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Making Federalism through Law: Regulating Socio-economic Challenges of Energy Development, a Case Study of Alberta's Oil sands and the Regional Municipality of Wood Buffalo

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Making Federalism through Law: Regulating Socio-economic Challenges of Energy
Development, a Case Study of Alberta's Oil sands
and the Regional Municipality of Wood Buffalo

by

Chidinma Bernadine Thompson

A THESIS

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DEDICATION

TO MY ROCK, SWORD AND SHIELD, MY BEST FRIEND, JESUS CHRIST; THIS IS
ONLY POSSIBLE BECAUSE YOU SAID SO, THAT THE WORLD MAY KNOW THAT
YOU ARE TRUE AND THAT WITH YOU ALL THINGS ARE POSSIBLE.

ABSTRACT

Socio-economic challenges of large scale oil and gas development, especially oil sands, within municipal boundaries are not given adequate attention in Alberta's oil and gas development regulatory framework. There is no forum in the framework that allows a thorough consideration and proactive resolution, by responsible governments, of socio-economic challenges of large scale energy development prior to, or at the time of, project approvals. The jurisdiction of municipal authorities to regulate such development is highly circumscribed. None of the recently adopted initiatives by the province seems to have closed this gap in the regulatory framework. The gap exists because Alberta's oil and gas regulatory framework adopts the unitary model of governance. Given the critical role of public infrastructure and services in energy resource development, the thesis recommends a reform of Alberta's legislative and regulatory framework for energy development using federalism and its underlying principle of non-centralization. The thesis recommends a suite of non-centralized intergovernmental mechanisms which can conveniently fit into the regulatory framework and anchored in the energy legislative scheme. Using legally-mandated intergovernmental partnerships, Alberta can proactively obviate severe growth pressures, crippling demands on public infrastructure and services, lower quality of life for workers in the host areas, difficulty in attracting and retaining a workforce, and greater risk to energy resource development and huge private investment. A weather-proof regulatory framework with built-in, federal fail-safe mechanisms that enable energy development projects while preserving the wellbeing of host communities is *sine qua non* to achieve Alberta's ambitious global energy leadership goals.

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TABLE OF CONTENTS

DEDICATION.....	ii
ABSTRACT.....	iii
ACKNOWLEDGMENTS	iv
LIST OF ACRONYMS	xii
LIST OF FIGURES	xvi
INTRODUCTION	1
A. Federalism and Regulation of Socio-economic Challenges of Energy Development.....	1
B. Research Questions and Thesis.....	9
C. Methodology	12
D. Importance, Originality and Organization	13
Chapter One Federalism and Elazar's Theory of Federalism.....	16
1.1 What is Federalism?.....	17
1.1.1 Definition and Meaning of Federalism	17
1.1.2 Federalism Compared with Intergovernmental Relations	20
1.1.3 Federalism Compared with Decentralization and Subsidiarity	22
1.2 Origin of Federalism	26
1.2.1 The Covenantal Origin of Elazar's Federal Theory.....	30
1.3 Characteristics of Elazar's Federalism.....	35
1.3.1 Compact and Multi-faceted Partnership	35

1.3.2	Territorial Division of Power/Democracy	36
1.3.3	Non-centralization.....	37
1.4	The Federal Matrix Model and Other Models of Governance	44
1.4.1	The Matrix Model	44
1.4.2	The Pyramid Model	47
1.4.3	The Center-Periphery Model	48
1.5	Why Federalism?	50
1.6	Factors for the Success of Federalism	55
Chapter Two Canadian Federalism.....		58
2.1	Canadian Federalism Today	58
2.2	Original Conception of Canadian Federalism.....	62
2.3	Evolution of Canadian Federalism.....	64
2.4	Non-Centralization in Canadian Federalism.....	68
2.4.1	Co-operative Federalism.....	69
2.4.2	Collaborative Federalism.....	71
2.4.3	Executive Federalism.....	72
2.5	Benefits and Problems of Executive Federalism	73
2.6	Preliminary Conclusion	76
Chapter Three Municipal Government in Federal Systems.....		78
3.1	The Role of Municipal Government in Federal Systems.....	79

3.2	Legal Status of Municipalities in Federal Systems.....	85
3.3	Relational Status of Canadian Municipalities.....	97
3.3.1	Federal-Municipal Relations.....	97
3.3.2	Provincial-Municipal Relations	99
3.3.3	Mechanisms for Provincial-Municipal Relations	102
3.4	Municipal Government in Alberta.....	106
3.4.1	Brief History of Provincial-Municipal Relations in Alberta.....	107
3.4.2	Municipal Government Powers under the <i>Alberta Municipal Government Act</i>	112
3.5	Preliminary Conclusion	121
Chapter Four The Governance Framework for Energy Development in Alberta and the Role of Municipalities		124
4.1	The Importance of Oil and Gas Resources in Alberta and the Place of Oil Sands in Alberta's Energy Reserves.....	125
4.2	Provincial Jurisdiction over Oil and Gas Resources in Alberta.....	128
4.3	Governing Institutions and Regulatory Bodies in Alberta's Oil and Gas Regulatory Framework.....	131
4.4	Municipal Jurisdiction in Oil and Gas Development in Alberta.....	136
4.4.1	Brief History of Municipal Planning and Development Legislation in Alberta.....	136
4.4.2	Overview of Municipal Powers over Planning and Development under Part 17 MGA	139
4.4.3	Municipal Planning and Development Jurisdiction over Oil and Gas Development	144

4.4.4	Concurrent Provincial-Municipal Jurisdiction in Planning and Development Prior to Part 17 of the MGA.....	149
4.4.5	Conflicts and Inconsistencies in Provincial-Municipal Planning and Development Concurrent Jurisdictions	150
4.4.6	Section 620 of the MGA	160
4.4.7	Section 619 of the MGA	163
4.4.8	Principles of Statutory Interpretation.....	169
4.4.9	Legislative History	172
4.4.10	Academic and Other Opinions.....	173
4.4.11	Non-legislative Statements and Hansard Debates	182
4.4.12	Tribunal Decisions	183
4.4.13	Effect of Part 2 of the MGA on Municipal Jurisdiction over Oil and Gas Matters..	193
4.4.14	The Rule Against Circumvention	194
4.4.15	Section 13 of the MGA and the Three-part Conflict Test	199
4.4.16	Case Study of Municipal Attempts to Regulate Oil and Gas Impacts Under Part 2	200
4.5	The Oil and Gas Development Regulatory Process.....	204
4.5.1	Exploration.....	206
4.5.2	Mineral Rights	208
4.5.3	Preliminary Disclosure, Scheme Approval and Development Licenses	211

4.5.4	Environmental Approvals and Surface Rights.....	216
4.6	Effect of Alberta Land Stewardship Act on Oil and Gas Development Regulatory Process and Municipal Jurisdiction	223
4.7	Preliminary Conclusion	231
Chapter Five Case Study - Regional Municipality of Wood Buffalo and Oil Sands Development		233
5.1	Brief History of the Regional Municipality of Wood Buffalo and Oil Sands Development.....	234
5.2	Socio-economic Challenges of Oil Sands Development and Expansion Projects.....	236
5.3	Municipal Governmental Efforts to Deal with Oil Sands Development and Expansion Challenges.....	240
5.3.1	The Resource Development Review Committee	241
5.3.2	The Business Cases.....	242
5.3.3	Intervention at ERCB Oil sands Scheme Approval Hearings	245
5.4	ERCB's Previous Treatment of Socio-economic Challenges of the Oil Sands Development Prior to the RMWB Intervention.....	257
5.5	Provincial Governmental Efforts to Deal with Oil Sands Development Expansion Challenges.....	266
5.5.1	Independent Reports	267
5.5.2	Provincial Government Policies	271
5.6	Effect of Municipal and Provincial Governmental Efforts.....	288
5.7	Lessons from the Case Study.....	290

Chapter Six Making Federalism through Law in Alberta’s Oil and Gas Regulatory Framework	294
6.1 How We Got There - Alberta’s Oil and Gas Development Regulatory Framework Revisited	294
6.2 How Not to Get There Again - The Federal Principle Applied	303
6.2.1 Financial or Regulatory Problem?	303
6.2.2 Alberta’s Model of Governance and Underlying Principle	307
6.3 Adapting the Federal Principle to Alberta’s Oil and Gas Development Regulatory Framework	312
6.3.1 Executive Federalism in the Oil and Gas Development Regulatory Framework... ..	314
6.3.2 Federalism and the Municipal Association or a Liaison Secretariat/Department... ..	323
6.3.3 Federalism and the Quasi-Judicial Regulator	327
6.4 The Role of Law in Making and Sustaining Federalism in Alberta’s Energy Development Regulatory Framework.....	346
6.5 Legislated Provincial-Municipal Partnership in Other Jurisdictions	350
6.6 Proposed Legislated Provincial-Municipal Partnership in Alberta’s Energy Development Regulatory Framework.....	353
6.6.1 Option 1: Statutorily-mandated Executive Federalism at a Statutorily-mandated Preliminary Disclosure Stage of the Energy Development Regulatory Framework in the REDA and its Regulations	354
6.6.2 Option 2: Statutorily-mandated Partnerships to set Legally Enforceable Socio-economic Thresholds, Limits and Triggers, and Executive Federalism for Management Response in the ALSA and its Regional Plans	356

6.7	Conclusion	358
	SCHEDULE “A”	361
	BIBLIOGRAPHY	371

LIST OF ACRONYMS

AAMD&C	Association of Municipal Districts and Counties
AER	Alberta Energy Regulator
ALSA	Alberta Land Stewardship Act
AMO	Association of Municipalities of Ontario
ARP	Area Redevelopment Plan
ASP	Area Structure Plan
AUC	Alberta Utilities Commission
AUMA	Alberta Urban Municipalities Association
BC	British Columbia
CAG	Oil Sands Consultation Advisory Group
CAPP	Canadian Association of Petroleum Producers
CERI	Canadian Energy Research Institute
CEMA	Cumulative Environmental Management Association
CMDRC	Crown Mineral Disposition Review Committee
CRISP	Comprehensive Regional Infrastructure Sustainability Plans
EIA	Environmental Impact Assessment
EPEA	Environmental Protection and Enhancement Act
ERCB	Energy Resources Conservation Board
ERP	Emergency Response Plans

ESRD	Environment and Sustainable Resource Development
EUB	Energy and Utility Board
FCM	Federation of Canadian Municipalities
IDP	Intermunicipal Development Plan
IGR	Intergovernmental Relations
LARP	Lower Athabasca Regional Plan
LUB	Land Use Bylaw
LUF	Land-Use Framework
LUS	Land-Use Secretariat
MCMS	Minister's Council on Municipal Sustainability
MDP	Municipal Development Plan
MGA	Municipal Government Act
MGB	Municipal Government Board
MLA	Member of Legislative Assembly
MLE	Minimum Level of Evaluation
MMA	Mines and Minerals Act
MOU	Memorandum of Understanding
MSC	Multistakeholder Committee
MSL	Mineral Surface Lease
MSRC	Municipal Statutes Review Committee

NLHR	Northern Lights Health Region
NRCB	Natural Resources Conservation Board
OGCA	Oil and Gas Conservation Act
OGCR	Oil and Gas Conservation Regulation
OSCA	Oil Sands Conservation Act
OSDG	Oil Sands Developers Group
OSMSC	Oil Sands Ministerial Strategy Committee
OSTR	Oil Sands Tenure Regulation
PLA	Public Lands Act
PMO	Policy Management Office
Quangos	Quasi-nongovernmental Organizations
RDC	Responsible Development Council
RDRC	Resource Development Review Committee
REDA	Responsible Energy Development Act
REDC	Responsible Energy Development Council
REP	Regulatory Enhancement Project
RIWG	Regional Issues Working Group
RMWB	Regional Municipality of Wood Buffalo
SADR	Subdivision and Development Regulation
SAGD	Steam-Assisted Gravity Drainage

SDAB	Subdivision and Development Appeal Board
SEIA	Socio-Economic Impact Assessment
SRB	Surface Rights Board
TCC	Athabasca Oil Sands Area Transportation Coordinating Committee
TOR	Terms of Reference
UBCM	Union of British Columbia Municipalities
UDSR	Urban Development Sub-Region

LIST OF FIGURES

- Figure 1: The Matrix Model
- Figure 2: The Power Pyramid
- Figure 3: The Center-Periphery Model
- Figure 4: Energy Industry Authorization Overview

Making Federalism through Law:* Regulating Socio-economic Challenges of Energy Development, a Case Study of Alberta's Oil sands and the Regional Municipality of Wood Buffalo

INTRODUCTION

The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life.¹

If there is a federal principle, it cannot be limited to relations between national and state governments. If it is good for power to be divided and shared, that principle must also prevail in relationships among states and their cities, counties, and special districts.² [Emphasis added].

