are unable to meet public expectations and discharge their mandates as established through law or policy . . .
- Environmental, economic and social objectives, where defined, may be unachievable because of the effects of uncoordinated and inconsistent activities on the same land base . . . or on surrounding land.<sup>124</sup>

These problems prompted calls for the Alberta government to adopt a comprehensive land use plan for the whole province. In 2008, the provincial government responded by creating the Land Use Framework (“LUF”), a policy that outlined the government’s approach “to manage public and private lands and natural resources to achieve Alberta’s long-term economic, environmental and social goals.”<sup>125</sup> The LUF is “a novel and unprecedented approach to land management” that will alter the way that land use decisions are made as well as the project-review and approval process.<sup>126</sup>

The LUF adopts the following seven goals: (1) to develop seven land use regions, including a regional plan for each of them; (2) to establish a governance structure in the form of a land use Secretariat and a regional Advisory Council for each region, for the implementation of the LUF; (3) to establish a cumulative effects management system that will replace a project-by-project management system to address the combined impacts of multiple activities on lands; (4) to develop new policy instruments to promote stewardship and conservation on all lands; (5) to support wise use of land to reduce the human footprint on Alberta’s landscape; (6) to create a monitoring, evaluation and reporting system, including an integrated information system to ensure steady improvements in land use planning and decision-making; and (7) to respect the special constitutionally protected rights of aboriginal communities, adversely affected by energy development on their lands, and encourage aboriginal participation in the land use planning process.<sup>127</sup> The LUF marks the end of the era of “project-by-project” management of land, inaugurating a new period with an integrated management system.<sup>128</sup>

Additionally, in 2009, the Alberta government enacted the Alberta Land Stewardship Act (“ALSA”)<sup>129</sup> as the legislative framework for the implementation of the LUF. ALSA’s lofty land development and use objectives are as follows: (1) “to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta”; (2) “to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future gener-

ations of Albertans”; and (3) “to create legislation and policy that enable sustainable development by taking account of . . . the cumulative effect of human endeavour . . . .”<sup>130</sup>

Subsections (b) and (c) suggest that what is contemplated under LUF and ALSA is a land use planning process that is intended to promote sustainable development to supplant the “municipality-by-municipality or project-by-project” approach that has characterized land use planning in the past.<sup>131</sup> The objectives of ALSA reflect an “ecosystem management” approach for land and resource management, “a set of normative principles and operational guidelines for managing human activities in a way that permits them to coexist, over a specified management area, with ecological processes deemed to be worth protecting over the long term.”<sup>132</sup>

ALSA provides for the creation of “integrated planning regions,”<sup>133</sup> described as “an expression of the public policy of the Government” and regarded as “legislative instruments” that have the status of regulations.<sup>134</sup> The power to make and amend regional plans vests in the Lieutenant Governor in Council (“LGC”).<sup>135</sup> Such plans are binding on the provincial government, local governments, decision makers, regulators, industries, and private individuals.<sup>136</sup>

The Act also creates a framework to develop regional land use plans.<sup>137</sup> Each plan will set the context for all land-use decision making in a region and will have the force of law after the government approves the plan.<sup>138</sup>

In fact, ALSA prevails over all other Alberta statutes and regulations.<sup>139</sup> Regional plans prevail over inconsistent regulations, municipal bylaws, government policies and codes of practice.<sup>140</sup> This means that once a regional plan has been created and published in the provincial government gazette, local governments and regulatory bodies must amend their inconsistent bylaws and regulations to bring them into harmony with the requirements of a regional plan.<sup>141</sup> After more than three years of consultation with area residents, indigenous peoples, and experts regarding environmental, social, and economic issues, the provincial government approved the Lower Athabasca Regional Plan. The plan, approved in 2012, covers the area in which the oil sands mines are located.<sup>142</sup>

*Prosper Petroleum Ltd.*<sup>143</sup> is the first regulatory appeal in which the concerns of Aboriginal residents about the regional and cumulative effects of a proposed oil sands exploration

124. KENNETT ET AL., *supra* note 121, at 51–52.

125. GOV’T OF ALTA., LAND-USE FRAMEWORK 7 (Dec. 2008), available at [https://www.landuse.alberta.ca/Documents/LUF\\_Land-use\\_Framework\\_Report-2008-12.pdf](https://www.landuse.alberta.ca/Documents/LUF_Land-use_Framework_Report-2008-12.pdf) [hereinafter LAND-USE FRAMEWORK].

126. Alan Harvie & Trent Mercier, *Alberta Land Stewardship Act and its Impact on Alberta’s Oil and Gas Industry*, 48 ALTA. L. REV. 295, 298 (2010).

127. LAND-USE FRAMEWORK, *supra* note 125, at 3–4, 19–21.

128. *See id.* at 3, 13, 31.

129. Alberta Land Stewardship Act, S.A. 2009, c. A-26.8 (Can. Alta.).

130. *Id.* § 1.

131. Kevin Marron, *Clear as Mud*, CAN. LAWYER, July 2011, at 21, 22.

132. KENNETT, *supra* note 113, at 19.

133. Alberta Land Stewardship Act § 3(1).

134. *Id.* § 13(1)–(2).

135. *Id.* § 4(1).

136. *Id.* § 15(1).

137. *Id.* § 8.

138. *Id.* §§ 5, 8, 13(2).

139. Harvie & Mercier, *supra* note 126, at 303.

140. *Id.* at 307.

141. *Id.* at 308.

142. *Lower Athabasca Regional Plan*, GOV’T ALTA., <http://esrd.alberta.ca/focus/cumulative-effects/cumulative-effects-management/management-frameworks/lower-athabasca-regional-plan.aspx> (last visited Sept. 27, 2014).

143. *Prosper Petroleum Ltd.*, 2014 ABAER 013 (Alta. Energy Regulator Nov. 5, 2014), available at <https://www.aer.ca/documents/decisions/2014/2014-ABAER-013.pdf>.

(“OSE”) program and land use planning legal requirements under ALSA<sup>144</sup> have been discussed. They obtained the oil sands mineral rights on public lands from the Alberta Government, and then as required by the Alberta Energy Regulator pursuant to Directive 056,<sup>145</sup> carried out a consultation program regarding the proposed exploration program with Aboriginal residents in the project area during the fall of 2012. In light of resident concerns about the project impacts, the Fort McKay First Nation (“First Nation”) indicated that it desired a buffer zone, encompassing proposed program lands, where no OSE would occur. But the Aboriginal group decided not to meet with the company’s representative. In light of the refusal of First Nation to discuss the proposed program, there was a delay in an administrative decision regarding the adequacy of the company’s consultation program with the group until February 2013. As there was no “formal objection” to the proposed exploration program from the group, the company decided to submit a routine application to the provincial energy regulator for permission to drill twenty-four wells to evaluate the oil sands deposit.<sup>146</sup> The company also applied to Alberta Environment and Sustainable Resource Development (“AESRD”) for approval of the use of the surface of the public lands for an exploration program under the Public Lands Act (“PLA”).<sup>147</sup> Proposed activities included “clearing [the lands], construction, drilling, and reclamation of [lands covered by] temporary leases and access areas for the” drilling of sixteen additional wells during the winter season 2014/2015.<sup>148</sup> The company proposed preparing sites and associated access roads when the ground was frozen to minimize surface disturbance, and indicated that core-hole drilling would be done under frozen-ground conditions to minimize surface impacts. The company was issued a letter of authority (“LOA”) to proceed with the exploration program, subject to the consent of all occupants and other conditions attached to the LOA.<sup>149</sup> The company drilled eight wells before the ground became unfrozen.<sup>150</sup>

