

**Impacts of New Provincial Legislation and Recent Case Law Developments on
Landowner Rights and Compensation**

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This paper is divided into two parts. The first part examines recent provincial legislation impacting on governmental processes for either taking rights in private lands or restricting the uses of private lands and occupied Crown lands. The second part of this paper examines recent trends and developments with respect to surface rights compensation and board procedures of the Energy Resources Conservation Board.

I. NEW PROVINCIAL LEGISLATION RELATING TO LAND ACQUISITION, CONTROL AND TRANSMISSION LINES

1. Bill 19 – The Land Assembly Project Area Act

Bill 19, the *Land Assembly Project Area Act* (LAPAA) was passed by the Alberta Legislative Assembly in the spring session of 2009. The purpose of the LAPAA is to authorize the Alberta Government to secure large tracts of private land for public purposes such as transportation and utility corridors or water reservoirs.

Prior to Bill 19 and under existing law, namely the *Expropriation Act*, the government had the right to expropriate private lands for public purposes. However, the *Expropriation Act* would require the government to pay the landowner compensation based on a broad set of principles intended to make the landowner whole. Sections 41 through 58 of the *Expropriation Act* set out the compensation principles. Here is a summarized listing of those principles and the corresponding section numbers from the *Expropriation Act*.

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These provisions of the *Expropriation Act* reflect an underlying public policy goal to make the landowner whole when his or her land is taken for a public purpose.

However, the purpose of Bill 19 is to give the government an alternative means of securing large tracts of private land without having to invoke the *Expropriation Act*.

Bill 19 was drafted so as to allow the government to freeze the existing use of land and restrict development from occurring on the land in the early planning stages of a transportation or utility corridor. The government's goal is to protect the suitability of the land for the government project.

The Legal Mechanics of Bill 19

Bill 19 authorizes the provincial Cabinet to designate an area of land as a land assembly 'Project Area':

Land Assembly Project Area

2(1) Subject to section 3, if in the opinion of the Lieutenant Governor in Council one or more areas of land are required for a public project and the land is intended to be acquired by the Crown over a period of time, the Lieutenant Governor in Council, on

the recommendation of the Minister, may by order designate that area or those areas of land as a Land Assembly Project Area.

(2) For the purpose of this Act and the regulations, a project is a public project if the project is

- (a) 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, pipes or other conduits, poles, towers, wires, cables, conductors or other devices, including any ancillary structures, or
- (b) a project related to the conservation or management of water.

(3) A Project Area shall not include any land within a Metis settlement.

Once an area of land has been designated as a Project Area, the Cabinet can then enact a regulation that places controls and restrictions on the use of the land by the landowner. The Order can prohibit a landowner from using his or her land in any manner that the Cabinet regulation specifies. The Cabinet can require that the landowner obtain the approval of the Minister of Infrastructure for any kind of use, development or occupation of his or her land. The Order can also confer rights on the government to remove buildings, improvements or animals from the land. These broad powers conferred on the Cabinet to control private lands are set out in section 4 of the LAPAA:

Control, restriction and prohibitions

4(1) Notwithstanding any other Act or regulation, where the Lieutenant Governor in Council designates an area of land as a Project Area, the Lieutenant Governor in Council may, with respect to the Project Area, make regulations

- (a) respecting the control, restriction, prohibition or approval of any kind of use, development or occupation of land in the Project Area;
- (b) authorizing the Minister to consent to or approve any particular kind of use, development or occupation of land in the Project Area or to exempt any particular kind of use, development or occupation of land from the operation of any provision in the regulations made pursuant to clause (a);
- (c) respecting the removal of any buildings, improvements, materials or animals from the Project Area, and respecting the payment of compensation by the Crown for any loss resulting from the removal;
- (d) respecting the control, restriction or prohibition of the exercise of any power referred to in the regulations by a Minister of the Crown, government official or government agency;
- (e) respecting the control, restriction, prohibition or approval of the dumping, deposit or emission within the Project Area of any substance referred to in the regulations;
- (f) making any or all of the provisions of the *Surface Rights Act* inapplicable to any Crown land in the Project Area;

- (g) respecting the prohibition, with respect to any Crown land in the Project Area, of any expropriation to which the *Expropriation Act* applies;
- (h) respecting any other matter or thing the Lieutenant Governor in Council considers necessary or incidental to the use, development or occupation of land in the Project Area.

In order to ensure that the Project Area Order is enforced, the government will register the Order with the Registrar of Land Titles. The Order will be listed as an encumbrance on the title. In addition, the government will serve a copy of the Order on the local municipality. These requirements are found in section 5 of the Act as follows:

Notice of project area orders and associated regulations

5(1) The Minister

- (a) shall send a notice of the project area order and its associated regulation, together with a certified copy of the project area order and a certified copy of the associated regulation, to the chief administrative officer of each municipality which, or a part of which, is in the Project Area,
- (b) shall file a notice of the project area order and its associated regulation, together with a certified copy of the order and a certified copy of the associated regulation, with the Registrar and, on its being filed, the Registrar shall endorse a memorandum of the notice on each certificate of title pertaining to land within the Project Area, and
- (c) shall, in accordance with the regulations, send to each person shown on the certificate of title as having a subsisting estate or interest in land in the Project Area, at the last address shown for that person on the certificate of title, a notice of the project area order and its associated regulation, together with a copy of the project area order and a copy of the associated regulation.

The registering of Order on the landowner's land title puts any potential purchaser as well as the landowner's lender or financial institution on notice that the land has been designated by the government for potential future use for a public purpose, that the land's use is subject to the control and restriction of the government and that the land may be acquired at some time in the future. Section 5(1)(c) of the Act expressly states that a copy of the Order and associated regulation for the lands must be served on each person shown on the title as having an interest in the lands. This would clearly include any financial institutions that have mortgages or other security registered against the title. Serving the Order on the local municipality puts the municipality on notice of the land designation so that the no subdivision plans or development permits will be approved by the municipality unless they are first approved by the Minister of Infrastructure.