Of course the relationship between God and the human covenanting party was not one of equals, but it was one of equal partnership in a common task (the redemption of the world) in which both parties preserved their respective integrities even while committing themselves to a relationship of mutual responsibility. According to the biblical account God graciously limits Himself so that humans may become His free partners. This audacious idea meant that subsidiary covenants linking human agencies or entities would perforce be covenants between equals in partnership.³

A. Federalism and Regulation of Socio-economic Challenges of Energy Development

It was July 5, 2006, the air was dense with tension as the applicant, intervener groups and their lawyers arranged their witness panels in the hearing room in Fort McMurray for the public hearing of Suncor Energy Inc.'s ("Suncor") application for expansion of its North Steepbank oil sands mine. Among the interveners were the Regional Municipality of Wood Buffalo ("RMWB") with its panel of ten witnesses led by the Mayor, Melissa Blake, and the Northern

* This phrase is from P.H. Solomon Jr. ed., *Making Federalism Through Law: Canadian Experience and Russian Reform Under Putin* (Toronto: Center for Russian and East European Studies University of Toronto, 2003).

¹ D.J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987) at 12 [hereinafter *Exploring Federalism*].

² A. Wildavsky, "A Bias toward Federalism: Confronting the Conventional Wisdom on the Delivery of Governmental Services" (1976) 6 *Publius* 9.

³ D.J. Elazar, "The Political Theory of Covenant: Biblical Origins and Modern Developments" (1980) 10 *Publius* 3 at 15; *Exploring Federalism*, *supra* note 1 at 117-118.

Lights Health Region (“NLHR”). Shortly thereafter, the Alberta Energy and Utility Board (“EUB”) members filed in and the oral hearing commenced. The proceeding advanced to interveners’ evidence-in-chief and a summary of the evidence of the RMWB and NLHR on the project’s socio-economic challenges is as follows.

[RMWB: any new development that would exacerbate an already stressed situation was not in the public interest. There was already an infrastructure deficit, with much of the public infrastructure and services already stretched. The addition of another 2000 people from the Voyageur Project would have significant impact. The situation would be made more unmanageable if the deficit was allowed to increase and a sustained rate of growth did not allow the RMWB to catch up. The housing market in Fort McMurray presented a challenge especially for those with low incomes. The Voyageur Project would have a further impact on the availability of housing and affordable housing in the region. There was already a shortfall of 2,840 units and the typical time frame to turn a piece of raw land into residential housing was about three years. Land had just been released for residential development but the 11,800 dwelling units expected to become available would only carry the municipality to an extent as there would be demand for up to 15,496 new dwelling units up to 2010. The lands that were expected to accommodate 6000 of the anticipated 11,800 dwelling units posed a problem for municipal servicing, as the land would be cut up by streams and muskeg and would have access issues, resulting in a high cost of servicing. The front-end cost to open up these new areas was over and above the municipality’s planned capital expenditures. To respond to the infrastructure deficit, the RMWB must first put in place planning frameworks, which required a significant amount of time, financial resources and a total of 225 new positions between 2006 and 2008, a 50 percent increase in staff. The RMWB would have the highest debt load relative to revenues of all cities in the province and its debt limit would be reached or exceeded if it tried to implement the capital and operating plans. Undertaking this level of spending and growth means serious financial risk should non-residential assessment not come on stream as expected or the current trend in escalating construction costs continued. Possible solutions include the Board conducting a comprehensive multi-stakeholder inquiry on the cumulative socio-economic impacts of oil sands development in the region, and a delay of the approval of the Voyageur Project until the results of the inquiry were available and needed infrastructure arrangements had been made.⁴

NLHR: the Voyageur Project would adversely affect the delivery of health services in the region. Current and planned oil sands development imposed unique challenges on the NLHR and affected the ability of the NLHR to achieve its

⁴ *Re Suncor Energy Inc. Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area* (November 14, 2006), EUB Decision 2006-112 (E.U.B.) at 3, 9 and 15 [hereinafter EUB Decision 2006-112].

health care mandate. The impacts include physician and staff shortages, difficulty recruiting, additional cost to maintain rental units for staff, overburdened medical staff and facilities, a funding formula that underestimated funding needs, special funding increases that did not match increasing costs, and requests for land and capital projects that took too long to obtain. The emergency department was operating at capacity, had a shortage of acute care beds, and the medivac system that was not robust enough to handle a situation that involved a large number of patients being transported to other hospitals. Given the current state of infrastructure and resources, it would be hard pressed to deal with a major industrial accident or epidemic. The problems with health services could not be solved with an infusion of additional funding alone. Issues such as affordable housing, staff shortages, recruitment challenges, and challenges in providing health care in rural and remote areas, would also have to be addressed. An effective solution required the Board to convene a broad-based inquiry to examine the socio-economic impacts of oil sands development with a multidisciplinary approach involving numerous provincial ministries, the RMWB, industry partners, Advanced Education, the NLHR, and any others who could bring their information and input to a round table discussion.]⁵

Such is the ordeal of host municipalities in the event of uncoordinated large-scale energy development within municipal boundaries. In the case of the \$4 billion Alsands project, proposed to produce 140,000 barrels of synthetic oil per day from 1980 until December 31, 2010, the Alberta Court of Appeal acknowledged that, of necessity, there would be a great impact on the surrounding area and a profound change in the life style of the people living there.⁶ However, the host communities are not the only ones that suffer. Industry, and huge private capital investments already committed, risk being stranded as the required infrastructure and skilled labour to support development are not available in the host regions. The cost of doing business escalates and projects are delayed. The Wood Buffalo Business Case 2005 prepared by the Regional Issues Working Group (“RIWG”) (now the Oil Sands Developers Group (“OSDG”)) with the RMWB, to provide the provincial government with a comprehensive overview of the critical role of infrastructure and public services in the development of oil sands and preservation of

⁵ *Ibid.* at 3 and 8.

⁶ *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1980] 5 W.W.R. 165, 22 A.R. 541 at para. 17 (Alta. C.A.) affirmed by [1981] 1 S.C.R. 699.

sustainable communities, stated that failure by Government to pre-invest in the public infrastructure and services required to support oil sands growth could result in increased oil sands project costs and delays, which in turn would delay or reduce expected royalties and taxes from oil sands development as well as jeopardize the shared government-industry vision for ongoing oil sands development.⁷

The organization of Alberta's energy regulatory framework is very relevant to the situation. This thesis has identified a gap in the framework. First, the Alberta Energy Regulator's ("AER" or Regulator as of June 17, 2013⁸ and formerly the Energy Resources and Conservation Board "ERCB") regulatory approvals are paramount to all municipal planning instruments and development regime, including decisions of municipal Appeal Boards. Applicants who have AER approvals can proceed without facing any further regulatory burdens. Apart from authority to decide on changes by the applicant to the project concept approved by the AER, and other planning matters not dealt with by the AER in its approval, municipalities simply implement AER approvals at the municipal approval stage if applicable to the project. They have no veto power over these energy projects, whether on socio-economic or any grounds, as long as the project is consistent with AER approval. Therefore socio-economic challenges of energy projects are not resolved at the municipal approval stage of the regulatory framework. It is very unlikely

⁷ Regional Municipality of Wood Buffalo et al., *Wood Buffalo Business Case 2005: A Business Case for Government Investment in the Wood Buffalo Region's Infrastructure*, (Alta.: Athabasca Regional Issues Working Group, 2005) at 6, 38-39.

⁸ The legislative and policy changes of 2013 after the thesis was written, pursuant to the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("REDA"), did not affect the substantive analysis in this thesis. Therefore the AER and ERCB are used interchangeably throughout the thesis. The impact of the recent changes is discussed in chapter 6 below.

that a municipality can use its general bylaw making powers under Part 2 of the *Municipal Government Act* (“MGA”)⁹ to circumvent these restrictions.

Second, there is no other forum in the regulatory process where socio-economic impacts of energy project are fully addressed except at the AER if a hearing is conducted. While the ERCB considered (and the AER is mandated to consider) socio-economic impacts as one factor among many within its public interest determination, the Board stated that it did not have the mandate to “resolve” socio-economic issues, as that responsibility rests with the appropriate government bodies that are in a position to provide direct assistance, determine appropriate funding mechanisms and possible contributors.¹⁰ The effect is that there is no forum in Alberta’s energy regulatory framework to “resolve” cumulative socio-economic challenges of energy development projects as it affects industry and host communities prior to, or at the time of, project approvals. This gaping hole in the process appears to have caused the socio-economic crisis described in the RMWB’s evidence at the 2006 hearing.

Third, while recent institutionalized government initiatives to address policy gaps, such as the Land-Use Framework (“LUF”), the *Alberta Land Stewardship Act*¹¹ (“ALSA”) and its Regional Plans, have taken strides in moving towards the cumulative effects approach as well as setting measurable limits and triggers for environmental protection, these reform initiatives have failed to adequately guide regulatory decision-making on incremental or cumulative socio-economic challenges of resource development. The only recent institutionalized provincial initiative with full legal force which has become part of the energy regulatory framework is the ALSA and its

⁹ R.S.A. 2000 c. M-26.

¹⁰ EUB Decision 2006-112, *supra* note 4 at 13.

¹¹ S.A. 2009, c. A-26.8.

Regional Plans. Unfortunately, while the ALSA has an objective to coordinate decision-making regarding land use and development, its only coordinative requirement is mandating compliance with Regional Plans by all decision-makers.

Also, while the *Lower Athabasca Regional Plan* (the “LARP”), sets legally enforceable limits and triggers to be applied by all decision-makers, on environmental factors, it leaves socio-economic factors to be generally monitored and evaluated by unenforceable policy indicators and strategies. The only legal requirement is to establish and maintain monitoring and evaluating programs. Although decision-makers are required by the LARP to consider the broad socio-economic policy objectives in its Strategic Plan and Implementation Plan, there is no enforceable socio-economic policy in the Regulatory Details Plan for decision-makers to apply in their decisions with respect to adequacy of public infrastructure and services or the capacity of a particular municipality to accommodate multiple or large-scale developments. The failure to adopt clear thresholds against which to measure cumulative socio-economic effects makes it difficult to evaluate or determine whether or what level of incremental impacts from each new project can be accommodated or should trigger a government response action. Instead, the LARP seems to mandate decision-makers to disregard the fact that government has not performed its commitments in the LARP policy statements. This means that projects can proceed without a corresponding duty on the government to fulfil its commitments under the LARP.