In August 2013, a provincial statute, the Responsible Energy Development Act (“REDA”),<sup>151</sup> came into force and replaced the Energy Resources Conservation Act (“ERCA”).<sup>152</sup> With the repeal of the ERCA, the Energy Resources Conservation Board was dissolved and replaced by the Alberta Energy Regulator (“AER”). REDA provides for appealing some AER decisions in a new process called a “regulatory appeal” in which a panel reviews, and can overturn, a previous administrative decision. On August 2, 2013, the First Nation and the Fort McKay Métis Com-

munity Association (collectively “Aboriginal Group”) initiated such an appeal of the decision to approve the partially completed OSE, based on division 3 of REDA and part 3 of the AER Rules of Practice.<sup>153</sup> The Aboriginal Group posited that the company should not have submitted a so-called “routine application” for approval of the proposed exploration program.<sup>154</sup> They argued the company should have submitted a “non-routine” application in which the objections of the indigenous group needed to be disclosed about the proposed exploration program.<sup>155</sup> After the appeal was filed, the company did not drill the balance of the wells that had been approved.<sup>156</sup>

On November 14, 2013, the AER granted the Aboriginal Group’s request for a regulatory appeal.<sup>157</sup> At the subsequent hearing, the Aboriginal interveners argued that the AER should not allow the company’s exploration program as such an authorization would “prejudice its work with the Government of Alberta (GoA) [in] developing and implementing the Moose Lake Protection Plan, which [was] intended to guide [future oil sands] development in the area of [its Reserve lands.]”<sup>158</sup> The Aboriginal Group submitted that the long-lasting effects of the company’s OSE program would restrict the options available for implementing the Moose Lake Protection Plan that was under development and impair the plan’s ability to protect the intended ecological and cultural functions of the Moose Lake reserves.<sup>159</sup> The interveners submitted that the Moose Lake reserves’ land areas were becoming increasingly important in light of the impacts from oil sands development elsewhere in Fort McKay’s traditional territory.<sup>160</sup>

The Aboriginal Group raised concerns about the effects of the OSE program on vegetation, wildlife, and fish in the area and cumulative effects on a broader regional basis.<sup>161</sup> In addition to local environmental and cultural effects (traditional land use activities) from the proposed OSE program, concerns were raised about cumulative effects and how these are being addressed in the provincial land use planning process.<sup>162</sup> The OSE company in its response reported that its activities would disturb only 16.5 hectares.<sup>163</sup>

Pursuant to section 20 of REDA, the AER must act in accordance with regional plans created under ALSA. The proposed OSE program considered in the appeal is in an area covered by the first Regional Plan developed under ALSA. At the hearing of the appeal, the Aboriginal Group raised concerns about the incomplete nature of the regional plan and questioned the adequacy of the plan to meaningfully address potential environmental impacts.<sup>164</sup> The request for

144. Alberta Land Stewardship Act, S.A. 2009, c. A-26.8 (Can. Alta.).

145. ENERGY RES. CONSERVATION BD., DIRECTIVE 056: ENERGY DEVELOPMENT APPLICATIONS AND SCHEDULES (2014), available at <https://www.aer.ca/rules-and-regulations/directives/directive-056>.

146. See Prosper Petroleum Ltd., 2014 ABAER 013, at para. 3. Routine applications are directed toward energy projects that do not prompt objections from persons that may be affected by a proposed energy project.

147. Public Lands Act, R.S.A. 2000, c. P-40.

148. Prosper Petroleum Ltd., 2014 ABAER 013, at para. 7.

149. *Id.* at para. 2.

150. *See id.* at para. 5.

151. Responsible Energy Development Act, S.A. 2012, c. R-17.3.

152. Energy Resources Conservation Act, R.S.A. 2000, c. E-10 (repealed 2013).

153. Prosper Petroleum Ltd., 2014 ABAER 013, at para. 5.

154. *See id.* at paras. 8–9.

155. *See id.*

156. *Id.* at para. 6.

157. *Id.* at para. 5.

158. *Id.* at para. 8.

159. *Id.*

160. *Id.*

161. *See id.* at para. 9.

162. *See id.* at paras. 9, 28, 50–52.

163. *Id.* at para. 7.

164. *See id.* at paras. 50–51.

a review of the administrative decision to approve the OSE program included a request that the following four actions be taken by the provincial government:

- (a) amend [the regional plan] to change its effective date to December 2015 or upon completion of the management frameworks and tools that have not yet been completed;
- (b) develop a traditional land use management framework;
- (c) establish designated buffer areas in which resource development is not permitted around the hamlet of Fort McKay and adjacent lands owned by Fort McKay and surrounding Reserves 174a and 174b; and
- (d) develop a management framework for the protection of water levels and quality in all rivers and in Buffalo (Namur) Lake and Gardiner Lake.<sup>165</sup>

The Aboriginal Group noted that plans for managing cumulative effects, such as biodiversity and landscape management frameworks had not been developed yet; therefore, the AER did not have adequate information to properly evaluate the impacts from the proposed OSE program when it made the decision to approve the OSE program.<sup>166</sup> Interveners also submitted that as the regional land use planning initiatives had not been completed for lands surrounding the Moose Lake reserves, the balance of the proponent's OSE program should be delayed until the plans were finished. The initiatives included biodiversity and land use management frameworks to be developed under the regional Plan ("LARP") and the Moose Lake Protection Plan.<sup>167</sup> The Aboriginal Group also argued that the OSE program should be postponed until the Moose Lake Protection Plan was completed in 2016 and the frameworks established.<sup>168</sup> They submitted that the First Nation's reserves and the surrounding area were critical to the preservation of their culture and traditional practices as they had provided areas for both ongoing cultural activities and harvesting activities in the surrounding area.<sup>169</sup> The company submitted that the Aboriginal Groups was "essentially asking the AER to refuse to consider applications within . . . [an] area around its reserves until 2016, when a management plan from Alberta may or may not be finalized" and that if the provincial government "believed that authorizing new exploration in the area before 2016 would prejudice the Moose Lake Protection Plan, it has the ability to impose a moratorium on new energy development applications in the Moose lake area."<sup>170</sup>