The Act contains specific enforcement and penalty provisions. Section 11 authorizes the Minister of Infrastructure to issue an enforcement order against any landowner that the Minister believes is using his or her land in manner not permitted by the Project Area Order and Regulation:

Enforcement orders

11(1) Where, in the Minister's opinion, a person has contravened a regulation made under section 4, the Minister may serve that person with an enforcement order.

(2) An enforcement order under subsection (1) may

- (a) direct a person to cease the contravention specified in the order,
- (b) direct a person to stop doing something, or to change the way in which the person is doing it,
- (c) direct a person to take any action or measures the Minister considers necessary to remedy the contravention, including, without limitation, the following:
 - (i) the removal or demolition of a structure that has been erected or placed in contravention of the regulation;
 - (ii) the restoration of the land to the condition it was in before the contravention occurred,
- (d) state a time within which the person must comply with the directions, and
- (e) state that if the person does not comply with the directions within a specified time, the Minister will take the directed action or measures at the expense of the person.

(3) An enforcement order must contain the reasons for making it and, subject to section 12, must be served on the person to whom it is directed.

(4) The Minister may, by order,

- (a) amend a term or condition of, add a term or condition to or delete a term or condition from an enforcement order, or
- (b) cancel an enforcement order.

(5) A copy of an order issued under subsection (4) must, subject to section 12, be served on the person to whom the original enforcement order is directed.

(6) An enforcement order may be filed with the clerk of the Court of Queen's Bench and, on being filed, is enforceable as if it were a judgment of the Court.

(7) If the person to whom an enforcement order is directed fails to comply with the enforcement order, the Minister may take whatever action or measures the Minister considers necessary to carry out the terms of the enforcement order, and the costs of the action or measures taken by the Minister shall be paid by that person.

(8) For the purposes of this section, the costs referred to in subsection (7) include, without limitation, any costs incurred in investigating and responding to

- (a) any matter to which the enforcement order relates, or
- (b) the failure to comply with the enforcement order.

(9) Costs under this section are recoverable by the Crown

- (a) in an action in debt against the person to whom the enforcement order is directed, or
- (b) by order of the Minister directing any person who has purchased land from the person to whom the enforcement order is directed to pay to the Minister instead of to the vendor an amount not exceeding the amount owing in respect of the costs.

(10) A purchaser who pays an amount to the Minister under subsection (9)(b) is discharged from any obligation to pay that amount to the vendor.

Joint and several liability

13 Where an enforcement order is issued to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs referred to in section 11.

The Act also authorizes the issuance of injunctions against landowners:

Injunction re commission of offence

16(1) Where, on the application of the Minister, it appears to the Court of Queen's Bench that a person has done, is doing or is about to do any act or thing constituting or directed toward the commission of an offence under this Act, the Court may issue an injunction ordering any person named in the application

- (a) to refrain from doing that act or thing, or
- (b) to do any act or thing that it appears to the Court may prevent the commission of an offence under this Act or the regulations.

(2) At least 48 hours' notice of the application must be given to the party or parties named in the application unless the Court is of the opinion that the urgency of the situation is such that giving notice would not be in the public interest.

Finally, the Act contains the following penalty provisions for landowners who do not comply with an enforcement order:

Offence

17(1) A person who contravenes an enforcement order under section 11 is guilty of an offence and liable,

- (a) in the case of an individual, to a fine of not more than \$100 000 or to imprisonment for a period of not more than 2 years, or to both a fine and imprisonment, or
- (b) in the case of a corporation, to a fine of not more than \$1 000 000.

Potential Impacts on Landowners' Ability to Utilize Their Lands For Financing

The Act states that a copy of the Order and the specific regulation setting out the restrictions and prohibitions for the lands will be served on anyone having an interest in the land. This would include banks, credit unions, and other financial institutions that have mortgages or other forms of security registered on the land title. Section 10 of the Act appears to extend the obligations of the landowner under the Order to these banks, credit unions and other financial institutions and make them subject to the regulation. Section 10 reads:

Obligations of person with interest in Project Area land

10 A person who holds or acquires an estate or interest in land in a Project Area holds or acquires that estate or interest subject to this Act and the regulations.

It is unclear how a lender might react when served with notice of the Order and a copy of the regulation setting out the restrictions and controls on the use of the land. Landowners may encounter difficulty either maintaining existing financing or placing new financing using their land as security.

Mandatory Consultation Requirements

Section 3 of the Act requires the Minister to provide advance notice to the landowner of the Minister's intention to have Cabinet designate his or her land as a Project Area. The Act also requires the Minister to consult with landowners and places a two-year time limit on which that consultation must be completed:

Plans, consultation and other requirements

3(1) The Lieutenant Governor in Council may not designate an area of land as a Project Area with respect to a public project unless the Minister

- (a) has prepared a plan, in accordance with the regulations, of the proposed project,
- (b) has made the plan of the proposed project available to the public in accordance with the regulations,
- (c) has provided the registered owners of land within the proposed Project Area with notice of the proposed project in accordance with the regulations, and

- (d) has consulted, in accordance with the regulations, with the registered owners of land within the proposed Project Area.
- (2) The Lieutenant Governor in Council may not designate an area of land as a project area if more than 2 years has elapsed since the plan of the proposed project was made available to the public under subsection (1)(b).
- (3) Where a project area order is amended to add land to a Project Area that does not exceed the maximum amount of land determined under the regulations, subsection (1)(c) and (d) apply only to the registered owners of the land being added and of any land adjacent to the land being added.

It is unclear what value the consultation process would have as there is no adjudicative process through which the landowner can try to convince someone of his or her views. The addition of consultation in the Act appears to be more political than substantive. There is no formal process through which affected landowners can seek to persuade Cabinet of their concerns. There is no requirement that Cabinet consider the landowners' views.