Despite current policy and legislative reforms, there is still no mechanism or forum in the regulatory framework by which socio-economic factors are measured of themselves, like environmental factors, and checked off as either “acceptable,” “resolved,” or “management

action required” where limit (if any) is about to be exceeded. With highly circumscribed powers to regulate municipal matters relating to energy development, very meager resources, and no forum in the regulatory framework to resolve socio-economic challenges prior to project approvals, Alberta municipalities are unable to keep up with crippling growth pressures occasioned by large-scale energy development. Industry and huge capital investments also face serious risks. In large part, the gap in the regulatory framework seems to result from Alberta’s highly centralized, unitary governance model in energy matters. Alberta’s regulatory framework has a top-down, command-and-control approach with little or no contact among all or some categories of the provincial regulatory bodies, and between the provincial institutions and municipalities.

Canada, like the United States, is a federal state built on federal principles. In fact Canada has been described as one of the three classic federal systems of the world,¹² and federalism is for most Canadians inseparable from their image of their country. It is a fundamental attribute of the way in which Canada conducts its public business.¹³ While federal values are said to have shaped Alberta and its unique place in Canada over the previous century,¹⁴ it appears that Alberta has not, as Ontario and British Columbia have done, extended the federal relationship to its municipalities, especially on energy matters. Alberta needs to revive the federal principle and non-centralization which underlies it, a principle that seeks to substitute coordinative

¹² D. J. Elazar, “Urbanism and Federalism: Twin Revolutions of the Modern Era” (1975) 5 *Publius* 15 at 23 [hereinafter “Urbanism and Federalism”].

¹³ G. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 5th ed. (Montreal: McGill-Queen's University Press, 2009) 1 [hereinafter *Unfulfilled Union*].

¹⁴ Library of Legislative Assembly, *Today's Advantage, Tomorrow's Promise: Alberta's Vision for the Future; Today's Opportunities, Tomorrow's Promise: A Strategic Plan for the Government of Alberta* (Budget 2005 Document) (Edmonton, AB: Library of Legislative Assembly, 2003-2004) at 4, online: Alberta Legislature Homepage <<http://www.assembly.ab.ca/lao/library/egovdocs/alpm/2004/143704.pdf>>.

relationships for hierarchical ones to the maximum extent possible.¹⁵ Federalism is the generic term for self-rule/shared-rule relationships.¹⁶ It is a form of political-legal organization which distributes power among general and constituent governments so that they all share in the system's policy decision-making and executing processes while protecting their respective existence and authority.¹⁷

The most practical manifestations of the workings of federalism are the processes of intergovernmental relations and negotiated coordination among the general and constituent governments and the interests they represent.¹⁸ Federalism is founded on the principles of partnership, negotiation, and sharing.¹⁹ It involves a special mode of political and social behavior that commits to partnership, active cooperation, and permeation with the spirit of federalism. It manifests in sharing through negotiation, mutual forbearance and self-restraint in the pursuit of goals, as well as a consideration of the substantive consequences of one's act.²⁰ The principle underlying federalism is described by Elazar as "non-centralization." Non-centralization is the diffusion of power among multiple centers which must cooperate with one another in order to govern and to achieve common goals.²¹ Non-centralization is best conceptualized as a matrix of governments, with no higher or lower or single power centers only larger or smaller arenas, each of which is an arena for decision-making and action in and of itself as well as part of the overall

¹⁵ D.J. Elazar, "Federalism vs. Decentralization: The Drift from Authenticity" (1976) 6 *Publius* 9 at 18 [hereinafter "Federalism vs. Decentralization"].

¹⁶ *Exploring Federalism*, *supra* note 1 at 12 and 16.

¹⁷ "Federalism vs. Decentralization" *supra* note 15 at 12; D.J. Elazar, *Federalism: An Overview* (Pretoria: HSRC Publishers, 1995) 1 [hereinafter *Federalism: An Overview*].

¹⁸ D.J. Elazar, "The Themes of a Journal of Federalism" (1971) 1 *Publius* 3 [hereinafter "The Themes of a Journal of Federalism"].

¹⁹ *Exploring Federalism*, *supra* note 1 at 265.

²⁰ *Ibid.* at 154; *Federalism: An Overview*, *supra* note 17 at 2.

²¹ "The Themes of a Journal of Federalism," *supra* note 18 at 5-6; D.J. Elazar, *Building cities in America: urbanization and suburbanization in a frontier society* (Lanham, MD: Hamilton Press, 1987) at 122.

arena, with the smaller arenas linked to and are parts of larger ones through an appropriately developed communications network based on the principles of negotiated cooperation.²²

The thesis argues that to fill the gap identified, Alberta's energy regulatory framework needs to adopt federalism and its underlying non-centralization principle. The thesis advocates federalism because federal systems have built-in, fail-safe mechanisms which deal with problems of institutional failure. When governmental institutions in one arena are unable to work, institutions in another are often able to pick up the slack and in some cases, taking advantage of the flexibility of federalism, new institutions are devised.²³ Further, the strength of federalism lies in its flexibility or ability to adapt to a variety of local conditions, traditions, histories, and stages of economic development, as well as changes in times and circumstances.²⁴ The federal principle has been successfully applied in many different ways under a variety of circumstances, each region inventing its own unique legal-political inventions.²⁵ Therefore using the federal principle does not necessarily mean establishing a federal system in the conventional sense of a modern federal state. The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships.²⁶

B. Research Questions and Thesis

From the foregoing context, the thesis addresses the following questions. First, what is the scope of municipal powers under the MGA to regulate socio-economic challenges of large-scale energy

²² *Exploring Federalism*, *supra* note 1 at 37.

²³ *Ibid.* at 216.

²⁴ A. Ward & L. Ward, "Introduction to the Volume" in A. Ward & L. Ward eds. *The Ashgate Research Companion to Federalism* (Surrey: Ashgate, 2009) 2 [hereinafter "Introduction to the Volume"].

²⁵ D.J. Elazar, ed., *Self rule/Shared Rule Federal Solutions to the Middle East Conflict* (Ramat Gan: Turtle Dove Publishing, 1979) at 11 [hereinafter *Self rule/Shared Rule*].

²⁶ See *Exploring Federalism*, *supra* note 1 at 11-12.

development? This question has been controversial due to paucity of judicial consideration of the issue. Finding an answer to this broad question entails the legal interpretation of sections 618 to 620 of the MGA. The legal interpretation determines the appropriate legal conflict tests for paramountcy in the provincial-municipal relations and the scope of the rule against circumvention in Part 2 of the MGA. Second, concluding that municipal powers are limited, the thesis asks what is the mechanism and forum for “resolving” socio-economic challenges of large-scale energy development on host communities and industry prior to project approval? Third, the thesis looks at the recent policy and legislative reforms and asks to what extent have they addressed the socio-economic gap in the regulatory framework? Fourth, seeking a solution, the thesis asks how can federalism help, and what intergovernmental mechanisms based on the federal principle of non-centralization can be adapted into the regulatory framework, to fill the gap identified in the analysis? Finally, what is the role of law in securing any intergovernmental mechanism that may be adopted?

In summary, the thesis argues that the power of municipalities to regulate local socio-economic challenges of oil and gas development is severely circumscribed and there is no forum in the regulatory framework that resolves cumulative socio-economic impacts of oil and gas developments on host communities and industry. The result is severe growth pressures, crippling demands on public infrastructure and services, a lower quality of life for residents and workers in the host areas, difficulty in attracting and retaining a workforce, and great risk to energy resource development and huge private investment. None of the recently adopted initiatives by the province seems to have closed the gap in the regulatory framework on how to proactively resolve cumulative socio-economic impacts of energy developments.

The thesis argues that the gap exists because Alberta's oil and gas regulatory framework adopts the unitary model of governance. Given the critical role of municipal government and public infrastructure and services in energy resource development, the thesis recommends a reform of Alberta's legislative and regulatory framework for energy development using federalism and its underlying principle of non-centralization. The thesis recommends a suite of intergovernmental mechanisms, based on the federal principle, which can be conveniently fit into the regulatory framework and secured in the energy legislative scheme. A weather-proof regulatory framework with built-in, fail-safe mechanisms that enables energy development projects while preserving the wellbeing of host communities is necessary to achieve Alberta's ambitious energy goals. Legislating provincial-municipal intergovernmental partnership in Alberta depends on which of the options suggested in the thesis is chosen. The suggested options and corresponding legislative amendments include (a) a statutorily-mandated Executive Federalism at a statutorily-mandated Preliminary Disclosure stage of the energy development regulatory framework under the *Responsible Energy Development Act* ("REDA") and its Regulations;²⁷ or (b) statutorily-mandated partnerships to set legally enforceable socio-economic thresholds, limits and triggers, together with Executive Federalism for management response under the ALSA and Regional Plans, and repeal of section 7(3) of the LARP and similar provisions in Regional Plans.

Having set the stage the thesis pauses here to explain the scope of this thesis and some of the terms employed. The context of the thesis is oil and gas, and the particular focus is on oil sands development and all associated facilities. Therefore the use of "energy resource" throughout the thesis means oil and gas and oil sands. However the emerging principles and lessons learnt may be applicable to the development of other large-scale energy resources except electricity which is

²⁷ S.A. 2012, c. R-17.3, *supra* note 8, which came into force on June 17, 2013 after the thesis has been written.

produced differently and therefore has a slightly different regulatory regime. Further, the thesis focuses on municipal government as defined in the MGA and not other local government bodies. Therefore the use of “local government” is limited to locally elected government.

C. Methodology

In answering the research questions, the thesis conducts a multi-disciplinary literature review of federalism, especially Elazar’s federal theory and its origin in covenantal political theory, as well as the role of municipal governments in federal systems. It performs a brief comparative analysis of federalism and intergovernmental relations and federalism, decentralization and subsidiarity to show the breadth and deep normative value of federalism. Following the comparative analysis is a historical account of Canadian federalism to locate the federal principle of non-centralization in Canada. The thesis then undertakes a doctrinal analysis of Parts 2 and 17 of the MGA to determine the scope of municipal power to regulate socio-economic challenges of large-scale energy development within municipal boundaries, as well as the ALSA to determine its effect and the effect of Regional Plans on municipal powers. Next is a regulatory review of Alberta’s energy development framework to determine the stage and mechanism for resolving socio-economic impacts of large-scale development and the model of governance in use.

Concluding that a gap exists in the framework, the thesis uses the case study approach to illustrate the practical implications of the gap in the regulatory system. The case study of the RMWB’s experience with oil sands development highlights the connection between energy development and the socio-economic challenges in host communities. The lessons learnt from the case study set the stage for the recommendation of federalism as an alternative model of governance for Alberta’s energy regulatory framework. Telephone interviews are used to gather

information from municipal officials, provincial regulatory bodies and municipal organizations. In testing the federal principle in Alberta's regulatory framework, the thesis adopts a qualitative evaluation of the pros and cons of each intergovernmental mechanism discussed. Finally, with a doctrinal analysis of the recent REDA reforms, the thesis embeds the suggested intergovernmental options in Alberta's legislative framework for energy development.