In its decision, the panel concluded that as broad-scale land use decisions fall under the regional land use plan in another forum, that body in which Aboriginal groups could present their concerns about land use management in the region was the appropriate one to consider the land use

issues not the regulatory panel.<sup>171</sup> At the hearing, the panel did acknowledge that the regional land use plan was, at the time of the appeal, a work in progress and that several sub-regional plans and frameworks were under development.<sup>172</sup> The panel noted that upon completion and implementation, the plans and frameworks would assist the AER in its future decisionmaking.<sup>173</sup> However, until the plans are complete and implemented by the provincial government, "the AER cannot speculate on what these plans and frameworks will contain."<sup>174</sup> The panel also noted that "[i]n addition to considering social, economic, and environmental factors and the public interest in making its determination on the regulatory appeals, the AER must also act in accordance with LARP as it exists today."<sup>175</sup> The panel concluded that it would be inappropriate "to defer its decisions on the regulatory appeals until the various LARP subregional plans and frameworks have been developed and implemented."<sup>176</sup>

In making its decision, the panel referred to section 7(3) of the Regulatory Details Plan in the regional land use plan that states that

a decision-maker or local government body must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of

- (a) the Crown's non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan, or
- (b) the incompleteness by the Crown or anybody of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.<sup>177</sup>

The panel concluded that the submissions of the Aboriginal Group

on cumulative regional impacts were of limited assistance in its deliberations on the potential effects of the OSE program. Within the scope of the AER decision-making process on applications such as these, submissions that would be most helpful to the panel would address the specific impacts expected within the immediate area of the program or lease. The panel also note[d] that Prosper's leases [were] a small part of the study areas used to identify cumulative effects in these studies.<sup>178</sup>

The panel acknowledged the potential cumulative effects from oil sands development on Fort McKay's traditional use area when it indicated that "regional planning under LARP is the appropriate mechanism for addressing regional cumulative effects of resource development, including the contribution of oil sands development."<sup>179</sup> As some key deliverables from LARP were still outstanding, including

171. *See id.* at para. 56.

172. *See id.*

173. *Id.* at paras. 56, 73.

174. *Id.* at para. 56.

175. *Id.* at para. 57.

176. *Id.*

177. *Id.* at para. 58.

178. *Id.* at para. 120.

179. *Id.* at para. 121.

165. *Id.* at para. 52.

166. *See id.* at para. 50.

167. *Id.*

168. *Id.*

169. *Id.* at para. 8.

170. *Id.* at para. 68.

a biodiversity management framework and the landscape management plan, the panel indicated that “[i]n the absence of the framework and any associated thresholds or disturbance limits, the panel does not have a basis on which to assess the significance of the OSE program’s contribution to cumulative effects.”<sup>180</sup> The panel concluded that “since Prosper will use minimal disturbance techniques and seasonal access, the project-specific effects are negligible. Therefore, it follows that any potential contribution of the OSE program to regional cumulative effects would also be negligible.”<sup>181</sup>

In further considering its mandate and arriving at its decision, the Panel considered section 41(2) of the REDA and concluded that “the only matter before [it was] whether to confirm, vary, suspend, or revoke the AER decisions to issue the well licences and extend the LOA.”<sup>182</sup> The panel noted that the AER is governed by its enabling statute REDA and the Responsible Energy Development Act General Regulation (REDA General Regulation).<sup>183</sup> REDA sets out the mandate of the AER as follows:

2(1) The mandate of the Regulator is

- (a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta through the Regulator’s regulatory activities, and
- (b) in respect of energy resource activities, to regulate
  - (i) the disposition and management of public lands,
  - (ii) the protection of the environment, and
  - (iii) the conservation and management of water, including the wise allocation and use of water, in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with the specified enactments.<sup>184</sup>

The panel then concluded that under section 15 of REDA, when it is considering an appeal of a decision made under legislation such as the Oil and Gas Conservation Act (“OGCA”),<sup>185</sup> it must, in addition to other factors, consider any factor prescribed by the regulations, including the interests of landowners.<sup>186</sup>

Section 3 of the REDA General Regulation<sup>187</sup> sets out the factors that the AER must consider: (a) the social and economic effects of the energy resource activity, (b) the effects of the activity on the environment, and (c) the impacts on

a landowner as a result of the use of the land on which the activity is located.<sup>188</sup>

The panel also noted that the OSE wells had been approved under the OGCA, and then alluded to the following purposes of the Act enumerated in section 4:

- (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;
- (b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas or the storage or disposal of substances;
- (c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta . . .
- (e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta.<sup>189</sup>

In its “Summary of Findings” the panel concluded there was “a need for the project” because the company was required under the terms of the oil sands lease awarded by the provincial government to evaluate the commercial potential of the area for oil sands production.<sup>190</sup> The panel noted the concerns of the Aboriginal interveners in regard to the regional effects of current and future oil sands development but concluded that “management frameworks and thresholds to be established under LARP and efforts by Fort McKay to work with the GoA toward developing the Moose Lake Protection Plan are the appropriate mechanisms for addressing concerns about regional development and the cumulative effects of resource development.”<sup>191</sup> The panel noted that the proposed OSE program was a designated use under LARP and in compliance with the regional plan.<sup>192</sup>

After considering the economic, social, and environmental effects of the proposed OSE program, the panel concluded that the well licences and the LOA satisfied all AER regulatory requirements and the project was in the public interest.<sup>193</sup> The panel concluded that the provincial legal requirements in the pro oil development province for the delineation of the oil sands leases established the need for drilling the additional evaluation wells and an extension of the LOA.<sup>194</sup> The panel then confirmed the validity of the previous decisions to issue the well licences and to extend the LOA since they met “all AER regulatory requirements and [were] in the public interest.”<sup>195</sup>

180. *Id.*

181. *Id.* at para. 122.

182. *Id.* at para. 14.

183. *Id.* at para. 15.

184. *Id.* at para. 16.

185. Oil and Gas Conservation Act, R.S.A. 2000, c. O-6.

186. Prosper Petroleum Ltd., 2014 ABAER 013, at para. 17.

187. Responsible Energy Development Act General Regulation, Alta. Reg. 90/2013.

188. Prosper Petroleum Ltd., 2014 ABAER 013, at para. 17.

189. *Id.* at para. 18.

190. *Id.* at para. 134.

191. *Id.* at para. 136.

192. *Id.*

193. *Id.* at para. 140.

194. *See id.* at para. 49.

195. *Id.* at para. 140.

In the first regulatory appeal to consider the application of ALSA and the strategic land planning process to address local and cumulative effects in the region, the panel was not prepared to grant the request of the Aboriginal interveners to delay an OSE program until after the completion of the strategic land use planning process in the area. The decision in *Prosper Petroleum Ltd.* is consistent with the pro oil and gas investment and development policy of the Alberta Government that has existed since the 1940s. In this decision, oil sands development trumps the concerns of some residents about local, regional and cumulative effects from additional OSE and development.

In addition, provincial EAs are part of the energy project evaluation on provincial lands pursuant to part 2 of the Alberta Environmental Protection and Enhancement Act ("EPEA").<sup>196</sup> The most comprehensive and transparent form of environmental review includes the preparation of an Environmental Impact Assessment report that considers the activities in the area surrounding the energy project as well as the resource sustainability.<sup>197</sup> An EA is required for energy projects under EPEA when the complexity and scale of a proposed project, technology, resource allocation, or siting considerations create uncertainty about the nature of the longer term environmental effects, or result in a potential for significant adverse environmental effects.<sup>198</sup> The Environmental Assessment (Mandatory and Exempted Activities) Regulation<sup>199</sup> lists those activities that must undergo environmental impact assessments.