Opportunity for the Landowner to Request Buy-out

Under the Act, the Project Area Order can remain in place indefinitely. There is no time limit within which the government must either purchase the land or remove the land from the Project Area. In order to provide some relief for landowners, the Act includes provisions that allow the landowner to request that the government purchase the land that is subject to the Order:

Request to purchase by registered owner

- 6(1)** Subject to section 7, at any time, at the request of the registered owner of land within a Project Area, the Crown shall enter into an agreement with the registered owner to purchase the land at market value.
- (2) Where under subsection (1) the registered owner agrees to sell the land and the Crown agrees to purchase the land but there is no agreement as to the market value of the land, the registered owner may apply to the Land Compensation Board or the Court of Queen's Bench or in accordance with any other process agreed on by the parties for a determination of the market value of the land as at the time the registered owner made the request under subsection (1) or as at such other time as the parties agree on.
- (3) If the registered owner requests that the Land Compensation Board make the determination as to the market value of the land, for the purpose of making the determination, the Land Compensation Board has jurisdiction with respect to the determination of market value under this Act and may exercise the powers given to it pursuant to section 28 of the *Expropriation Act*.
- (4) The registered owner referred to in subsection (3) or the Minister may, within 30 days after receiving notice of the determination of the Land Compensation Board,

appeal the determination to the Court of Appeal, and section 37 of the *Expropriation Act* applies to the appeal.

Requirement of land by the Crown

7 When the land within a Project Area is required by the Crown for or in connection with the public project, the Crown may acquire the land by purchase or expropriation.

There are a number of problems raised by the wording of sections 6 and 7. First, there is an emphasis on compensation being restricted to the “market value” of the land. However, if a business is forced to relocate to allow the public project to proceed, shouldn’t that business owner also be compensated for the relocation costs? If a dairy farmer is in the midst of expansion of his dairy and has to stop the expansion and relocate, should that farmer not also be compensated for the losses and impacts beyond merely the underlying ‘market value’ of his land? The repeated references in the Act to compensation being restricted to “market value” indicate that the legal answer is “no”. A landowner would only be entitled to the market value. No compensation would be payable for the fact that the landowner was effectively forced into selling; no compensation would be payable for interruption or loss of financing arising from the Order being served on the lender; no compensation would be payable for relocation costs, business interruption losses, injurious affection or the other heads of compensation typically awarded when a landowner has to sell because of a governmental action. The wording of the Act restricts the authority of the government’s Treasury Board to only paying for the market value and nothing more.

Secondly, to the extent the government might be obligated to pay market value under section 6 becomes ambiguous because that section is ‘subject to section 7’. However, section 7 is permissive, not mandatory. In other words, the compensation provisions appear to mean that after the Crown has decided the land within a Project Area will in fact be needed for a public project—and only after the Crown has made that determination—is the Crown required to acquire the land by purchase or expropriation. Furthermore, the Act is unclear on whether the ultimate purchase would be governed by the broad compensation principles of the *Expropriation Act*. A careful read of sections 6 and 7 suggest that the broad compensation principles of the *Expropriation Act* would not apply and that the government would only be required to pay market value and nothing more.

Balancing of the Government's Acquisition Process Needs with Fair Treatment of Landowners

Bill 19 was developed because the government recognized the advantages of freezing large tracts of land for an extended period of time as it completes its internal planning for major infrastructure projects. From the perspective of the government, it makes sense to freeze the land and prevent development that might increase the value of the land that the government may need to purchase.

However, Bill 19 appears to lack balance in terms of understanding the impacts that a long-term land freeze could have on landowners. Businesses could be forced to put growth plans on hold indefinitely. The ability for business and individuals to utilize their land as collateral could be compromised. Restricting compensation to market value does not recognize the negative impact that the Order is likely to have on landowners. Furthermore, there will be situations where the government after completing its planning process decides that it does not want to route the transportation corridor along a particular route. In such a case, the landowner would receive a notice that the land is no longer subject to the Order. There is no provision for compensation to be paid for the negative impacts on the landowners while the land was subject to the Order.

2. Bill 36 – The Alberta Land Stewardship Act

Bill 36 was also passed in the 2009 spring session of the Alberta Legislative Assembly. The Alberta Land Stewardship Act (ALSA) was proclaimed into law on October 1, 2009.

This paper does not attempt to describe the many features of Bill 36. Instead, this paper focuses on the powers of the Act confers on Cabinet to control private lands and the activities occurring on private lands and occupied Crown lands, the extent to which the Act allows for compensation to landowners and businesses as well as the restrictions the Act places on Alberta Courts and due process.

The Act divides the province into seven land use regions that approximate major river basin boundaries. These regions are: Lower Peace, Upper Peace, Lower Athabasca, Upper Athabasca, North Saskatchewan, South Saskatchewan and Red Deer.

Here is a general description of the legislative framework with a more detailed examination of the legal wording following below. (The applicable sections of the Act are referenced in parentheses.) The Act authorizes Cabinet to implement “regional plans” for each region. Through a regional plan, Cabinet in its sole discretion, can specify what types of activities are going to be permitted or prohibited on both private and Crown lands (ss. 5, 9, 11, 12 and 15(1)). There is no appeal against the Cabinet’s decision (ss 5, 13, 15(3)). There is a statutory bar against any Court interfering with the Cabinet’s actions (s. 15(4)). A regional plan approved by Cabinet applies to proposed activities and those already occurring (s. 11). ALSA has paramountcy over all of other Alberta statutes and applies to the Crown, municipalities, boards and commissions and all persons (s.17). The Act allows Cabinet to amend or “extinguish” existing rights held under licenses, permits, leases, approvals, or any form of governmental approval issued by the Alberta Government, a municipality or government agency (s. 11). The Act restricts rights to compensation where exiting rights are amended or extinguished (s.19). There is no appeal to the Courts and a privative clause blocking a citizen’s right to seek judicial review or commence an action (s. 15(3) and (4)).