D. Importance, Originality and Organization

Federalism, which the thesis recommends, is a multi-dimensional concept that has both theoretical and practical aspects with normative and empirical elements.²⁸ The thesis is the first to use the federal theory of non-centralization to remodel Alberta's energy governance framework to fix the gap created by the centralized and uncoordinated efforts of various categories of regulatory bodies towards a common goal. More specifically, the thesis is the first to advocate the use of the federal principles to resolve socio-economic challenges of large-scale energy development in host municipalities prior to project approvals. The doctrinal analysis of Part 2 (section 619 and 620) of the MGA, and the ALSA adds clarity to the unresolved scope of municipal powers over energy development in Alberta. More specifically, the doctrinal analysis discovers a third legal test, the "Specifically Legislated Test," in resolving intergovernmental conflicts. The recommendations in this thesis do not anticipate that a constitutional amendment will be required as the conflict tests emerge from judicial application of the federal constitutional principles. This topic is very crucial given that Alberta has merged and separated its primary energy regulator several times in search of coordination and efficiency. The recommendations in the thesis may be the missing key to the puzzle in Alberta's quest for enhanced regulation and competitiveness. The thesis contributes to the literature on the federal theory of non-

²⁸ "Introduction to the Volume," *supra* note 24 at 2.

centralization and proves its practical utility, flexibility and adaptability to various circumstances and functions. It also contributes to the literature on energy regulatory law and municipal law.

The remainder of the thesis is organized as follows. Chapters one to three answer the “why” question and lay the theoretical foundation for the thesis. Specifically, chapter 1 reviews Elazar’s conception of federalism as a model of political organization and governance while briefly touching upon competing theories. Chapter two reviews the Canadian model of federalism in search of the non-centralization that characterizes Elazar’s federal theory. Chapter three examines the function of municipal government in federal systems, especially Canada, with a particular focus on Alberta. The analysis and case study in chapters four and five identify the problem and outline lessons from the study. Particularly, chapter four discusses Alberta’s energy regulatory framework, especially oil sands, and locates the role of municipal authorities in the framework. The chapter also analyzes the scope of municipal powers to regulate socio-economic challenges arising from oil and gas and oil sands development within municipal boundaries. Chapter five studies the experience of the RMWB and the provincial government’s response and approaches to resolution. Chapter six recaps the problem identified in Alberta’s energy regulatory framework in chapters four and five, and explains the causes and reasons for its reoccurrence or occurrence elsewhere in Alberta if the source of the problem is not effectively addressed. Chapter six then offers a normative solution and suggests practical options to adapt the solution to the specific context. It explains the role of law in securing any of the intergovernmental mechanisms that may be adopted to resolve the problem and illustrates the role of law in similar contexts in two other Canadian jurisdictions. The chapter applies two options of provincial-municipal intergovernmental mechanisms to Alberta’s energy development

legislative framework, and concludes with the recommendation that a weather-proof energy development regulatory framework with federal built-in failsafe mechanisms is key to Alberta's energy future.

Chapter One

Federalism and Elazar's Theory of Federalism

This chapter reviews Elazar's conception of federalism as a model of political organization and governance while briefly touching upon competing theories. Elazar's theory of federalism, based on self-rule/shared-rule relationships, forms the foundation for the thesis that an institutionalized model of coordination, communication and sharing of power and authority among the responsible planes of government and regulatory bodies, anchored in law, may be the key to permanently resolving socio-economic challenges of energy development in Alberta. The brief comparison with competing theories puts into perspective the current model of governance in Alberta's institutional and legal framework and its underlying principles. This chapter discusses the meaning of federalism and compares the concept with related terms such as intergovernmental relations, decentralization and subsidiarity. The chapter recounts the origin of federalism and the covenantal basis of Elazar's federal theory. It explains the core elements of the federal principle, especially non-centralization and its organizational expression in the matrix model of governance. The chapter compares the matrix model with the pyramid model and the center-periphery model. It then discusses the importance of federalism and its various forms and usage. The chapter concludes with the factors that determine the success or otherwise of federalism.

1.1 What is Federalism?

1.1.1 Definition and Meaning of Federalism

Federalism is part of the classic terminology and therefore suffers the same plight of lack of a clear-cut definition.¹ Any attempt, therefore, to confine such a complex and dynamic concept as federalism to a single authoritative definition is deeply problematic.² Federalism as a value concept, like democracy, carries with it an essence or core meaning capable of being interpreted in a variety of ways under different circumstances as long as its essentials are adhered to.³ It has a rich theoretical diversity occasioned by its massive scope and the conceptual flexibility intrinsic in the idea.⁴ As a classic value concept and a root term of massive scope, the lack of ability to agree on a single definition for all times is not a sign of weakness for federalism but of

¹ D.J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987) at 15 [hereinafter *Exploring Federalism*].

² A. Ward & L. Ward, "Introduction to the Volume" in A. Ward & L. Ward eds. *The Ashgate Research Companion to Federalism* (Surrey: Ashgate, 2009) 1 [hereinafter "Introduction to the Volume"]. For instance, a definition of federalism as "the formation of a political unit out of a number of separate states, provinces or colonies, so that each retains the management of its internal affairs" is said to be misleading because it assumes that the components of the federation, whether states, provinces, or colonies, previously enjoyed a separate existence. The three Prairie Provinces in Canada and a majority of the fifty states in the United States had no separate existence prior to the federal union, but were formed subsequently out of territories which the national government had acquired by purchase or conquest. Since it would be absurd to exclude Canada or the United States from any definition of federalism, this definition needs modification. See G. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 5th ed. (Montreal: McGill-Queen's University Press, 2009) at 3-4 [hereinafter *Unfulfilled Union*].

³ *Exploring Federalism*, *supra* note 1 at 15. This is not to suggest that federalism is simply a blank slate open to every imaginable interpretation and conceptual construction. See "Introduction to the Volume," *ibid.* at 2.

⁴ "Introduction to the Volume," *ibid.* at 1-2. Theoretical reflections on federalism cover periods from classical antiquity and medieval political theology through to early modern history and political philosophy, as well as the modern American and European theories and experiences of federalism. Current examples of the rich theoretical diversity of federalism are reflected in William Riker's Rational Federalism (federalism with Rational Choice theory) and Daniel Elazar's Covenantal Federalism (federalism with Covenant theology) See *ibid.* at 3 and 6.

strength.⁵ This is evidenced by the ability of federalism to be a legal,⁶ political,⁷ and socio-cultural⁸ phenomenon involving both the structure and the processes of government.

As a principle of political and social organization, federalism is a multi-dimensional concept having both theoretical and practical aspects with normative and empirical elements.⁹ The structural, legal, and institutional questions about the division of power in a state inevitably point to fundamental issues of moral and political philosophy to consider such values as liberty, tolerance, and civic engagement.¹⁰ Hence any effort to understand the meaning of federalism must include an understanding not only of its ability to adapt to a variety of local conditions, traditions, histories, and stages of economic development, but also of federalism's capacity to adapt to changes in times and circumstances.¹¹ The simplest possible definition of federalism is that offered by Elazar as, "self-rule plus shared-rule." Thus, federalism is the generic term for self-rule/shared-rule relationships.¹²

⁵ *Exploring Federalism*, *supra* note 1 at 29.

⁶ The legal and structural element of federalism ensures the achievement of the goals of power sharing and the maintenance of pluralism. See D.J. Elazar, ed., *Self Rule/Shared Rule Federal Solutions to the Middle East Conflict* (Ramat Gan: Turtle Dove Publishing, 1979) at 3-4 [hereinafter *Self rule/Shared Rule*].

⁷ Federalism as a political phenomenon, understood from the modern meaning of "political," is essentially the relations among governments or polities. See *Exploring Federalism*, *supra* note 1 at 22, 69-70.

⁸ An example of the manifestation of federalism as a social phenomenon is the proper relationship among people, as individuals or in families and groups as well as in their capacity as citizens, whereby they relate to each other federally as partners, that is, respectful of each other's integrity while cooperating for the common good in every aspect of life. Another way it manifests is the institutionalization of certain religious, ethnic, cultural, or social groups around which political life is organized whether or not the polity is structured around those groups. See *ibid.* at 70. As a cultural phenomenon, federalism manifests itself in the idea that society is made up of a series of interrelated covenants and compacts which allow people to unite for common purposes while retaining their respective integrities which is embedded in the culture of authentic federal systems. See *ibid.* at 78.

⁹ "Introduction to the Volume," *supra* note 2 at 2.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Exploring Federalism*, *supra* note 1 at 12 and 16.

Elazar's federal theory of self-rule/shared-rule is said to be both institutional and ethical,¹³ far beyond the description of the legal-political structure of a federation.¹⁴ Elazar theorizes federalism to be a form of political-legal organization which distributes power among general and constituent governments so that they all share in the system's policy decision-making and executing processes while protecting their respective existence and authority.¹⁵ In its political form, the most practical manifestations of the workings of federalism are the processes of intergovernmental relations and negotiated coordination among the general and constituent governments and the interests they represent.¹⁶ According to Elazar, federalism addresses the whole problem of the concentration, diffusion and, most particularly, the sharing of power in political and social systems.¹⁷

Therefore, federalism is not just a matter of relationships among planes of government; it is also a total approach towards government that seeks the dispersion or diffusion of power in a variety of ways and among different authorities within each governmental arena.¹⁸ It involves some kind

¹³ Elazar's definition of federalism alternated between what can be called procedural federalism versus substantive federalism. Further, Elazar describes federalism as both idealistic and realistic, paralleling both philosophical and legal dimensions. It is the institutional (procedural) dimension which provides a remedy to human nature and provides guarantees for the ideological goals of federalism. Thus, Elazar's federalism is not simply about establishing the correct lines of authority or communication, but about institutionalization of a particular kind of relationship. This makes the institutions and structures flexible so long as the substantive goals of federalism are preserved. Moot maintains that in substantive terms, Elazar's federalism is essentially about having liberty under the law by emphasizing both voluntary negotiated federal arrangements and a certain degree of autonomy within that arrangement. See G. A. Moots, "The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar" in Ward & Ward, *supra* note 2 at 399 and 401 [hereinafter "The Covenant Tradition of Federalism"].

¹⁴ *Self rule/Shared Rule*, *supra* note 6 at 3.

¹⁵ In a larger sense, federalism represents the linking of free people and their communities through lasting but limited political arrangements to protect certain rights and achieve specific common ends while preserving the respective integrities of the participants. D.J. Elazar, "Federalism vs. Decentralization: The Drift from Authenticity" (1976) 6 *Publius* 9 at 12 [hereinafter "Federalism vs. Decentralization"]; D.J. Elazar, *Federalism: An Overview* (Pretoria: HSRC Publishers, 1995) 1 [hereinafter *Federalism: An Overview*].

¹⁶ D.J. Elazar, "The Themes of a Journal of Federalism" (1971) 1 *Publius* 3 [hereinafter "Themes of a Journal of Federalism"].