## V. Energy Corridors in Alberta

The NEB has reported that Canada has "very large supplies of oil, natural gas, electricity and coal relative to the size of its domestic energy markets" and with "the vast physical distances between supply sources and markets, the development of interconnecting pipeline and transmission infrastructure would not have been economically viable without the inclusion of export volumes to absorb a share of the costs."<sup>200</sup> The oil sands situated in Alberta constitute roughly half of the world's privately accessible oil resources, with reserves of approximately 168 billion barrels out of provincial reserves of 170 billion barrels and national reserves of 173 billion barrels.<sup>201</sup> The oil sands are critical to Canada's energy security,<sup>202</sup> and part of the rationale for significant investment in and expansion of current oil sands mines has been to supply the growing U.S. and global market. The NEB's baseline pro-

jections about Canada's energy supply and demand outlook up to 2035 forecast that unconventional oil production will be Canada's dominant source of oil supply growth over the projected period while conventional oil production will continue its decline.<sup>203</sup> Oil sands production will roughly triple over the period, increasing its share from its current 57% to 86% of Canada's total oil supply.<sup>204</sup> The NEB has projected a reduction in total end-use domestic energy demand during the same time period.<sup>205</sup>

However, with recent increased oil production in the United States, an International Energy Agency prediction suggests that the United States will be the world's largest oil producer by the year 2020. With significant declines projected for United States oil imports in 2014<sup>206</sup> and depressed natural gas prices in North America, Canada's oil and gas exports to service the U.S. market are anticipated to decrease.<sup>207</sup> Several commentators have suggested that countries, such as Canada, that have historically relied on the American market for their oil and gas products should explore other markets now.<sup>208</sup> Sales in other markets will require the building of new pipeline infrastructures to transport oil and gas products.<sup>209</sup>

In addition to maintaining its national energy security, and in light of its excess oil production capacity, the main challenge for Canadian oil producers is to market and transport surplus oil and natural gas (liquefied natural gas) available for export to Asia and Europe during the projected period.<sup>210</sup> A leading Canadian newspaper, the *Financial Post*, has reported that "[t]he shortage of pipeline capacity and rising output has widened the gap between Canadian and U.S. crude benchmarks to US\$36."<sup>211</sup> To address the oil and gas pipeline infrastructure deficiency, the Alberta government has planned for a large scale energy corridor in which a variety of energy infrastructure can be located.<sup>212</sup> With regard to energy corridors in Alberta, regional plans created under

196. Alberta Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12 (Can.).

197. *Id.*

198. See GOV'T OF ALTA., ALBERTA'S ENVIRONMENTAL ASSESSMENT PROCESS 2 (Mar. 2013), available at <http://environment.gov.ab.ca/info/library/6964.pdf>.

199. Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta. Reg. 111/93 Schedule 1 (Can. Alta.).

200. NAT'L ENERGY BD., NATURAL RES. CAN., CANADA'S ENERGY FUTURE: REFERENCE CASE AND SCENARIOS TO 2030 11 (2007).

201. GOV'T OF ALTA., ALBERTA OIL SANDS INDUSTRY: QUARTERLY UPDATE 2 (Summer 2013), available at [https://albertacanada.com/files/albertacanada/AOSID\\_Quarterly\\_Update\\_Summer2013.pdf](https://albertacanada.com/files/albertacanada/AOSID_Quarterly_Update_Summer2013.pdf).

202. NATURAL RES. CAN., OIL SANDS: A STRATEGIC RESOURCE FOR CANADA, NORTH AMERICA AND THE GLOBAL MARKET 1 (2013).

203. See NAT'L ENERGY BD., ENERGY FUTURES BACKGROUNDER: ADDENDUM TO CANADA'S ENERGY FUTURE: ENERGY SUPPLY AND DEMAND PROJECTIONS TO 2035 7-8, 28 (2012).

204. See NEB CANADA'S ENERGY FUTURE 2013, *supra* note 3, at 37, 39.

205. *Id.* at 25.

206. See U.S. ENERGY INFO. ADMIN., DOE/EIA-0383, ANNUAL ENERGY OUTLOOK 2013 WITH PROJECTIONS TO 2040 32 (2013).

207. See INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2012: EXECUTIVE SUMMARY 1 (2012), available at <http://www.iea.org/publications/freepublications/publication/English.pdf>.

208. See Jim Prentice, Senior Exec. Vice President, Can.-Am. Bus. Council, Address to the Can.-Am. Bus. Council on Canada's Energy Future in the Aftermath of the U.S. Election (Nov. 19, 2012); see also GERRY ANGEVINE & VANADIS OVIEDO, FRASER INST., ENSURING CANADIAN ACCESS TO OIL MARKETS IN THE ASIA-PACIFIC REGION 20-21 (2012).

209. See ELEASALO V. ALE, FAEGRE & BENSON LLP, CONDEMNATION FOR ENERGY CORRIDORS: SELECTED LEGAL ISSUES IN THE ACQUISITION FOR PIPELINE, TRANSMISSION LINE AND OTHER ENERGY CORRIDORS 1 (2009), available at <http://www.faegrebd.com/webfiles/Energy%20Corridors%20White%20Paper.pdf>.

210. See ANGEVINE & OVIEDO, *supra* note 208, at 1.

211. Jim Snyder & Rebecca Penty, *Keystone's Fate Rests in Hands of Climate Hawk John Kerry*, FIN. POST (Jan. 25, 2013), [http://business.financialpost.com/2013/01/25/keystones-fate-rests-in-hands-of-climate-hawk-john-kerry/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+FP\\_TopStories+%28Financial+Post++Top+Stories%29&\\_\\_lsa=4b13-e4dc](http://business.financialpost.com/2013/01/25/keystones-fate-rests-in-hands-of-climate-hawk-john-kerry/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+FP_TopStories+%28Financial+Post++Top+Stories%29&__lsa=4b13-e4dc).