The specific wording of the Act that impacts on landowners’ rights is as follows:

A regional plan can restrict or prohibit anyone from engaging in an “activity” and can amend or extinguish “statutory consents”. Section 1 of the Act defines these terms as follows:

- (a) “activity” means
 - (i) anything that requires a statutory consent, and
 - (ii) anything that, under an enactment, must comply with a rule, code of practice, guideline, directive or instrument;
- ...
- (aa) “statutory consent” means a permit, licence, registration, approval, authorization, disposition, certificate, allocation, agreement or instrument issued under or authorized by an enactment or regulatory instrument;

This means that a regional plan can apply to:

- a development permit, subdivision plan approval issued by a municipality;
- a water licence issued under the *Water Act* to an irrigation district, food processor, cattle feedlot, or municipal users;
- an approval or registration issued by the Natural Resources Conservation Board for a confined feeding operation (dairy, poultry, cattle or hog operation);
- a Crown grazing lease, grazing permit or other disposition under the *Public Lands Act*;
- approvals for drainage works under the *Water Act*;
- “instruments” under the *Land Titles Act* which are defined in that Act to include deeds, mortgages, encumbrances, or any other document dealing with land or evidencing title to land;
- Crown mineral leases, mining permits, and forestry management agreements;
- ERCB issued well licenses, facility approvals, pipeline permits; and
- AUC’s approvals for power transmission lines among others.

Since all of the items in the list above fall within the definition of ‘statutory consents’, section 11 of the Act is significant:

Statutory consents may be affected

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

Section 17 of the Act sets out the legislative hierarchy of ALSA in relation to all other Alberta statutes as follows:

Resolution of conflicting provisions

17(1) Subject to subsection (2), if there is a conflict or inconsistency between

- (a) a regional plan and a regulation made under an Act, the regional plan prevails;
- (b) a regional plan and a regulatory instrument, the regional plan prevails.

(2) A regional plan does not prevail over a General Council Policy or anything authorized under or by the Co-Management Agreement, as amended, referred to in Schedule 3 of the *Metis Settlements Act*.

(3) If there is a conflict or inconsistency between an Act and a regional plan, the Act prevails.

(4) If there is a conflict or inconsistency between this Act and any other enactment, this Act prevails.

This means that a decision by Cabinet to restrict or prohibit any type of activity within a regional plan prevails over any decision by Alberta Environment, the NRCB, ERCB, AUC, or a municipality among others.

If there was any doubt about the intention of the government to give the Cabinet unrestricted discretion, such doubt is removed by section 5:

Lieutenant Governor in Council not constrained

5(1) A regional plan may be made or amended whether or not

- (a) a regional advisory council has been appointed for a planning region to which a regional plan or an amendment to a regional plan applies;
- (b) a regional advisory council or other person has provided advice about a proposed regional plan or an amendment to a regional plan and irrespective of the advice given and irrespective of whether or not the advice was considered or followed;
- (c) the secretariat has provided advice with respect to a regional plan or an amendment to a regional plan and irrespective of the advice given and irrespective of whether or not the advice was considered or followed.

(2) The Lieutenant Governor in Council may repeal a regional plan.

And by section 13:

Legal nature of regional plans

13(1) A regional plan is an expression of the public policy of the Government and therefore the Lieutenant Governor in Council has exclusive and final jurisdiction over its contents.

(2) Regional plans are legislative instruments and, for the purposes of any other enactment, are considered to be regulations.

(3) The meaning of a regional plan is to be ascertained from its text, in light of the objectives of the regional plan, and in the context in which the provision to be interpreted or applied appears.

(4) A regional plan and every amendment to a regional plan must

- (a) be published in Part I of The Alberta Gazette, and
- (b) be made publicly available by the secretariat in accordance with section 59(c).

(5) A regional plan and every amendment to a regional plan comes into effect when it is published in Part I of The Alberta Gazette or on any later date specified in the regional plan or amendment.

Administrative law principles dictate that public policy decisions of government are not subject to judicial review.

In addition to the foregoing, the Act also contains the following statutory bar against judicial review or commencing an action against the government for something done under a regional plan approved by Cabinet:

Binding nature of regional plans

15(1) Except to the extent that a regional plan provides otherwise, a regional plan binds

- (a) the Crown,
- (b) local government bodies,
- (c) decision-makers, and
- (d) all other persons.

...

(3) Subject to subsection (5), subsection (1) does not

- (a) create or provide any person with a cause of action or a right or ability to bring an application or proceeding in or before any court or in or before a decision-maker,
- (b) create any claim exercisable by any person, or
- (c) confer jurisdiction on any court or decision-maker to grant relief in respect of any claim.

(4) For the purposes of subsection (3), a claim includes any right, application, proceeding or request to a court for relief of any nature whatsoever and includes, without limitation,

- (a) any cause of action in law or equity,
- (b) any proceeding in the nature of certiorari, prohibition or mandamus, and
- (c) any application for a stay, injunctive relief or declaratory relief.

(5) Subsection (3) does not apply in respect of an application by the stewardship commissioner to the Court of Queen's Bench under section 18.

Given that the Act gives the Cabinet such broad powers to impact existing and future rights—including the rights to use one's land, carry on business, and develop resources—the provisions in the Act relating to compensation for the taking of rights are important.

Here is what the Act says about compensation:

Compensation limited

19 No person has a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done in or under a regional plan except either

- (a) as expressly provided for under Part 3, Division 3, or
- (b) as provided for under another enactment.

The provisions referred to in section 19(a) are largely of no benefit to someone's who rights have been impacted or 'extinguished' by a regional plan. Part 3, Division 3 of the Act deals only with "conservation directives". That part of the Act does not deal in any way with the loss of rights or restriction of rights triggered by the sections listed above.

Furthermore, most other enactments do not provide for compensation for the cancellation of the rights under a 'statutory consent'. For example, there does not appear to provisions in the *Municipal Government Act* that would entitle a business owner who relies on a municipal development permit to carry on his business to receive compensation if the regional plan extinguishes his development permit. There are no provisions in the *Agricultural Operation Practices Act* that would allow a confined feeding operation to receive compensation if it has to cease operation because of a regional plan. Similarly, the *Water Act* restricts its compensation provisions to a very narrow range of circumstances where Alberta Environment suspends or cancels a water license under the *Water Act*. There are no provisions in the *Water Act* that entitle a person to compensation if their water rights are lost as a result of any governmental action under a different statute. Hence, the rights of a landowner or business to obtain compensation under ALSA are exceptionally narrow, if they exist at all.