¹⁷ *Ibid.*

¹⁸ D.J. Elazar, *Building cities in America: Urbanization and Suburbanization in a Frontier Society* (Lanham, MD: Hamilton Press, 1987) xxiii [hereinafter *Building cities in America*].

of contractual linkage of a presumably permanent character that (a) provides for power sharing, (b) cuts around the issue of sovereignty but does not ignore or eliminate it, and (c) supplements but does not seek to replace or diminish prior organic ties where they exist.¹⁹ Federalism is founded on the principles of partnership, negotiation, and sharing.²⁰ It emphasizes the primacy of bargaining and negotiated cooperation among several power centers, and stresses the virtues of dispersed power centers as a means for safeguarding individual and local liberties.²¹ Federalism is therefore said to be an institutionalized set of political relationships of a particular kind through certain kinds of structures and processes.²² The institutionalized relationships are built on partnership among individuals, groups and governments, denote cooperative relationships that make the partnership real, and underscore negotiation among the partners as the basis for sharing power.²³ Federalism is therefore not a descriptive term but a normative one based on the presumed value of achieving both unity and diversity through representative institutions.²⁴

1.1.2 Federalism Compared with Intergovernmental Relations

Federalism has all too often been reduced to “intergovernmental relations” (“IGR”).²⁵ The emergence of the terminology of intergovernmental relations was occasioned, partly by the serious study of the administration of federal systems as separate from the legal and

¹⁹ *Exploring Federalism*, *supra* note 1 at 12.

²⁰ *Ibid.* at 265.

²¹ *Federalism: An Overview*, *supra* note 15 at 1. Thus, it is a form of popular government embodying elements of both republicanism and democracy. *Exploring Federalism*, *supra* note 1 at 186. Popular sovereignty means, *inter alia*, that government with the consent of the governed is the only legitimate basis of political organization. See *Exploring Federalism*, *ibid.* at 231.

²² D.J. Elazar, “The Political Theory of Covenant: Biblical Origins and Modern Developments” (1980) 10 *Publius* 3 at 7 [hereinafter “The Political Theory of Covenant”].

²³ *Federalism: An Overview*, *supra* note 15 at 1.

²⁴ R. Watts, “Models of Federal Power sharing” (2001) 53 *International Social Science Journal* 23 at 24 [hereinafter “Models of Federal Power Sharing”].

²⁵ “Themes of a Journal of Federalism,” *supra* note 16 at 3. Elazar states that this was because the only scholars who paid attention to questions of federalism in the twentieth century were drawn from the field of public administration.

constitutional dimensions of federalism,²⁶ and partly by the behaviorist revolution in political science in the 1950s and 1960s which sought to jettison “traditional” terminology for “scientific” terminology to achieve the definition of concepts with greater precision.²⁷ IGR therefore was distinguished from federalism which came to be described by the revolutionists as an arid inquiry into constitutional and legal doctrines that ignored the realities of politics and administration more important in an expanding government.²⁸

Federalism, however, means far more than IGR although IGR is a very important aspect of federal systems.²⁹ IGR is neither the primary characteristic of federalism nor is it exclusive to federal systems. It is a universal phenomenon found wherever two or more governments interact in the development and execution of public policies and programs. It has to do with particular ways and means of operating a system of government which involve extensive and continuing relations among the constituent parts.³⁰ Any political system, including unitary systems, that embraces more than a tribe or a single city is likely to divide the tasks of government between general and local authorities and, consequently, will encourage some degree of what may be termed intergovernmental relations; that is not the same as federalism.³¹ Federalism is said to be a generic term for self-rule/shared-rule relationships.³² Before the emergence of its political character, federalism is a theological concept used to define the proper relationship between God

²⁶ *Exploring Federalism*, *supra* note 1 at 14-15.

²⁷ *Ibid.* Deil Wright, a principal proponent of IGR, has traced the emergence and evolution of IGR in the public administration literature since the 1930s. He used William Anderson’s definition of intergovernmental relations as “an important body of activities or interactions occurring between governmental units of all types and levels within the federal system.”

²⁸ *Ibid.* at 15.

²⁹ “Themes of a Journal of Federalism,” *supra* note 16 at 4.

³⁰ It is a technical term of great use in exploring the processes within specific political systems, particularly but not exclusively, federal ones. *Exploring Federalism*, *supra* note 1 at 16-18.

³¹ “Themes of a Journal of Federalism,” *supra* note 16 at 4.

³² *Ibid.*

and man which has contributed to understanding federalism as a legal, political and social concept.³³ Therefore, federalism is a prior and more comprehensive concept which encompasses intergovernmental relations.³⁴

1.1.3 Federalism Compared with Decentralization and Subsidiarity

Federalism is not the same as decentralization, although decentralization is frequently and erroneously used to describe federal systems.³⁵ It is important to maintain the distinction between federalism and decentralization because they lead to a genuine difference in governance.³⁶ Centralization and decentralization are extremes of the same continuum where it is rather simple to measure the flow of power one way or another. Decentralization is essentially an administrative device, indicating the devolution of power from a single center by those who control that center.³⁷ It is a managerial strategy by which a centralized regime can achieve the results its desires in a more efficient manner.³⁸ It implies the legal investment of power in a

³³ *Ibid.*

³⁴ *Exploring Federalism*, *supra* note 1 at 17. When used as an independent term in non-federal systems, IGR is said to be still highly normative because it in fact defines or redefines the nature of political authority within the political system. It is also empirically useful in describing a universal phenomenon of particular significance in an age of highly complex governmental structures, relationships, and processes. With such implications the subsidiary use of the term “intergovernmental relations” can reinforce the use of the root term “federalism” in the conceptualization of the political order as well as for description and analysis of polities. *Ibid.* at 18.

³⁵ *Ibid.* at 34.

³⁶ See Rubin, E. L., et. al., “Federalism and Interpretation” (2008) 38 *Publius* 167 at 171-2 [hereinafter “Federalism and Interpretation”].

³⁷ The history of the United Kingdom shows this distinction. Prior to the rise of the Tudors (1485), England itself was an example of a non-centralized polity with authority diffused by right among a number of centers which saw territorially-based aristocrats sharing decision-making powers under the loose overall rule of the monarch. The Tudor rulers were able to replace this non-centralization with a more unitary system by subtly shifting the distribution of powers to a decentralized basis. As the kings acquired authority to exercise new powers, they delegated the actual exercise of those powers to local officials who were formally linked to them, usually by royal appointment. Over time, the national government of England became the single center of governmental power which, by its own will, allowed a practical diffusion of responsibility among the local governments. Parliament later superseded the monarchy as the locus of national power and beginning in the mid-nineteenth century the national government began to assert its authority first to reorganize local government and then to shift powers from the local governments to the center. Thus there has been substantial centralization of power in England, diminishing the scope, powers, and self-respect of local governments. See D.J. Elazar, “Cursed by Bigness or toward a Post-Technocratic Federalism” (1973) 3 *Publius* 239 at 241-2 [hereinafter “Cursed by Bigness”].

³⁸ “Federalism and Interpretation,” *supra* note 36 at 171.

central government where decisions are made, which may or may not choose to devolve power on local governments, and can decentralize or recentralize power as it desires.³⁹

The diffusion of power is actually a matter of grace, not right, and in the long run it is usually treated as such.⁴⁰ In decentralized systems, the interests of the local governments can be made effective only insofar as they can effectively be expressed by local representatives in the councils of the central government.⁴¹ Decentralization implies either a hierarchical pyramid of governments or a center with a periphery, wherein the various arenas of government are categorized as “levels” of government with gradations of power flowing from the top or center.⁴² Initiatives come from, and decision-making occur at, the center or the top for fear that complexities may be introduced by considering the interests of the lower levels in the pyramid model, or the peripheral actors in the center-periphery model. The use of the words “centralization” and “decentralization” is said to mark the end of the federal rule in a federal system.⁴³ Hence a dire need to return to the federal principle that offers a means for sharing policy-making and implementation on the basis of a model of efficiency more appropriate to a democratic polity.⁴⁴

The principle of subsidiarity, on the other hand, is the concept that law-making and implementation are often best achieved at a “level of government” that is effective and also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness,

³⁹ *Building Cities in America*, *supra* note 18 at 123.

⁴⁰ *Exploring Federalism*, *supra* note 1 at 34. The ultimate power to alter or abolish all sub-governments rests with the central government. See *Building Cities in America*, *ibid.*

⁴¹ *Building Cities in America*, *ibid.*

⁴² *Exploring Federalism*, *supra* note 1 at 35. The pyramid and the center-periphery model of governance are discussed below.

⁴³ V. Ostrom, “The Contemporary Debate over Centralization and Decentralization” (1976) 6 *Publius* 21 at 32.

⁴⁴ “Federalism vs. Decentralization,” *supra* note 15 at 19.

and to population diversity.⁴⁵ Subsidiarity originated as a concept for the division of functions between the European Union and its member states. As stated in the European Treaties, the Union “shall take action ..., only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by the reason of the scale or effects of the proposed action, be better achieved by the [Union].”⁴⁶ A broader expression of subsidiarity states that decisions will be taken “as closely as possible to the citizen.”⁴⁷ Three operative elements have been identified within the principle. The first is a preference for power to be allocated and exercised by smaller units. The second is the efficiency test which qualifies the preference, i.e. that power should be shifted downwards unless centralization will result in efficiency gains to a level that outweighs the preference for local power. The third is a preference for power to be allocated and exercised by the units containing the people who will be affected by the power.⁴⁸ This shifting of power to a particular “level of government,” whether upwards or downwards, is *not* what the federal principle of non-centralization advocates.

The federal principle is different from decentralization and subsidiarity as it represents a different continuum, predicated on the effective combination of unity and diversity, where measurement of the flow of power is a considerably difficult matter.⁴⁹ As discussed in detail below, the federal principle of non-centralization implies that there is no center but rather a

⁴⁵ 114957 *Canada Ltee (Spraytech, Societe d' arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, (2001) 200 D.L.R. (4th) 419 at para. 3; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para. 183.

⁴⁶ N. W. Barber, “The Limited Modesty of Subsidiarity” (2005) 11 *European Law Journal* 308 at 311 citing Article 5 EC.

⁴⁷ *Ibid.* at 312 citing Article 1 TEU. See also P. Craig, “Subsidiarity: A Political and Legal Analysis” (2012) 50 *Journal of Common Market Studies* 72.

⁴⁸ Barber, *ibid.* at 311-312.

⁴⁹ *Exploring Federalism*, *supra* note 1 at 64. According to Elazar, the primary diffusion of power makes “involvement” take on many different meanings. Even apparently unilateral programs may be substantially shaped by the other governments through the political process. As those working in local government know, he who pays the piper does not necessarily call the tune, certainly not in proportion to the amount of money spent. See “Federalism vs. Decentralization,” *supra* note 15 at 13.

matrix of governments, with powers so distributed that the “rank order” of the several governments is not fixed, which must coordinate with one another to make the body politic work.⁵⁰ In a federal non-centralized system, power is so diffused that it cannot be legitimately centralized or concentrated without breaking the structure and spirit of the covenant or compact.⁵¹ This means that more sophisticated legal instruments must be used to measure centralization or decentralization within federal systems in order to curb or eliminate any contrary tendencies or threats.⁵²

The key to understanding the difference between the federal principle of non-centralization and decentralization is an understanding of federalism as a set of concurrent regimes rather than a hierarchical system of governmental units.⁵³ Interchange and conflict between units of government in a federal system which produce increased information, and forces diverse sets of interests to be considered and compromised through negotiation, is preferable to unitary decision-making that takes place in the interstices of decentralized bureaucratic structures.⁵⁴ The key to understanding the difference between the federal principle of non-centralization and subsidiarity is an understanding of subsidiarity as an autonomous model of governance which prefers that the powers and actions of local authorities be as far as possible unimpeded by the central government organs. Subsidiarity advocates concentration of power at a particular level of government or center, based on the efficiency test. This model of governance is based on the

⁵⁰ *Exploring Federalism*, *supra* note 1 at 36.