212. Press Release, Gov't of Alta., New Legislation Enhances Process to Assemble Land for Large-Scale Infrastructure Projects (Mar. 2, 2009), available at

ALSA must identify the general locations for transportation and utility corridors (“TUCs”).<sup>213</sup> The LUF requires the development of a strategy for provincial energy corridors.<sup>214</sup>

Energy corridors known as Restricted Development Areas (“RDAs”) were first created in the province during the mid-1970s around Alberta’s two major cities, Calgary, Canada’s corporate oil industry headquarters, and Edmonton, the provincial capital.<sup>215</sup> Lands within the RDAs were designated for local TUC uses.<sup>216</sup> The TUCs established multiple-use corridors with the goal of facilitating infrastructure development to accommodate the expanding energy transportation needs of the two cities and their surrounding regions and provinces.<sup>217</sup> Uses of the TUCs were divided into primary and secondary uses.<sup>218</sup> The primary uses included ring roads, petroleum pipelines, power lines, transmission lines, regional water lines, sewer lines, telecommunication lines, and municipal services.<sup>219</sup> The secondary uses included an assortment of agricultural, parking, commercial, recreational, and outdoor storage activities.<sup>220</sup> The implementation of the TUC program involved land use planning and land acquisition and management.<sup>221</sup> Regulations were adopted to secure the lands needed for the TUCs.<sup>222</sup>

The proposed energy corridors would have occupied much larger swaths of land and may extend to the United States-Canada border and to provinces east and west of Alberta.<sup>223</sup> They intend to incorporate construction and placement of oil, natural gas, and carbon dioxide pipelines connected to carbon capture and storage facilities to reduce GHG emissions, electricity transmission lines, new rail lines, roads, and fibre optic cables and facilities.<sup>224</sup> Because of their geographical coverage, the corridors may not have uniform economic development along the entire length and breadth, and their impact on persons and communities located along the routes will likely be varied.<sup>225</sup>

A significant area in Alberta is farm and ranch land. Private landowners in areas where the government could expropriate private lands for the creation of energy corridors are concerned about the negative impacts on their property rights and the level of compensation that they may receive from the government through negotiation, or if the negotiation is unsuccessful and there is an expropriation. In

Alberta, for example, the construction of high-voltage power lines across private property has prompted litigation.<sup>226</sup> An Alberta rancher who was opposed to the construction of a high-voltage electricity transmission line through his land brought a case to the Supreme Court of Canada in 1959.<sup>227</sup> The appellant, Calgary Power, attempted to negotiate a right-of-way over the respondent rancher’s private lands to construct a transmission line to the growing municipality of Calgary.<sup>228</sup> The parties were unable to agree on the amount of compensation for the right-of-way, and the land needed for the power line was expropriated.<sup>229</sup> The Supreme Court of Canada affirmed the validity of the ministerial order to expropriate the land required for the power line because it was in the public interest.<sup>230</sup>

This case, as well as the broader need to address inadequate pipeline and electricity transmission line infrastructure, prompted the government of Alberta to adopt a second strategic land use planning statute called the Land Assembly Project Area Act (“LAPAA”) in 2009.<sup>231</sup> This Act authorized the LGC to designate lands to be used for major infrastructure projects including electricity transmission lines and oil and gas pipelines as “Land Assembly Project Area[s].”<sup>232</sup> After the land area was designated, the LGC could adopt regulations imposing restrictions on the use of that land by the landowner including the private property owners.<sup>233</sup> This would have allowed the provincial government to effectively freeze the development and use of significant areas of land while major infrastructure projects were being planned.<sup>234</sup> The Act also created a framework for government acquisition of private lands as a part of a strategic land planning process for anticipated major energy projects. A “public project” was defined in LAPAA as “a project related to the transportation of people or goods, which may also include as part of that project a corridor of land for pipelines, or other conduits, poles, towers, wires, cables, including fibre optic cables, conductors or other devices, including any ancillary structures.”<sup>235</sup> In addition, a “public project” could include “a project related to the conservation or management of water,”<sup>236</sup> such as a hydroelectric dam. However, section 95(2) of ALSA explicitly renders ALSA regional plans superior to inconsistent provisions of LAPAA.<sup>237</sup>

To understand the legal and environmental context prompting the creation of LAPAA, it is necessary to consider a 1977 decision of Alberta’s highest court. In *Heppner*

<http://alberta.ca/ACN/200903/25396C868C74A-F6A2-A45E-7AAD5ED-676F651F9.html>.

213. See Harvie & Mercier, *supra* note 126, at 316.

214. LAND-USE FRAMEWORK, *supra* note 125, at 43.

215. ALTA. ENVTL. PROT., SUMMARY AND GUIDELINE FOR THE EDMONTON AND CALGARY TRANSPORTATION/UTILITY CORRIDORS (TUCs) 1 (1997), available at <http://environment.gov.ab.ca/info/library/7259.pdf>.

216. *Id.*

217. See *id.* at 1–2.

218. *Id.* at 2.

219. *Id.* at 8.

220. *Id.* at 11.

221. *Id.* at 2.

222. *Id.*

223. See, e.g., *Lower Athabasca Regional Plan*, *supra* note 142, at 83–93 (permitting 77,452 square kilometres for multi-use corridors, which include energy transmission infrastructure).

224. See *id.* at 58–59, 90 (utilizing multi-use corridors as a part of the Comprehensive Regional Infrastructure Sustainability Plan (CRISP)).

225. See *id.* at 59.

226. See *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24 (Can.).

227. *Id.*

228. *Id.* at 25.

229. *Id.*

230. *Id.* at 37.

231. Land Assembly Project Area Act, S.A. 2009, c. L-2.5 (Can. Alta.).

232. *Id.* § 2(1).

233. *Id.* § 4(1).

234. KEITH WILSON, IMPACTS OF NEW PROVINCIAL LEGISLATION AND RECENT CASE LAW DEVELOPMENTS ON LANDOWNER RIGHTS AND COMPENSATION (Nov. 2009), available at <http://www.landownerassociation.ca/tsfcs/wilsoncritique.pdf>.

235. Land Assembly Project Area Act, 2009, § 2(2)(a).

236. *Id.* § 2(b).

237. Alberta Land Stewardship Act, S.A. 2009, c. A-26.8, § 95(2) (Can. Alta.).

*v. Alberta*,<sup>238</sup> the Alberta government had endorsed the construction of a hydrocarbon pipeline and created an RDA that incorporated the land of a farmer who owned land within the RDA for the project. The purpose of designating the RDA was to protect the environment against the adverse impacts of mineral development, pursuant to the Department of the Environment Act (“DEA”),<sup>239</sup> which permitted such a designation in the interest of the public. After the government, by Order-in-Council,<sup>240</sup> approved the proposal to construct a pipeline in the RDA, the landowner challenged the approval. While the chambers judge dismissed the landowner’s challenge, the Appellate Division of the Alberta Supreme Court allowed his appeal. The court set aside the Order-in-Council on the grounds that the pipeline violated the intent of the enabling statute (the DEA), as the pipeline would defeat the purpose of creating the RDA—environmental protection—due to the risk of leaks and blowouts.<sup>241</sup> In its judgment, the court noted that

the primary purpose and the motivating force behind the promulgation of the Order-in-Council being impugned in this appeal was the creation of “a transportation and utility corridor,” a purpose not authorized by the Act, and therefore the Order-in-Council and the regulations purported to be issued thereunder are invalid. The fact that, in accomplishing this invalid purpose, a peripheral purpose falling within the strict terms of the Act may be accommodated does not render valid what would otherwise be invalid subordinate legislation.<sup>242</sup>