There are other provisions within ALSA that could impact on landowner rights that should be noted. Section 9 contains wording that appears to authorize the Cabinet to amend other laws through a regional plan including matters that are within the legislative authority of the Legislature itself:

Implementing regional plans

9(1) A regional plan may contain provisions that the Lieutenant Governor in Council considers necessary or appropriate to advance or implement, or to both advance and implement, the purposes of this Act.

(2) Without limiting subsection (1), a regional plan may

- (a) include or adopt statements of provincial policy for one, all or some planning regions to inform, guide or direct;
- (b) adopt, as part of the regional plan, regulations made under Part 3 or 4 for the purpose of achieving or maintaining an objective or policy in the regional plan;
- (c) **whether or not another enactment deals with the same, similar or associated matters, make, as part of the regional plan, law on any matter within the legislative authority of the Legislature that is designed to advance or implement, or to both advance and implement, the purposes of this Act;**

- (d) **make, as part of the regional plan, law that may be made as a regulation under this Act, or as a regulation under any other Act, and also make, amend or repeal regulations under any other Act whether**
 - (i) the other Act is enacted before or after this Act comes into force, or
 - (ii) the authority to make regulations under the other Act is given to the Lieutenant Governor in Council, a Minister, a board or agency, or any combination of those persons;
- (e) manage whatever is necessary to achieve or maintain an objective or policy, including managing all or part of the cause of an effect or those matters that affect or that might affect the economy, social objectives, the environment, human health or safety, a species or any element of any of them;
- (f) **with respect to a planning region, make, as part of the regional plan, law about matters in respect of which a local government body may enact a regulatory instrument;**
- (g) manage the surface or subsurface of land and any natural resource; [Emphasis added]

In summary, it is clear that ALSA confers upon Cabinet broad powers to determine the types of activities that landowners and businesses will be permitted to engage in and restricts through unprecedented legal drafting the rights of individuals to have access to due process, the Courts, and compensation.

3. Bill 50 -- Electric Statutes Amendment Act

Under current law, there is a two step process for a major power transmission line to be approved. First, the Alberta Utilities Commission (AUC) must be satisfied, after conducting a public hearing, that there is a 'need' for the proposed power transmission line. Second, where the AUC decides that there is a need, the AUC holds a public hearing with respect to routing of the power transmission line.

Bill 50 proposes to transfer the AUC's public, quasi-judicial decision-making process regarding 'need' from the AUC to the provincial Cabinet. Under Bill 50, the Cabinet will have the authority to designate proposed transmission lines as 'critical transmission infrastructure' and to effectively declare there to be a 'need'.

The question of 'need' in the context of power transmission is a highly technical and complex subject matter. Under the pre-Bill 50 system, assessments of 'need' included an examination of the transmission system's current capacity and the reasonableness of future demand forecasts. In Alberta, the utility company that constructs the line is guaranteed payment; charges are imposed on residential, commercial, and industrial consumers of electricity. The public hearing process administered by the AUC has been based on a recognition that there can be competing interests, motivations and perspectives on whether there is truly a need for additional transmission capacity. The current process also recognizes that there may be options and alternatives to building additional capacity or technical questions on which technology should be utilized in any new line. Through the public hearing process, competing utility companies and power generators, consumers, business and environmental groups are able to bring forward their evidence and arguments on whether or not there is a 'need' and any positions on the technology to be employed. The AUC is able to assess and weigh the evidence it receives and render a written, reasoned decision.

If Bill 50 becomes law in its current form, the technical and complex decision-making on need and technology will be made behind the closed-door of the Cabinet room. This could increase the potential for unnecessary power transmission lines to be approved and constructed on farmland in Alberta and stifle technological innovation relating to modernizing Alberta's power distribution system.

II. Recent Case Law Developments on Landowner Rights and Compensation Everything

Surface Rights in Context: From Common Law to Statute Law

A logical starting point for a discussion on surface rights is to restate the relationship between the traditional common-law approach to allowing energy companies to access land and the current statutory approach.

Attached to this paper as an appendix is a detailed legal history of the evolution of the law relating to surface rights and a description of the current state of the common-law. The information can be summarized as follows:

Under the common law, where an energy company had secured the mineral rights to land, the energy company had the right to enter the lands and explore for and produce the minerals without paying compensation. The rationale for the common-law approach was that it was presumed that the owner of the lands sold or leased the minerals under his lands with the full knowledge that the energy company would be entering his lands to develop the minerals. The common-law theory was based on the notion that the mineral owner and surface owner were at least at one time the same person and that the surface owner had an opportunity when dealing with the minerals to address the issue of compensation for surface disturbance. Hence, the surface owner was deemed to have given his consent to the lands being accessed. This doctrine became known as the “implied consent doctrine”.

However, in western Canada at the time of settlement in most cases the government reserved the minerals unto itself. There were exceptions including lands owned by the Hudson's Bay Company and the lands granted to the railways in which case the minerals remained with the surface owner of the lands. However, the vast majority of lands within Alberta or homesteaded or otherwise acquired did not come with the mineral rights.

In *Cabre Exploration Ltd. v. Arndt* (Alta C.A.), [1988] A.J. No. 479, the Alberta Court of Appeal reviewed the history of surface rights legislation and made the following observation regarding the current status of the implied-consent doctrine:

In Alberta today, there exists a legislative compromise between the traditional common law rule about the status of the holder of the mineral interest and the cry for expropriation.

. . .

The implied-consent doctrine makes little sense to Albertans, who find it historically inaccurate to suggest that their forefathers willingly took title without the minerals or negotiated a lower price because they did not get them. Most agrarian land in this province was originally granted by the Crown with a reservation of mines and minerals, or first sold by the two largest grantees (the C.P.R. and

the Hudson's Bay Company) with a similar reservation. Moreover, these were not matters of negotiation: in many cases, the lands were homesteaded, which means they were bought on a take-it-or-leave-it terms and paid for with sweat, not treasure. As a result, when the well-driller arrives, he seems to the farmer to be a surface taker just as much as those who come to install power lines, pipelines, or highways. The point is that the legislature might be seen here as redressing an injustice, not creating one.

The *Surface Rights Act* conveys greater rights to energy companies than they had under the common law. There was no common law right to put in pipelines or power lines for example.