⁵¹ *Ibid.* at 34. The covenant theory of federalism is discussed in detail below.

⁵² *Ibid.* at 199.

⁵³ R.B. Hawkins Jr., “Federal Principles for Government Reorganization” (1978) 8 *Publius* 133 at 134.

⁵⁴ *Ibid.*

“Dual Federalism” theory, described as a residue of the past, which posits that the spheres of government are clearly separated into watertight compartments.⁵⁵

1.2 Origin of Federalism

Federalism has an older and more diverse origin than is often recognized. It has been traced to five periods: the ancient, medieval, reformation, modern, and contemporary epochs which are beyond the scope of this work. However it is noteworthy that there are three “critical” federal experiments in the history of humanity to date.⁵⁶ The first was said to be the Israelite tribal federation described in the Bible which formulated the founding principle of federalism by transforming the earlier vassal treaty among unequals into a covenant among equal partners, although they became equal for the purposes of the covenant.⁵⁷ The second was the Swiss Confederation which preserved liberty in the medieval Europe.⁵⁸ The third was the United States of America which became the first modern federation and showed the way to combine freedom and federalism in a continental-sized polity.⁵⁹ Classic examples of the modern federal systems are said to be the United States, Switzerland, and Canada.⁶⁰

The federal idea, in its original form in the ancient era, was theo-political defining the relationship between God and man as one in which both were linked by covenant in a lasting yet limited union, a partnership designed to make them jointly responsible for the world’s welfare.

⁵⁵ F. Kjellberg, “The Changing Values of Local Government” (1995) 540 *The Annals of the American Academy* 40 at 41; F. Kjellberg, “Local Government and the Welfare State: Reorganization in Scandinavia” in B. Dente and F. Kjellberg eds., *The Dynamics of Institutional Change Local Government Reorganization in Western Democracies* (London: Sage, 1988)39 at 48-49.

⁵⁶ *Exploring Federalism*, *supra* note 1 at xii.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ D.J. Elazar, “Urbanism and Federalism: Twin Revolutions of the Modern Era” (1975) 5 *Publius* 15 at 23 [hereinafter “Urbanism and Federalism”].

This covenant was as much a liberating device as a means of binding people to God's commandments. By restricting his otherwise omnipotent powers under the terms of the covenant, God granted humans a significant measure of freedom (from whence the Puritans later developed the concept of "federal liberty" – intergovernmental freedom).⁶¹

In the medieval period, a movement in the direction of federalism grew out of the development of medieval commercial towns in central Europe, which formed leagues for mutual defence and assistance within the loose framework of the Holy Roman Empire, following the Greek model. These medieval municipal corporations were founded by compacts among guilds, which were themselves partnerships. They acquired a formal place within the feudal system by means of charters obtained from the appropriate imperial or regional ruler.⁶² The most important development in this era, however, was the first confederation of Swiss mountain republics in 1291 for mutual aid in defence of their independence. This effort was successful because of its connection with popular government on a covenantal basis.

The Helvetic Confederation grew over the centuries by addition of other Swiss republics through a network of multilateral and bilateral covenants renewed regularly.⁶³ The biblical covenant theory of federalism was revived by the Bible-centered "federal theologians" of the sixteenth and seventeenth century Protestant Reformation as a central category in reaction to the modern

⁶¹ *Exploring Federalism*, *supra* note 1 at 5 and 115 citing D. Hillers, *Covenant: The History of the Biblical Idea* (Baltimore: Johns Hopkins University Press, 1969), and P. Miller, *The New England Mind: The Seventeenth Century* (New York: Macmillan, 1939).

⁶² *Ibid.* at 123. Feudalism, dominating this era, is often seen as a manifestation of certain federal principles because of its emphasis on essentially immutable contractual relationships permanently linking the contracting parties while guaranteeing their rights. But the hierarchical and essentially private character of those relationships coupled with the lack of practical mechanisms to maintain the terms of the contract drastically limited any association between feudalism and federalism. Ultimately a fusion of contractual elements from feudalism with political mechanisms from the commercial and agrarian confederacies gave rise to the immediate antecedents of modern federalism.

⁶³ *Ibid.* at 123-124.

unitary state and its theoretical and practical problems.⁶⁴ The reformed churches found the biblical covenant concept the most appropriate expression of their theological ideas and expectations for the church polity and began to apply federal principles for state-building purposes.⁶⁵ They coined the term “federal” from the Latin word *foedus*, which means “covenant,” to create a federal theology that was given political expression, first by political theologians, and then by political philosophers.⁶⁶

The modern epoch, lasting from the middle of the seventeenth until the middle of the twentieth century, saw the secularization of the federal idea. The profederalism of the United Provinces and the Helvetic Confederation, coming at the outset of the age of nationalism, stimulated the first serious efforts to formulate federal theories based on modern political principles.⁶⁷ The convergence of theology and political thought, which led to the philosophic revolution of the seventeenth century, also opened up the possibility of serious federalist thought.⁶⁸ The accompanying republican revolution made federalism possible as a workable form of political organization. In the modern era, new federal institutions were invented, which became the

⁶⁴ “The Political Theory of Covenant,” *supra* note 22 at 19. See *Exploring Federalism*, *supra* note 1 at 128-9 and 139. See generally, D.J. Elazar, “Harmonizing Government Organization with the Political Tradition” (1978) 8 *Publius* 49 at 51 [hereinafter “Harmonizing Government Organization”]. The dominant idea of unitary sovereignty was further championed by Thomas Hobbes and Samuel Pufendorf, and later modified by the English Whigs to produce the doctrine of Parliamentary Sovereignty. See “Introduction to the Volume,” *supra* note 2 at 5.

⁶⁵ Where Reformed or Calvinist free churches emerged, such as Switzerland, parts of Germany, Puritan England, Presbyterian Scotland, the Dutch provinces, and Huguenot France. See S. de Freitas & A. Raath, “The Reformational Legacy of Theologico-Political Federalism” in Ward & Ward, *supra* note 2 at 57; *Exploring Federalism*, *supra* note 1 at 126; and “The Political Theory of Covenant,” *supra* note 22 at 8 and 19. The Reformation theorists include John Calvin (Geneva); Heinrich Bullinger (Zurich, 1504-1575); Ulrich Zwingli (Zurich, 1523); Samuel Rutherford (Scotland, 1643 preceded by John Knox (1556) and Rollock (1596)); and Philippe Duplessis-Mornay (1549-1623). See de Freitas & Raath, *ibid.* at 53-5.

⁶⁶ Such as the Huguenots, the Scottish covenanters, and the English and American Puritans. See “The Political Theory of Covenant,” *supra* note 22 at 9. The Puritans were English Protestants who thought that the Church of England as established under Henry VIII and Elizabeth retained too many vestiges of Rome. They reorganized not only the church but the government of England and for 11 years ran the country without a king. At the root of the Puritan political thought are the ideas of covenant, and of separate spheres of church and state. See de Freitas & Raath, *supra* note 65 at 57.

⁶⁷ de Freitas & Raath, *ibid.* at 138.

⁶⁸ *Ibid.* at 153.

necessary artifacts for successful federal government.⁶⁹ The American Revolution further translated the covenant theory into a powerful instrument of political reform, merging it with the more secularized idea of compact to form American modern federalism/constitutionalism.⁷⁰

The early American Federalists, in the post-feudal society, sought to adapt to the emerging trend of the nation-state in such a way that the exercise of authority would be dispersed among different territorial and corporate centers so as to preserve traditional liberties and prevent absolutism.⁷¹ The eighteenth century witnessed the principal theoretical work, *The Federalist*, a collection of essays advocating for the adoption of the American Constitution of 1787 that gave birth to the first modern federal state created by constitutional design.⁷² In this brilliant invention, the founding fathers of the newly independent American states came up with the modern federalism which combined the theory of the state and federal principles to formulate constitutional/legal sharing of power among multiple centers (non-centralization) as the keystone of popular government. This transformed the principles of federalism into a practical system of government and a prototype for other modern federal systems such as Canada which is briefly compared with United States below.⁷³

⁶⁹ *Ibid.* at 153.

⁷⁰ It was noted that what is common to all political societies rooted in the covenant idea is that they have drawn their inspiration proximately or ultimately from its biblical source. The American Puritans and many Americans of the Revolutionary era were inspired by the biblical polity to seek federal arrangements for their own polities. See “The Political Theory of Covenant,” *supra* note 22 at 9, 13 and 20.

⁷¹ See *Exploring Federalism*, *supra* note 1 at 129.

⁷² “Introduction to the Volume,” *supra* note 2 at 5; *Federalism: An Overview*, *supra* note 15 at 24 citing A. Hamilton, J. Madison, & J. Jay, *The Federalist* (Cambridge, Mass.: Belknap Press, 1961) as the classical formulation of the principles of modern federalism. See *Exploring Federalism*, *supra* note 1 at 132 and 143 citing M. Diamond, “The Federalist,” in L. Strauss and J. Cropsey, eds., *History of Political Philosophy* (Chicago: Rand McNally, 1963) 573-593.

⁷³ *Exploring Federalism*, *supra* note 1 at 146. Elazar states that despite its fundamental contribution to the federal theory most of the American discussion of the American federalism has focused on the practical concerns of maintaining a federal system and thus remained in the realm of constitutional law. The pragmatic focus of these discussions has tended to obscure the theoretical importance of the American model of federalism. Leading political figures in this area include Albert Gallatin, John C. Calhoun, Abraham Lincoln, and Woodrow Wilson. Some British

The postmodern era has seen the development of new governmental arrangements to accommodate postmodern trends. These new governmental arrangements are said to have moved in two directions simultaneously to create both larger and smaller political units for different purposes, to gain economic or strategic advantage while at the same time maintaining indigenous communities and accommodate diversity. All embody the idea of more than one government exercising powers over the same territory, an idea which was at the heart of the American invention of federalism but anathema to the European fathers of the modern nation-state and the concept of sovereignty.⁷⁴ Also in the intellectual sphere, the center-periphery model of statehood is being challenged by the champions of a new model, which views the polity as a matrix of overlapping, interlocking units, powers, and relationships.⁷⁵ The long line of ancient, medieval, reformation, modern, and contemporary efforts to “think federal” and build federal institutions testifies to the endurance of federalism as idea and form.⁷⁶

1.2.1 The Covenantal Origin of Elazar’s Federal Theory

Elazar’s theory of federalism is largely informed by the covenantal political theory.⁷⁷ As discussed above, the federal idea itself has its roots in the covenant theory of the Hebrew Bible.

students of politics such as Bryce, Albert V. Dicey, John Stuart Mill, Henry Sidgwick, and K.C. Wheare approached the study of federalism from this pragmatic aspect and concluded that federalism was no more than a technique for political integration occasionally useful, transitory in nature, and ultimately evolves into a more simple form of decentralization within a strong unitary government. See *Exploring Federalism*, *ibid.* at 145 citing Bryce, *American Commonwealth*; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (New York: St. Martin’s Press, 1962); H. Sidgwick, *The Elements of Politics* (London: Macmillan, 1919); K.C. Wheare, *Federal Government*, 4th ed. (New York: Oxford University Press, 1964).

⁷⁴ *Exploring Federalism*, *supra* note 1 at 225. A nation-state is understood as a homogeneous political, geopolitical, cultural and/or ethnic sovereign entity.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* at 152.