One of the reasons that LAPAA was created was to avoid the type of legal challenges encountered in the *Copithorne* and *Heppner* decisions.<sup>243</sup> Thirty years after the leading *Copithorne* decision, another dispute arose in response to the proposed construction of additional high-voltage electricity transmission lines across private lands.<sup>244</sup> A hearing was conducted by a provincial electricity administrative board called the Alberta Energy and Utilities Board (“AEUB”) to consider the merits of the public concerns and decide whether or not to approve the construction of the transmission lines.<sup>245</sup> Contrary to the impartial role expected of administrative boards in the province under the rules of natural justice, in response to threats from disgruntled landowners that arose at the hearings, the AEUB hired undercover private investigators to observe affected landowners and interveners.<sup>246</sup> After

the AEUB’s action was disclosed publically, an inquiry concluded that the conduct of the AEUB was grossly inappropriate, and it was compelled to vacate its decision regarding the transmission line.<sup>247</sup> In response, a new board was created, called the Alberta Utilities Commission in 2008, as an independent quasi-judicial agency of the Alberta government to provide for a fair and responsible delivery of provincial utility services in the public interest.<sup>248</sup>

LAPAA anticipated these types of legal challenges and provided the framework for the government to access and, in some cases, acquire private lands for future major energy transportation corridors projects.<sup>249</sup> According to the Alberta Minister of Infrastructure, the legislation would enable the “government to designate land for major infrastructure projects and to regulate future development within an approved project area, with the understanding that the land will ultimately be purchased by the Province.”<sup>250</sup> The Minister added: “This new legislation will facilitate similar types of projects that often require years of preparation, while ensuring affected Albertans are treated fairly and have an opportunity to provide input.”<sup>251</sup>

The reasons for creating LAPAA include responding to the lack of a statutory framework to address the acquisition of lands for the energy corridor, the previous criticisms of the provincial government about the lack of long-term land use planning, and emphasizing the importance of effective energy transportation infrastructure.<sup>252</sup> Paula Simons writes:

For years, Alberta has suffered from a dearth of long-term, big-picture land-use planning. As our province grows and changes, we need to plan the major infrastructure that will be the backbone of future development. When necessary, the government needs the power to assemble and set aside large blocks of land for major public projects—and it can’t afford to get bogged down every time in protracted political fights, or held to ransom in endless and expensive negotiations.<sup>253</sup>

Section 2(1) of LAPAA would have allowed the Alberta government to establish a “Land Assembly Project Area” in situations where the government finds that “one or more areas of land are required for a public project and that land is intended to be acquired by the Crown over a period of time . . . .”<sup>254</sup> The government was first required to take several steps before establishing a project area outlined in section 3(1) of the Act.<sup>255</sup> The LGC could not designate an area of land as a Project Area with respect to a public project unless

238. [1977] 6 A.R. 154, 4 Alta. L.R. (2d) 139 (Can.).

239. Department of the Environment Act, R.S.C. 1985, c. E-10 § 5(ii) (Can. Alta.).

240. An Order-in-Council made by the Lieutenant Governor in Council is the way in which a regulation as a piece of subordinate legislation is brought into law. Regulations are generally made on the authority of the Cabinet without the fulsome democratic process required of their governing legislation.

241. *Heppner*, 4 Alta. L.R. (2d) at 149.

242. *Id.* at 152.

243. See WILSON, *supra* note 234, at 1 (noting that the purpose of LAPAA is to authorize Alberta Government to secure private land for public purposes including transportation and utility corridors).

244. Alice Woolley, *Enemies of the State?: The Alberta Energy and Utilities Board, Landowners, Spies, a 500 kV Transmission Line and Why Procedure Matters*, 26 J. ENERGY & NAT. RESOURCES L. 234, 238 (2008).

245. *Id.*

246. *Id.* at 234.

247. *Id.* at 235.

248. *Id.* at 235 n.6.

249. Land Assembly Project Area Act, S.A. 2009, c. L-2.5 (Can. Alta.).

250. Press Release, Gov’t of Alta., *New Legislation Enhances Process to Assemble Land for Large-Scale Infrastructure Projects* (Mar. 2, 2009), available at <http://alberta.ca/ACN/200903/25396C868C74A-F6A2-A45E-7AAD5ED-676F651F9.html>.

251. *Id.*

252. *Legislation—The Land Assembly Project Area Act*, ALTA. LAND & FACTS, <http://www.albertalandfacts.ca/legislation.htm> (last visited Sept. 28, 2014).

253. Paula Simons, *Bill 19 Toxic to Rural Landowners: Proposed Land Grab Alienates Some Voters*, EDMONTON J. (Mar. 14, 2009), <http://www2.canada.com/edmonton-journal/news/ideas/story.html?id=17b0ebf6-d3df-47ab-9484-2378f625a3ba>.

254. Land Assembly Project Area Act, 2009, § 2(1).

255. *Id.* § 3(1).

the Minister has (1) prepared a plan, in accordance with the regulations, of the proposed project; (2) made the plan of the proposed project available to the public in accordance with the regulations; (3) provided the registered owners of land within the proposed Project Area with notice of the proposed project in accordance with the regulations; and (4) consulted, in accordance with the regulations, with the registered owners of land within the proposed Project Area.<sup>256</sup>

Therefore, when the government had identified a potential need for an energy infrastructure project, it will prepare a plan to that effect. When the plan was ready, it would be circulated to the public, typically the landowners and others with interests in the land. Only registered landowners were to be notified. This suggests that the government must have previously identified the land to be used for the energy corridor. Notification was to be followed by consultation with the affected landowners, which give them the opportunity to comment on the proposed designation. The government would then evaluate the stakeholder comments received, and consider whether to proceed with the designation or not. It should be noted that, once the plan was made public, the government had two years to designate the area as a Land Assembly Project Area.<sup>257</sup> The need for a deadline was to avoid keeping landowners in a state of uncertainty and confusion regarding what they can or cannot do with their land.

After the government had designated an area as a Land Assembly Project Area, it had to provide municipalities within, or partly within, the area “with a certified copy of the project area order and a certified copy of the associated regulation.”<sup>258</sup> The reason for notifying municipalities was to avoid a situation whereby municipalities might deal with land already designated in a manner that is inconsistent with the purposes of the designation. The government also had to provide the Registrar of Land Titles with the same materials, and the Registrar is required to “endorse a memorandum of the notice on each certificate of title pertaining to land within the Project Area.”<sup>259</sup> In addition, the government had to provide landowners or interest-holders of an estate in land within the Project Area with similar information.<sup>260</sup> The information would indicate to the landowners and interest-holders that a notice had been filed on their Certificate of Title indicating that their land is part of the project area.<sup>261</sup> The Alberta government could not initiate the process of acquiring and assembling the land necessary for the infrastructure project until it satisfied that process.<sup>262</sup> Additional requirements specified the steps and measures the government had to take when a “project area order” or regulation was “amended or repealed.”<sup>263</sup>

It was anticipated that the Department of Infrastructure (“INFRAS”) would manage the acquisition, administration,

and coordination of the energy corridor lands.<sup>264</sup> The Minister of INFRAS would manage TUC lands by granting leases, licenses, utility rights of way, and rights of entry.<sup>265</sup> The TUC regulations would require that any individual or organization proposing an activity on the TUC lands that would likely cause a surface disturbance must obtain the written consent of the Minister of INFRAS.<sup>266</sup> Other government departments and agencies would have also required the consent of the Minister of INFRAS prior to exercising their powers that would affect TUC lands, or prior to authorizing any operation or activity that would cause a surface disturbance on the TUC lands. Apart from INFRAS, other provincial departments involved in issuing approvals for activities on TUC lands that may also be involved in authorizations for the development of pipelines, power lines, rail lines, and other types of utility infrastructure in the Alberta corridor include the Energy Resources Conservation Board, the Alberta Utilities Commission, Alberta Environment and Sustainable Resource Development, and Ministry of Transportation.