The *Surface Rights Act* attempts to provide the balancing of rights which had existed under the common law. The Act has a dual purpose: to provide right of entry to mineral development, and to provide compensation to surface owners. Right of entry is achieved through negotiation with the surface owner or the issuance of a right of entry order by the Surface Rights Board. The Board also has a responsibility to determine the compensation to be paid by a mineral developer to a surface owner. The procedures followed by the Board are intended to minimize conflict between a mineral developer and surface owner. When the legal history of the common law and statute law relating to mineral reservations and surface access are carefully examined it reveals that the common law implied-consent doctrine is no longer applicable in Alberta and that government has used its statutory powers to ensure that the surface owner has rights to an orderly process for compensation.

Scope of Entitlement to Compensation

Section 25 of the *Surface Rights Act* sets out the heads of compensation as follows:

Determining compensation

25(1) The Board, in determining the amount of compensation payable, may consider

- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,
- (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,
- (c) the loss of use by the owner or occupant of the area granted to the operator,

- (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,
- (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and
- (f) any other factors that the Board considers proper under the circumstances.

The Court of Queen's Bench in *True Energy Inc. v. Kitching* [2007] A.J. No. 1560, sets out the relationship between the various heads of compensation and how they are to be interpreted. In short, the Board is to give consideration to all of the heads of compensation when making a compensation award.

Tools to Determine Compensation: Empirical Approach and Pattern of Dealings

There are two common approaches employed to determine compensation. One approach is referred to as the 'pattern of dealings' which emanates from the seminal case of *Livingston v. Siebens Oil & Gas Ltd.* (1978), 8 A.R. 439. In that case, the Alberta Supreme Court, Appellate Division, ruled where there is evidence of a pattern of freely negotiated agreements "the Board should only depart from such compensation with the most cogent reasons."

The empirical approach involves a detailed quantification of the actual loss of use, tangible and intangible adverse effect, nuisance and inconvenience caused by the energy facility on the farm land.

The 'pattern of dealings' approach and the empirical evidence approach are both tools that can be used to determine proper and fair compensation. Whether one approach is to be used over another is a case-specific question and depends on the nature and the quality of the evidence. What is clear, however, is that cogent empirical evidence prevails over 'pattern of dealing' evidence.

Lemay Decision

In February 2009, Mr. Justice Mason of our Court of Queen's Bench issued his rulings on Conoco-Phillips and EOG Resources challenge of the Surface Rights Board's adverse effect

award to the Lemay's. The Surface Rights Board had awarded a significant increase in adverse effect compensation over the prevailing rates in the area.

Here is a summary of what the Board awarded and what the Court found on appeal:

| Category | CP 16-8 Well Site | | CP 5-31 Well Site | | EOG Well Site | |
|--|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| | SRB | Court | SRB | Court | SRB | Court |
| Adverse Effect | \$3,600 | \$3,460 | \$3,000 | \$2,454 | \$3,600 | \$3,600 |
| Loss of Use (as agreed by the parties) | \$350 /ac \$1,540 | \$350 /ac \$1,540 | \$350 /ac \$1,246 | \$350 /ac \$1,246 | \$350 /ac \$1,834 | \$350 /ac \$1,834 |
| Total | \$5,140 | \$5,000 | \$4,246 | \$3,700 | \$5,434 | \$5,434 |

The ruling by Justice Mason advances a number of important principles relating to surface rights in Alberta:

(1) Cogent empirical evidence of actual impacts can override a “Pattern of Dealings”:

[175] Conoco argues the Lemays provided no legal authority for their proposition that cogent reasons support departure from the pattern of dealings generally. However, Conoco also did not provide any legal authority for its proposition that compensation calculated by use of an empirical methodology did not qualify as cogent reasons for departure from the pattern of dealings. In fact, there appears to be no legal authority which uses principled legal reasoning to assess what constitutes cogent reasons and permits a Board or a court to decline to follow a proven pattern of dealings.

[176] It is my assessment that empirical evidence can form the basis for an exception to the pattern of dealings on the basis that it is more cogent evidence to assist in determining compensation. The Board's recognition of this meets the standard of reasonableness in this case. Its decision to proceed without providing Conoco the opportunity to test and answer was not, as referred to earlier in these reasons.

[177] There is no doubt that an empirical approach may not be flawless, but “cogent” does not mean “perfect”. This is recognized by our civil standard of proof, which does not require a party to prove its case to the point of absolute certainty, but only to tip the balance of probabilities.

[178] The most important advantage to the pattern of dealings approach may be its ability to provide conformity in assessing the compensation for adverse effect. However, from the Lemays' perspective, it is difficult to comprehend how they ought to have been

persuaded to agree to the pattern of dealings figures when the land agents were unable to explain where the initial numbers originated or how the final number was calculated. The Lemays' testimony was that it was this inability that motivated them to examine their data and analyse it to arrive at an actual adverse effect figure.

(2) Forward-Looking Analysis and Admissibility of Evidence: Conoco-Phillips had argued that the Court should look to the past five-years to assess appropriate compensation. Lemay's took the position that the analysis must be forward looking. Conoco-Phillips argued that the Court (and the Board) should not accept any evidence that might be available that is inclusive of the five-year period under consideration. (The five-year period in this case was 2005 to 2010) Lemay's argued that the Court should not blind itself to the best evidence of actual financial impact where the appeal is being heard after the five-period has commenced. Mr. Justice Mason ruled:

[194] A related issue is which span of years should be used to calculate the averages. One of the principles guiding the Board, and the court, is that compensation is payable for a future period, and the decision-maker is therefore to look to the future in determining compensation.

Following this principle, it is the most recent data from the landowner's farming operation that would provide the most useful information for a future forecast. Even this evidence could be subject to manipulation, however, if the farming operation had plans of changing, or, a party was able to adduce convincing evidence of a potential trend that would have a significant impact on one or more values.

[195] I therefore find that the Lemays were not in error in using data from 2005, 2006, and 2007 in their calculations because these years fall within the five-year period for which compensation is being set. However, the tangible adverse effect calculations the Lemays provided to the Board and this court are not representative averages of the Lemays tangible adverse effect losses generally, but only provide two snapshots in time as examples of what those losses could entail.