⁷⁷ It has been argued that “federalism” and “covenantal” are virtually interchangeable, and it is the academic specialization in the fields of theology and politics that has contributed to the separation of the two terms. The covenantal theorists argue that federalism entails an understanding of the relationship, between God and the world and among humans, as based on covenants. See de Freitas & Raath, *supra* note 65 at 49. For more on covenants and politics see J. Kincaid & D. J. Elazar, eds., *The Covenant Connection: Federal Theology and the Origins of Modern*

The biblical covenant was not simply designed to create a dependent entity linked and owing fealty to the imperial ruler, but a partnership between the parties involved. Of course, the relationship between God and the human covenanting party was not one of equals, but one of equal partnership in a common task (the redemption of the world) in which both parties preserved their respective integrities while committing themselves to a relationship of mutual responsibility. According to the biblical account, God graciously limits himself so that humans may become his free partners. This audacious idea meant that subsidiary covenants linking human agencies or entities would inevitably be covenants between equals in partnership.⁷⁸

The novelty of the biblical idea of covenant lies in the notion of it as both a historical and ethical foundation of all law and government.⁷⁹ First, the covenant idea showed that the biblical grand design for humankind is federal, in that, it is based upon a network of covenants which weave the web of human, especially political, relationships in a federal way. Federalism thus rests on the principle that political and social institutions and relationships are best established through covenants, compacts, or other contractual arrangements.⁸⁰

Second, the covenant idea also had within it the seeds of modern federalism/constitutionalism as it implies the accepted limitation of power on the part of all parties, a limitation not inherent in

Politics (Durham, N.C.: Carolina Academic Press, 1985); G.A. Moots, *Politics Reformed : The Anglo-American Legacy of Covenant Theology* (Columbia, MO: University of Missouri, 2010).

⁷⁸ “The Political Theory of Covenant,” *supra* note 22 at 15. The “covenant” is not the same as “relations.” While relations speaks to process covenant speaks to substance. Covenant is a wider concept which encompasses means of relations among the covenantees. The description of the difference between the two terms is akin to the distinction between federalism and IGR above.

⁷⁹ de Freitas & Raath, *supra* note 65 at 51 citing H. Silving, “The Jurisprudence of the Old Testament” (1953) 28 New York University Law Review 1129.

⁸⁰ *Exploring Federalism*, *supra* note 1 at 33.

nature, but involving willed concessions.⁸¹ The covenant therefore serves as an important political tool towards the furtherance of effective governance.⁸² Third, the covenant is said to define political justice, shape political behavior, and direct humans toward an appropriately civic synthesis of the two.⁸³ It is defined as a morally-informed agreement or pact between people or parties having an independent and sufficiently equal status, based upon voluntary consent, and established by mutual oaths or promises witnessed by the relevant higher authority. A covenant provides for joint action or obligation to achieve defined ends (limited or comprehensive) under conditions of mutual respect which protect the individual integrities of all the parties to it. Every covenant involves consenting, promising and agreeing; and most are meant to be of unlimited duration, if not perpetual.⁸⁴

In all its forms, the key focus of covenant is on relationships. It provides the basis for the institutionalization of a set of relationships of a particular kind.⁸⁵ As a theological and political concept, the covenant is informed by a moral or ethical perspective which treats political relationships in the classical manner, that is, it links power and justice thereby preserving the classic and ancient linkages between ethics and politics. The emphasis is not on structures, but on “relationships,” as the key to political justice. While structures are always important, they come alive (or fail to) only through the relationships which inform and shape them, no matter how finely tuned the structures.⁸⁶

⁸¹ de Freitas & Raath, *supra* note 65 at 51.

⁸² *Ibid.*

⁸³ Its importance is akin to natural law in defining justice, and to natural right in delineating the origins and proper constitution of political society. See “The Political Theory of Covenant,” *supra* note 22 at 3.

⁸⁴ *Ibid.* at 6.

⁸⁵ A covenant is the constitutionalization of a set of political relationships of a particular kind through certain kinds of structures and processes. See *ibid.* at 6-7.

⁸⁶ See generally *ibid.* at 10.

Elazar made the distinction between covenant, compact, and contract. Both compacts and contracts are in a sense derived from covenant, but covenants and compacts are public in character. As such covenantal or compactual obligation is broadly reciprocal and those bound by them are obligated to respond to one another beyond the letter of the law rather than to limit their obligations to the narrowest contractual requirements. Hence, covenants and compacts are inherently designed to be flexible in certain respects as well as firm in others.⁸⁷ Therefore a covenantal/federal partnership is not the kind of partnership created in private law in which the partners have very limited obligations to one another, but a public law partnership which creates community and thereby involves a more extensive set of mutual obligations.⁸⁸ Covenant, however, is said to differ from a compact in that its morally binding dimension takes precedence over its legal dimension. In its heart of hearts, a covenant is an agreement in which a higher moral force, traditionally God, is either a direct party to or guarantor of a particular relationship. Whereas, when the term compact is used, moral force is only indirectly involved. A compact based on mutual pledges, rather than guarantees by or before a higher authority, rests more heavily on a legal though still ethical grounding for its politics. Compact is therefore a secular phenomenon.⁸⁹

The concern of covenant with building and shaping relationships cannot be overemphasized. The essence of covenantal dynamics lies in three key biblical terms expressed in Hebrew as *brit*

⁸⁷ *Ibid.* at 11. Contracts, on the other hand, are private and tend to be interpreted as narrowly as possible so as to limit the obligation of the contracting parties to what is explicitly mandated by the contract itself.

⁸⁸ *Ibid.* at 15.

⁸⁹ Elazar states that the issue was further complicated by the social contract, a highly secularized concept which, even when applied for public purposes, never developed the same level of moral obligation as either covenant or compact. See *ibid.* at 11.

(covenant), *hesed*, and *shalom* (peace).⁹⁰ *Britu*, the original Semitic term for covenant itself suggests a dynamic process and relationship. It involves two actions; cutting and binding, that is, the separating of something into parts and its reunification in such a way that the parts remain separate in their identities.⁹¹ *Hesed* is best understood as the loving fulfillment of the obligations flowing from a covenant bond.⁹² *Shalom* means peace. Etymologically it suggests completeness, wholeness, and coming together. It involves the completing of something, bringing things together to create a new whole. Elazar concluded that peace is obtained through a *brit shalom* (a covenant of peace) which can be maintained only through the *hesed* of the parties.⁹³ The theological origins of the federal idea should not be ignored because it contributes significantly to understanding federalism as a legal, political, and social concept, through its emphasis on covenant/compact, partnership, negotiated cooperation, and sharing.⁹⁴ The biblical covenant remains central to the political community as a political and legal instrument as well as a moral requirement for the effective functioning of society. Entrenched in this principle and norm is a constitutional/legal government where a sense of accountability, responsibility and obligation are heightened.⁹⁵

⁹⁰ *Ibid.* at 26.

⁹¹ *Ibid.* at 26-7.

⁹² According to Elazar, the Supreme Constitutional Court of the German Federal Republic has developed the concept of *bundesfreundlichkeit* as a civil equivalent of the biblical idea of *hesed* and has applied it to adjudicate intergovernmental issues. It calls for a kind of federal friendship and loyalty among the federal government and the constituent *lander* (states) of the German federation, requiring them to go beyond the letter of the law in certain issues, so as to promote more effective intergovernmental cooperation. There are situations in which the federal government may be able to claim that the federal constitution does not require them to respond to their partners. But since such a stance reflects a lack of cooperative spirit, which could paralyze governance, the court has developed this concept as a constitutional norm which it will apply to ensure that the parties go beyond the letter of the law in order to fulfill its spirit. In the United States, the term “partnership” is the American quasi-constitutional equivalent of *hesed*. While it has not gained similar legal status, it has tremendous normative power. See *ibid.* at 27-8.

⁹³ *Ibid.* at 28.

⁹⁴ “Themes of a Journal of Federalism,” *supra* note 16 at 4.

⁹⁵ de Freitas & Raath, *supra* note 65 at 63.

1.3 Characteristics of Elazar's Federalism

According to Elazar, although functional differences can be discerned in the various political systems that assume federalism, the basic common characteristics and operational principles among truly federal systems are: (a) written compact/multi-faceted partnership; (b) non-centralization; and (c) territorial division of power/democracy.⁹⁶ These elements encompass both the structure and the process of governance.⁹⁷

1.3.1 Compact and Multi-faceted Partnership

The elements of the process include partnership among the parties, manifested through negotiated cooperation on issues and programs, and based on a commitment to open bargaining between all parties to an issue in such a way as to strive for consensus or, failing that, an accommodation that protects the fundamental integrity of all the partners.⁹⁸ It involves cooperative relationships that make the partnership real, and negotiation among the partners as the basis for sharing power.⁹⁹ Partnership describes a desired relationship that allows the participants freedom of action while acknowledging the very real ties that require them to function in partnership.¹⁰⁰ The partnership is such established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among each partner as well as the attempt to foster a special unity among them.¹⁰¹ Partnership implies the

⁹⁶ *Federalism: An Overview*, *supra* note 15 at 14-15; *Building Cities in America*, *supra* note 18 at 120-1.

⁹⁷ *Exploring Federalism*, *supra* note 1 at 67.

⁹⁸ *Ibid.*

⁹⁹ *Building Cities in America*, *supra* note 18 at 120.

¹⁰⁰ *Ibid.* at 122. Elazar states that this principle of partnership has been extended far beyond its simple sense to serve as the guiding principle in most of the political relationships that tie institutions, groups, interests, and individuals together. Thus the principle of partnership does not only animate intergovernmental relations, but public-private relations as well.

¹⁰¹ *Exploring Federalism*, *supra* note 1 at 5.

distribution of real power among several centers that must negotiate cooperative arrangements with one another to achieve common goals.¹⁰²

An effective partnership demands sharing among the partners and sharing means the involvement of all planes of government in virtually every activity of government as partners.¹⁰³ This is because it is impossible to take a specific issue or function and determine that it is exclusively national, state or local in character. When issues arise, that demand governmental attention, their impact is felt on all planes at approximately the same time thus demanding responses from all according to their respective abilities and inclinations.¹⁰⁴ Elazar's federal principle thus involves a special mode of political and social behavior that commits to partnership, active cooperation, and permeation with the spirit of federalism, as manifested in sharing through negotiation, mutual forbearance and self-restraint in the pursuit of goals, as well as a consideration of the substantive consequences of one's act.¹⁰⁵ It is therefore more appropriate to understand the federal principle as institutionalized power-sharing through systems that combine self-rule and shared rule.¹⁰⁶

1.3.2 Territorial Division of Power/Democracy

The federal idea also involves a structural arrangement, based on territorial democracy. The federal system usually organizes the population in such a way as to provide the same people with at least three sets of territorially based political attachments: national, state/provincial, and

¹⁰² *Building Cities in America*, *supra* note 18 at 122.

¹⁰³ *Ibid.* at 123.

¹⁰⁴ *Ibid.*

¹⁰⁵ See *Exploring Federalism*, *supra* note 1 at 154; *Federalism: An Overview*, *supra* note 15 at 2.