The government amended LAPAA in December 2011 to address concerns of private landowners about takings and the availability of compensation. The government clarified its rationale for creating LAPAA and, in the 2011 Land Assembly Project Area Amendment Act<sup>267</sup> clarified its legislative objectives. The following text has been incorporated into the preamble of section 2:

WHEREAS Alberta is projected to continue growing at a rapid rate;

WHEREAS the Government must plan for any required large scale infrastructure projects, including transportation and utility corridor projects, similar to the Edmonton and Calgary transportation and utility corridors, and water management projects, such as dams and reservoirs;

WHEREAS it is in the public interest that from time to time certain areas of Alberta be designated for major infrastructure projects to ensure that projects can be planned and constructed in an orderly manner;

WHEREAS public consultation should be conducted in advance of major infrastructure projects; and

WHEREAS it is desirable that land owners whose land will be required for major infrastructure projects are appropriately compensated for their lands and have recourse to the Land Compensation Board and the Courts.<sup>268</sup>

Section 5 of the LAPAA clearly indicated that the Alberta Expropriation Act,<sup>269</sup> which amended the LAPAA, applied to lands that would have been taken by the government

256. *Id.*

257. *Id.* § 3(2).

258. *Id.* § 5(1)(a).

259. *Id.* § 5(1)(b).

260. *Id.* § 5(1)(c).

261. *Id.* § 5(1)(b).

262. *Id.* § 3(1).

263. *Id.* § 5(2)–(3).

264. ALTA. INFRASTRUCTURE, TRANSPORTATION/UTILITY CORRIDOR (TUC) PROGRAM POLICY 1 (Apr. 16, 2004), available at <http://www.infrastructure.alberta.ca/TUCContent/tucpolicy.pdf>.

265. Government Organization Act, R.S.A. 2000, c. G-10, Schedule 11 §§ 7–8 (Can. Alta.).

266. ALTA. INFRASTRUCTURE, *supra* note 264, at 2.

267. Land Assembly Project Area Amendment Act, 2011, S.A. 2011, c. 21 (Can. Alta.).

268. *Id.* § 2.

269. Expropriation Act, RSA 2000, c. E-13 (Can. Alta.).

for a corridor. The amendment also provided for increased certainty and clarity for landowners in the land acquisition process. It is also important to note that the government in the amended Act contemplated private landowners continuing to occupy the lands after the government had acquired the lands for an energy corridor; for example, farmers could continue to use their land for agricultural purposes until the land is eventually required for the project.<sup>270</sup> This provision was designed to address the concerns of private landowners and help minimize social conflict and extend sustainable land use activities like ranching, farming, and forestry.

In regard to compensation, section 6 of the Act required the Alberta Government to enter into an agreement with the registered owner to purchase the land at market value if a landowner within a designated Land Assembly Project Area so requests.<sup>271</sup> The landowner could make such a request “at any time.”<sup>272</sup> In cases where the government and the landowner could not agree on a purchase price, the landowner could elect “to have the Court of Queen’s Bench determine compensation payable.”<sup>273</sup> Expropriation will be the last resort for the government.

Section 6 of LAPAA also made it clear that land in a project area could be acquired by purchase or expropriation, but the former Minister of Infrastructure noted that LAPAA “does not provide government with any additional land acquisition powers or remove any legislative protection landowners currently have to ensure they receive a fair price for their land,” and further, the projected completion date for the major projects is fifteen years from the date of the order designating the project area(s) that must cover at a minimum 1000 hectares of land.<sup>274</sup> It should also be noted that anyone who acquires a land interest within the designated area will assume that “interest subject to” LAPAA.<sup>275</sup> Other amendments made in 2011 to section 2 of LAPAA included the addition of details on the projected completion dates for projects and the minimum size of an area or areas (1000 hectares) to be included in a proposed “Project Area.”<sup>276</sup> Notwithstanding the fact that LAPAA was enacted in 2009, but not proclaimed in force, on November 17, 2014, the Act was repealed.<sup>277</sup> The Premier of Alberta indicated that LAPAA was repealed “to restore trust with landowners and introduce legislation to ensure Albertans property rights are respected.”<sup>278</sup>

LAPAA could have provided the Alberta government with the ability to secure private lands for energy transportation infrastructure a considerable number of years in advance of construction prior to the announcement

of any projects, to minimize objections to infrastructure projects directed toward the public good.<sup>279</sup> However, the amendments to LAPAA in 2011 were inadequate to sufficiently address the concerns of private landowners about expropriation of their lands to be incorporated into energy corridors and the level of compensation available from the government.

Although LAPAA was repealed, the approach to land use planning embodied in ALSA still promotes sustainable development. Unlike the previous incremental, sequential, reactive, project-by-project approach, ALSA reflects an integrative and proactive approach that requires strategic planning.<sup>280</sup> LAPAA, by focusing energy infrastructure into a single corridor, could have reduced the land surface footprint and facilitate quicker emergency response times to mitigate the environmental impacts from oil and natural gas pipeline leaks and explosions.<sup>281</sup> Regardless, ALSA requires the government to plan strategically for major energy oil, gas, hydro, and other major energy infrastructure projects.<sup>282</sup> In sum, ALSA provides an improved framework for sustainable land use planning and energy development to better address the needs of future generations who will reside in the province.

## VI. Conclusion

Currently, more than 60% of Canada’s electricity is generated from low carbon intensive sources, such as hydroelectricity, wind, and solar. In response to climate change during the next two decades, the federal and provincial governments have planned for phasing out older thermal coal plants and replacing generation capacity with increased natural gas, wind, and solar energy development.<sup>283</sup>

This review of federal and provincial legislation reveals that there is a lack of integrated landscape level planning for energy projects on both federal and provincial lands and a failure to address cumulative effects from oil and gas projects in a meaningful way. The new federal EA regime created in 2012 that provides for specific timelines for decisions that minimize the time required for an assessment of major energy projects reduces the potential for strategic planning and mitigating the negative environmental, social, and cultural impacts to areas where oil sand development proceeds review.<sup>284</sup> Changes to the federal EA process include more discretion, reduced scope, shortened timelines for decisions, fewer agencies and federal departments involved, and fewer persons or groups that may have “interested party” status.<sup>285</sup>

270. Land Assembly Project Area Act, 2011, § 6(4).

271. *Id.* § 6(1).

272. *Id.* § 6(2).

273. *See id.* § 6(1).

274. *See id.* §§ 2(1), 6(2); Press Release, Gov’t of Alta., Alberta Government Amends Bill 19 to Provide Greater Certainty for Landowners (Apr. 16, 2009), available at <http://alberta.ca/ACN/200904/25713AB998FE5-FA97-2C03-1BB0B82F3A96BF1B.html>.