[196] Conoco also argues that the evidence of sales prices provided by the Lemays may not be representative of their entire operation, for the sales documentation provided represents a very small portion of the entire Lemay crop production. It may also not be representative of the sales prices received for the crop on the field where the wellsite is located. I agree this is a valid concern, and am of the view that the values used in the calculations must be tied either to the

farming operation as a whole, with the majority of the records then produced, or to the field where the wellsites are located, with the majority of the records for that field produced.

- (3) Personal Costs: Entitlement of landowners to be compensated for time involved in preparing for and participating in the appeal hearings before the Court of Queen's Bench:

Personal Costs

[225] Included in the written argument filed in the appeal, the Lemays requested that the court award compensation to the Lemays for their extensive time spent engaged in, preparing for, and participating in these appeals.

[226] Mr. Wilson put forth a request for personal compensation for his clients on the following alternative grounds:

- 1) as part of the award of compensation for adverse effect, nuisance and inconvenience;
- 2) as part of the award of costs to be made under section 26(9)(a) *supra*; or,
- 3) under the broad discretionary compensation/damage provisions conferred on the Board and this Court. Mr. Wilson pointed out that the Board does award compensation to landowners/farmers for time involved in compensation hearings before it.

[227] In essence, the Lemays invoke the principles established by the Court of Appeal in the Charter Challenge to the cost provisions on appeal under this Act in Cabre. In Cabre, the court declared that the Surface Rights Act characterizes the right of entry or, the effect of an agreement, as a taking of the land in the wellsite with a quinquennial calculation of compensation and costs for the indeterminate term of statutory or contractual right of entry granted. Principles of justice and fairness are involved and recognized in the legislation, which the Court of Appeal found to be a rational approach to the issue and far from a breach of the Charter.

[228] Section 25 of the Act defines the various heads of compensation under which the Board may make an Order. Section 25(1)(f) includes compensation for "any other factors the Board considers proper under the circumstances". Section 39 permits the Board to establish a schedule of fees and other expenses by regulation and by Order to direct by whom the costs are to be taxed. The Board has not done so. It has assumed that mantle unto itself.

[229] Counsel for Conoco submits personal costs are outside the jurisdiction of this Court on appeal. Conoco refers to section 26(7) and argues that this Court is restricted to determining Acompensation payable@ and to whom it is payable and nothing more. Conoco states the Board's discretion to award costs pursuant to section 39 of

the Act is restricted by the very specific provisions of section 26(9) to award solicitor and client costs only on appeal.

[230] Conoco argues that an award of personal costs is not available on a review of annual compensation which is the basis of its appeal. Conoco cites as authority for its proposition *True Energy Inc. v. Nigel Andrew Kitchings et al*, (July 13, 2007), Wetaskiwin 0612 000150 (Alberta Taxing Officer), and the costs decision of Langston, J. in *Canadian Natural Resources Limited v. Bennett and Bennett Holdings Ltd., et al*, (September 20, 2008), Lethbridge/MacLeod 0606 00177 (Alta. Q.B.).

[231] In *Kitchings*, the Taxing Officer ruled that Mr. Kitchings' claim for compensation for his time away from his work was, unless otherwise ordered by the court, restricted to the allowances found in schedule C, number 3 for his participation in the proceedings as a witness. No exception to the rule having been made, Kitchings' compensation was reduced to witness fees and expenses.

[232] In *Bennett*, a claim of \$27,000.00 for costs by Mr. Bennett on his behalf and on behalf of his corporate entity as landowners was put forth on the following bases; a) the court has a broad discretion in the award of costs; b) the appeal was a tactical one by Canadian Natural Resources Limited to blunt the resistance of farmers to seek appropriate compensation through an appeal; c) it was a case that established an important principle; and d) that Darryl Bennett was himself an expert and in effect gave expert evidence.

[233] Langston J. rejected that the case was one of unique circumstances. He also rejected Mr. Bennett's claim for qualification as an expert and found his claim was really one for preparing materials and working with counsel in the presentation of his case. Justice Langston ruled that Mr. Bennett's application for personal costs was a double-barrel application request for costs and was subsumed in the claim for solicitor client costs and expenses. He found no authority to suggest that parties could come forward as litigants and claim what is essentially their time in trial preparation with counsel.

[234] In some respects the claim made by the Lemays for their personal costs is of like character to the costs claimed by Mr. Bennett before Langston, J.

[235] The question becomes, is there authority under the Act for the Board to make an allowance for personal costs to the landowner litigant who submits his case before the Board without counsel. In my opinion section 25(1)(f) does provide that discretion.

[236] The question then becomes, what is the situation before this Court on appeal where the operator chooses the de novo approach with

counsel and expert witnesses and the landowner is forced to respond in kind. The wording of section 25(1)(f) is broad enough to include an award of personal costs in special cases as one of the heads of compensation and therefore within the power of this Court under section 26(7), and I so find.

[237] This finding does not automatically mean that every landowner ought to receive personal costs in every compensation case. Each case must be considered on its own circumstances, just as Langston J. did in Bennett. I differentiate between a litigants' personal time and effort to assist counsel and the peculiar duties of the Lemays in this case.

[238] The Lemays were their own experts in the sense that their choice to take the empirical approach required they assemble all of the evidence necessary to meet the challenge of the operator's expert on the use of empirical data as a method of determining compensation. Instead of calling an expert to attest to farming under the John Deere G.P.S. guidance and recording equipment, and results, they did this part of the presentation on their own from their personal records and experience. Unlike the situation in Bennett, where it was decided that the landowner was preparing materials and working with counsel to present his case, I find that the Lemays developed their empirical methodology and presented it to the Board without the assistance of counsel. Once retaining counsel for this de novo appeal, as able as counsel is, I find the Lemay methodology, and hence their case, could not have been presented without their substantial preliminary work and trial involvement.

[239] While both Lemays have claimed costs for attendance at trial, it was only Mr. Brian Lemay that testified. Mr. Barry Lemay is a litigant in these proceedings, but he did not testify, and no justification has been given for his claim for personal costs for attendance at trial. Mr. Barry Lemay will therefore not receive compensation for his claimed costs of trial attendance.

[240] In my discretion, I award each of Mr. Barry Lemay and Mr. Brian Lemay 40% of their claims for personal costs for trial preparation. I award Mr. Brian Lemay 40% of his claim for personal costs for trial attendance. This totals considerably less than any expert would have charged.

Effect of the Lemay Decision on the Pattern of Dealings

The significance of the Lemay decisions is as follows:

- We now have a clear statement from the Courts that empirical evidence can trump a pattern of dealings;
- The increasing sophistication of modern farming operations makes it easier for farmers to collect the empirical evidence needed to trump a pre-existing pattern;
- The modern equipment being used by farmers includes GPS technologies that are linked to computerized mapping software, equipment yield monitors, equipment speed records and other monitoring equipment that allow for easy calculation of tangible adverse effects and crop yield reductions;
- In the past, energy companies have had an advantage over landowners in that energy companies would share information on lease rates with companies but not landowners—this resulted in energy companies being able to identify and establish lower patterns;
- Energy companies do not have access to the empirical data supporting adverse effects, nuisance, and inconvenience quantification—only the farmers themselves have access to this data;
- As more traditional farmers utilizing older technologies on a small land base are retiring or exiting the business of agriculture, they are being replaced by farmers:
 - using state-of the art equipment which allow for the quantification of impacts;
 - farming a much larger land base with long half-section fields free from obstructions being at a premium;
 - employing teams of equipment in an assembly-line method to maximize the speed and efficiency of their production;
 - who experience firsthand the disruption that well sites cause to their farming operation and their production efficiencies; and
 - who have the equipment know-how to easily demonstrate and quantify impacts from energy facilities.

In the future, it will become more common for energy companies to be faced with farmers with high expectations for adverse effect compensation—and farmers who will have the evidence to support their claim. This, in turn, could result in new patterns more favourable to farmers being established.

Kelly Decision – Test for Landowners being Granted Standing in ERCB Proceedings

In order for an energy company to obtain an entry order from the Surface Rights Board, the company must first obtain a well license or pipeline permit from Energy Resources Conservation Board (ERCB). The *Energy Resources Conversation Act* and the *Oil and Gas Conservation Act* require the board to consider a broad range of matters when granting a well license or pipeline permit. If a landowner has concerns about the proposed location, need, environmental impacts, health and safety aspects or other concerns about a proposed well site or pipeline, the only forum in which they can have those concerns adjudicated is before the ERCB. As a result, the approach that the board takes to granting standing to landowners is significant. Without standing, the landowner has no right to participate in the Board's processes or to have his or her concerns addressed.

In the past few years, there appears to have been a trend whereby the ERCB was narrowing its interpretation of the test for standing and thereby refusing requests from landowners to either trigger a hearing or to allow them to participate in a hearing that had been triggered by others.

In October 2009, our Court of Appeal released its decision in the case of *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349. The Court of Appeal ruled that the Board had erred in its interpretation of the test for standing. Specifically, the court ruled that a landowner is not required to show that he or she may be affected by a board decision in a way or to a greater degree than members of the general public. The Court confirmed that the test for standing continues to be the test as set out in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68, 363 A.R. 234, [2005] A.J. No. 158, leave to appeal to the Supreme Court of Canada dismissed [2005] S.C.C.A. No. 176, where the Alberta Court of Appeal described the test for standing to appear before the ERCB as follows:

First is a legal test, and second is a factual one. The legal test asks whether the claim, right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.

In addition, the Court found that where an ERCB Directive acknowledges or otherwise treats a landowner as having rights under the directive, the first branch of the test is met. With respect to the factual element of the test, the court ruled that onus is initially on the landowner to make a *prima facie* case of direct and adverse effect. After that, the onus shifts to the energy company to provide evidence to rebut the presumption of direct and adverse effect created by the landowner's *prima facie* evidence. This is significant because the Board had previously been taking the position that the onus rested with the landowner throughout the process of determining standing.

Section 39 ERCA Review Requests

Another important feature of the Kelly decision is the Court's ruling on the scope of landowner rights to request that the Board review a license or permit that has already been granted.

There are two sections in the ERCA that relate to review requests. Section 40 of the Act contains a 30-day limitation period for making a review request. However, section 39 does not. Section 39 is broadly worded and appears to allow a landowner to bring a review request to the Board at any time.

The Court ruled that when the Board receives a review request it must consider the review request under both sections 39 and 40. In other words, if more than 30 days have passed since the issuance of the decision, the Board cannot simply dismiss the review request. Rather the Board is required to consider the review request on its own merits.

III. Conclusion

The position of landowners in Alberta with respect to development and land use rights is in a considerable state of flux as a result of legislation recently passed by the Alberta Legislature. The true impact of the new legislation will not be known until the Cabinet invokes its new broad powers.

Similarly, recent court rulings have caused the rights of landowners to evolve. Fortunately, the court rulings have demonstrated respect for landowners' rights, entitlements to compensation and due process.



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Keith Wilson is a St. Albert-based lawyer who specializes in representing landowners in legal matters regarding property rights, agriculture, oil & gas, and environmental law.

Prior to entering private practice, Keith worked for 8 years with the provincial department of agriculture. While employed with the Alberta Government, Keith was assistant to the Farmers' Advocate of Alberta, a government-appointed agricultural ombudsman office dealing with issues related to the environment, surface rights, water, soil conservation, right-to-farm, land use, and intensive livestock operations.

In 15 years of private practice, Keith has familiarized himself on surface rights and environmental law and policy by representing farmers and landowners in a wide range of cases including appearances before the Alberta Court of Appeal, Court of Queen's Bench, Surface Rights Board, Energy Resources Conservation Board, municipal development appeal boards, Environmental Appeals Board, Natural Resources Conservation Board, among others.

In addition to working with individual producers, Keith also advises Alberta's major livestock organizations on legal and policy issues related to surface rights, property issues, environment, water, soil, producer liability and other industry issues.

Keith is a member of the Law Society of Alberta, Alberta Expropriation Association, and the American Agricultural Law Association.