275. *See* Land Assembly Project Area Act, 2011, § 10.

276. *See id.* § 2(1).

277. Alberta Legislative Assembly 28th Leg., 3d Sess., ALBERTA HANSARD 6 (Nov. 17, 2014) (statement of Premier Jim Prentice).

278. *Id.*

279. Land Assembly Project Area Act, 2011, § 2(1).

280. *See* KENNETT, *supra* note 97, at 20–21; KENNETT, *supra* note 113, at 28–29.

281. CHILENYE NWAPI & DAVID LAIDLAW, ALBERTA ENERGY CORRIDOR: IMPLICATIONS FOR ABORIGINAL RESIDENTS (Sept. 3, 2014), available at [http://www.cirl.ca/files/cirl/laidlaw-energy\\_corridor-2014sep3.pdf](http://www.cirl.ca/files/cirl/laidlaw-energy_corridor-2014sep3.pdf).

282. *See* Alberta Land Stewardship Act, S.A. 2009, c. A-26.8 § 1 (Can. Alta.); Land Assembly Project Area Act, 2011, Preamble.

283. NEB CANADA’S ENERGY FUTURE 2013, *supra* note 3, at 9–10.

284. Canadian Environmental Assessment Act, 2012, S.C. 2012, ch. 19, §§ 4(f), 8(2), 9(c), 10, 27(2), 27(6), 38(1), 38(3) (Can.).

285. *Id.* §§ 2(1), 4(f), 9(c), 10, 14(4)–(5), 15(b), 27(2), 38(1), 38(3), 52–53, 54(2)–(4).

It is anticipated that there will be fewer federal EAs for energy projects in the future and that those projects will have a much narrower scope of assessment than under the previous federal EA legislation.<sup>286</sup>

Landscape level planning will be particularly important for Alberta in the near future. Over the past two decades, Alberta has significantly increased its oil sands production.<sup>287</sup> The oil sands in Alberta constitute more than 50% of the world's privately accessible reserves and the provincial government has created two strategic land use planning acts to better regulate the development of its energy resources.<sup>288</sup> To address land use, environmental, and energy infrastructure challenges, the provincial government in 2009 adopted two strategic planning statutes: ALSA and LAPAA.<sup>289</sup> The legislative objectives of ALSA include providing a framework for strategic land use planning to address the needs of current and future residents and to enable sustainable development by considering cumulative effects of energy projects.<sup>290</sup> ALSA also incorporates an ecosystem management approach for land and resource management.<sup>291</sup> The legislation mandates the creation of "integrated planning regions" and the development of regional plans that consider regional differences in the availability of mineral and other natural resources varying levels of industrial development in different areas of the province.<sup>292</sup> ALSA additionally provides for landscape level planning for seven watersheds in the province.<sup>293</sup>

Moreover, ALSA prevails over all other provincial statutes and regulations in Alberta, including LAPAA. Regional plans will prevail over inconsistent regulations, municipal bylaws, government policies, and codes of practice.<sup>294</sup> After a regional plan has been created and published in the provincial government, municipal governments and regulatory bodies must amend all the inconsistent bylaws and regulations to harmonize them with the requirements of regional plans.<sup>295</sup> The first regional plan created under ALSA was completed in 2012.<sup>296</sup> In the first regulatory appeal to consider the applicability of ALSA and the potential of the strategic land planning act to address local and cumulative effects in the region, the panel was not prepared to grant the request of the Aboriginal inter-

veners to delay an OSE program until after the completion of the strategic land use planning process in the area. The decision in *Prosper Petroleum Ltd.* reflects the decades-old, pro oil and gas development policy of the Alberta Government. Clearly, oil sands development trumps the concerns of some residents about current and future environmental and cultural impacts from additional oil sands development.

The second strategic land use statute created by the Alberta Government facilitated the creation of major energy corridors.<sup>297</sup> LAPAA could have responded to the absence of a statutory framework to acquire lands for major energy projects in the public interest and to respond to the lack of strategic planning for energy transportation infrastructure.<sup>298</sup> The legislation could have allowed the provincial government to designate certain lands to be used for major energy infrastructure and water management projects, such as oil and gas pipelines, electricity transmission lines, and hydroelectric dams decades before a project proceeds, and to acquire private lands over an extended period of time to enable the construction of energy infrastructure with less litigation and delays due to private landowner opposition.<sup>299</sup>

The approach to land use planning embodied in ALSA can promote sustainable development. Unlike the previous incremental, sequential, reactive, project-by-project approach, ALSA reflects an integrative and proactive approach that requires strategic planning.<sup>300</sup> Similarly, LAPAA focused energy infrastructure into a single corridor which could have reduced the land surface footprint and facilitated quicker emergency response times to mitigate the environmental impacts from oil and natural gas pipeline leaks and explosions.<sup>301</sup> ALSA requires the government to plan strategically on a regional basis in the province for cumulative impacts from oil and gas development. Ultimately, as LAPAA has been repealed, ALSA is left to provide an improved framework for sustainable land use planning and energy development that better addresses the needs of future generations who will reside in a province with abundant natural resources, including both renewable and non-renewable energy resources.

286. Meinhard Doelle, *CEAA 2012: The End of Federal EA as We Know It?*, 24 J. ENVTL. L. & PRAC. 1, 4 (2012).

287. Bernard J. Roth, *NAFTA, Alberta Oil Sands Royalties, and Change*, 46 ALTA. L. REV. 335, 343 (2009).

288. GOV'T OF ALTA., OIL SANDS: THE RESOURCE (2013), available at [http://oil-sands.alberta.ca/FactSheets/Resource\\_FSht\\_Sep\\_2013\\_Online.pdf](http://oil-sands.alberta.ca/FactSheets/Resource_FSht_Sep_2013_Online.pdf).

289. Alberta Land Stewardship Act, S.A. 2009, c. A-26.8 (Can. Alta.); Land Assembly Project Area Act, S.A. 2009, c. L-2.5 (Can. Alta.).

290. Alberta Land Stewardship Act § 1.

291. KENNETT, *supra* note 113, at 19.

292. Alberta Land Stewardship Act § 3(1).

293. Harvie & Mercier, *supra* note 126, at 299.

294. Alberta Land Stewardship Act § 17(1).

295. *Id.* §§ 20–21.

296. *Lower Athabasca Regional Plan*, *supra* note 142. The Lower Athabasca Regional Plan was approved by the Cabinet on August 22, 2012, and became effective on September 1, 2012. South Saskatchewan Region is currently in the Planning and Consulting stage, while the North Saskatchewan Region just initiated the Regional Advisor Council nomination process. The other four regional plans have not been started. *Id.*

297. See Land Assembly Project Area Act, 2009, Preamble.

298. See WILSON, *supra* note 234, at 1–2.

299. See Land Assembly Project Area Act, 2009, §§ 2, 4.

300. See KENNETT, *supra* note 113, at 20–21, 28–29.

301. NWAPI & LAIDLAW, *supra* note 281.