¹⁰⁶ *Federalism: An Overview*, *ibid.* at 2.

local.¹⁰⁷ Through these three planes of political organization, the people are able to express their varied and often contradictory interests, and as such the system offers a way to project into the political arena the dynamic character of human personality.¹⁰⁸ Areal division of power ensures neutrality and representation of various groups and interests in the polity, as well as local autonomy.¹⁰⁹ The federal structure also involves a particular kind of legal/constitutional framework, visible in the division of power among a general government and the constituent governments, and involving the organization of the entire governmental structure of the polities on a non-centralized basis.¹¹⁰ According to Elazar, many polities with federal structures have been shown not to be truly federal in practice, in that, the structures mask a centralized concentration of power that stands in direct contradiction to the federal principle. Only in polities whose processes of government reflect federal principles is the structure of federalism meaningful.¹¹¹ Therefore structure alone is not sufficient to determine the federal character of any particular polity.¹¹²

1.3.3 Non-centralization

The federal principle of “non-centralization” is the diffusion of power among multiple centers which must cooperate with one another in order to govern and to achieve common goals.¹¹³ Contractual non-centralization, which is the structured dispersion of powers among many centers whose legitimate authority is legally/constitutionally guaranteed, is the key to the widespread and entrenched diffusion of power that remains the principal characteristic of, and argument for,

¹⁰⁷ *Building Cities in America*, *supra* note 18 at 121.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Exploring Federalism*, *supra* note 1 at 167-8.

¹¹⁰ *Ibid.* at 34.

¹¹¹ *Ibid.* at 67.

¹¹² *Ibid.* at 68.

¹¹³ “The Themes of a Journal of Federalism,” *supra* note 16 at 5-6; *Building Cities in America*, *supra* note 18 at 122.

federal democracy.¹¹⁴ Non-centralization ensures that no matter how some powers may be shared by the general and constituent governments at any particular time, the authority to participate in exercising them cannot be taken away from either without their mutual consent.¹¹⁵ Thus constituent polities are able to participate as partners in general government activities where necessary and to act unilaterally with a high degree of autonomy in areas open to them in the compact.¹¹⁶ It involves the diffusion of power so that the elements in a federal arrangement share in the process of common policy making and administration by right while the activities of the common government are conducted in such a way as to maintain their respective integrities.¹¹⁷

The federal principle of non-centralization made possible the development of new forms of community with new instruments for local self-government, and created better instrumentalities for citizen involvement in public affairs through the development of governmental arenas of differing size and scope, ranging from the immediately local to the most general.¹¹⁸ The federal idea makes possible the contractual sharing of public responsibilities by all governments in the system.¹¹⁹ This is made operationally effective by intergovernmental partnerships established within the legal framework. Such partnership may be based on a universal sharing of functions among governments on all planes. It may involve a complex deep-seated governmental and political arrangements designed to recognize and accommodate national and local interests, and to preserve the basic integrities of the several governments that participate in the system while

¹¹⁴ *Exploring Federalism*, *supra* note 1 at 34.

¹¹⁵ *Ibid.* at 166.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 6.

¹¹⁸ *Ibid.* at 110.

¹¹⁹ The contractual sharing of public responsibilities by all governments in the system is a central characteristic of federalism. *Ibid.* at 185.

mobilizing sufficient energy to maintain and develop positive public programs.¹²⁰ Central to the federal principle is negotiated cooperation. If there is no negotiated cooperation, it becomes coercive or antagonistic. Negotiated cooperation has two dimensions: sharing and bargaining.¹²¹

Sharing means the involvement of all planes of government in almost every activity of government, not as rivals but as partners.¹²² Broadly conceived, it includes common involvement in policy making, financing, and administration of government activities. The sharing dimension also reflects the assumption that intergovernmental cooperation is a good thing, that sharing should be patterned not random, and that the way to achieve a proper pattern of sharing is through bargaining.¹²³ While sharing can be accomplished through other means, sharing by design is the safest form for the health of the federal system because coercive elements are introduced in the other forms due to less attention to the necessity to systemize and institutionalize the sharing that takes place through them.¹²⁴ In contemporary federal systems, sharing is characterized by extensive intergovernmental collaboration. It is usually contractual in nature and can be based on highly formal arrangements or informal agreements. The contract is used in formal arrangements as a legal device to enable governments accountable to separate polities to engage in joint action while remaining independent entities.¹²⁵ However, even when governments cooperate without formally contracting to do so, the spirit of federalism that

¹²⁰ *Ibid.* at 184. This multiple wires of interaction have been referred to as “cooperative federalism.” *Federalism: An Overview*, *supra* note 15 at 40.

¹²¹ *Federalism: An Overview*, *ibid.* at 41. Federalism is the only system that makes bargaining an integral and required part of the system, subject only to the requirement that it be generally open and accessible. A major part of the politics of federal systems is to maintain the openness of bargaining both in terms of the bargaining itself and access to the bargaining table. *Ibid.* at 14.

¹²² *Building Cities in America*, *supra* note 18 at 123 and 126. Elazar argues that it is a mistake to assume that national problems are handled at the national capital, state problems at the state capitals, and local problems at city halls.

¹²³ *Federalism: An Overview*, *supra* note 15 at 41.

¹²⁴ *Ibid.* at 43.

¹²⁵ See generally *Exploring Federalism*, *supra* note 1 at 185 for the above paragraph on “sharing.”

pervades the federal system tends to infuse a sense of contractual obligation into the participating parties.¹²⁶ Sharing in the matrix model is pervasive with emphasis on concurrent and cooperative functions. However, one of the disadvantages to sharing and bargaining of cooperative federalism is that it may become an avenue for monopolies or oligopolies. These can be checked by changes to the choice of government representatives through elections, the formal “fences” of the matrix, as well as separation of powers.¹²⁷

Elazar argues that sharing in policy making in the federal non-centralization is not the same as centralized policy making or decentralized policy implementation or execution.¹²⁸ Centralized policy making may involve establishment of special-purpose authorities as policy-making and implementation devices.¹²⁹ The use of special purpose authorities or quasi-nongovernmental organizations (“Quangos”) leaves governance in the hands of boards, commissions, or committees. They may arise, not from a desire to create joint decision-making forums in areas of general interest, but to focus decision-making forums on problems of very specific concern.¹³⁰ Non-centralized policy making, on the other hand, may occur through collegial decision-making or cooperative programs. In cooperative programs sharing has been principally manifested through separate actions on the part of each different institution involving a series of steps with

¹²⁶ *Ibid.* The tension that exists between the general government and constituent polities in sharing is said to be an integral part of the federal relationship and its character go to determine the future of that federal system.

¹²⁷ *Federalism: An Overview*, *supra* note 15 at 43. Elazar argues that even the so-called “exclusive” functions have become shared functions.

¹²⁸ *Exploring Federalism*, *supra* note 1 at 203-206.

¹²⁹ *Ibid.* at 207 and 209. While federal systems also use special-purpose bodies, unitary systems that are ideologically and constitutionally committed to concentrating power in a relatively few institutions have found it necessary to develop special-purpose bodies to accomplish tasks that do not easily fit into existing jurisdictional frameworks, that require special expertise, or that involve the public-private mix which general-purpose governmental institutions cannot permit themselves to engage in directly. Elazar states that this is an example of how the same trend may lead to movement in two different directions to accommodate differing but equally important political trends.

¹³⁰ *Ibid.* at 209-210.

interchanges at the “joints,” which represent the points at which the separate institutions have to come together to coordinate with one another.¹³¹

Collegial decision making involves a single body in which the separate institutions are represented but which takes its decision on a collective basis.¹³² It requires that the constituent units are involved in decision-making in fields which the general government unilaterally made decisions and conversely that the general government is involved in local decision making.¹³³ It has been argued that the spread of collegial decision making is a function of necessity in the increasingly complex and interrelated systems to have single policy-making or coordinating mechanisms in an even greater number of fields. The collegial method may allow for the preservation of the basic principles of federalism while achieving collective decision making.¹³⁴ Elazar concluded that the more non-centralized a federal system is, the more likely it is to rely upon collegiality as a means of decision-making, whereby all the constituent units are represented more or less equally in a common collegial decision-making body.¹³⁵ Ultimately, federal principles seek to establish the revival of sharing or the reestablishment of the principle that more is gained by cooperation as a result of shared interests than through compulsion.¹³⁶

¹³¹ *Ibid.* at 207; D.J. Elazar, *The American Partnership: Intergovernmental Cooperation in the Nineteenth-Century United States* (Chicago: University of Chicago Press, 1962) [hereinafter *The American Partnership*].

¹³² Examples are said to be the Canadian First Ministers’ Conferences. Collegial bodies to undertake specific tasks also abound in United States on a federal-state, federal-state-local, federal-local, and state-local basis. See *Exploring Federalism*, *ibid.* at 208 citing R. Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972).

¹³³ *Exploring Federalism*, *ibid.* at 207.

¹³⁴ F. Thayer, *An End to Hierarchy, An End to Competition* (New York: New Viewpoints, 1973) cited in *Exploring Federalism*, *ibid.* 208. Elazar states that although collegiality does not violate the federal principle per se, it is not an element of the modern federalism in which the idea of administratively separate institutions has been the norm. However, if this argument is true collegial decision-making is a useful addition to the arsenal of federal arrangements even if it is not precisely what federal theorists had in mind. See *Exploring Federalism*, *ibid.* at 207-9.

¹³⁵ Elazar states that this is particularly true of confederations as in the case of Council of Ministers and the European Union, but it is also true of federations like Canada where the First Ministers Conference and its parallels play a major role in governance. *Federalism: An Overview*, *supra* note 15 at 35.

¹³⁶ “Harmonizing Government Organization,” *supra* note 64 at 57-8.

Elazar's non-centralization is best conceptualized as a matrix of governments, with powers so distributed that the rank order of the several governments is not fixed.¹³⁷ For example, if the federal government is primary in the fields of foreign affairs and defence, the provincial governments are primary in the public welfare and highways, and municipal governments are primary in land use and zoning.¹³⁸ In a matrix there are no higher or lower or single power centers only larger or smaller arenas, each of which is an arena for decision-making and action in and of itself as well as part of the overall arena, with the smaller arenas linked to and are parts of larger ones through an appropriately developed communications network based on the principles of negotiated cooperation.¹³⁹ The largest arena frames the whole. None of the arenas is more important than others because every arena, large or small, is of importance for some particular purpose.¹⁴⁰ While it is composed of multiple centers, these centers are not separated unto themselves. They are bound together within a network of distributed powers with lines of communication and decision-making that forces them to interact.¹⁴¹ In the matrix model, the distribution of powers can be seen as involving differential loadings in different arenas for different purposes but does not alter the order of governmental functions significantly.¹⁴²

The matrix of decision-making centers is linked through formal lines of authority with both formal and informal lines of communication crisscrossing it. The legal/constitutional framework provides the bare bones of the structure, which is fleshed out by formal and informal institutional arrangements often overlapping, while the lines of communication serve as the "nerves" of the

¹³⁷ *Exploring Federalism*, *supra* note 1 at 36.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* at 37.

¹⁴⁰ *Ibid.* at 199-200.

¹⁴¹ "Federalism vs. Decentralization," *supra* note 15 at 15.

¹⁴² *Exploring Federalism*, *supra* note 1 at 37-8.

overall system.¹⁴³ The matrix model views the polity as a matrix of overlapping, interlocking units, powers, and relationships.¹⁴⁴ What is important in this federal idea is not the simple matter of “power devolved” but the more complex matter of “power shared.”¹⁴⁵ It involves a matrix of polities, with permeable but good fences in order to make good neighbours, functioning in a manner similar to a cybernetic system wherein what counts are the channels of communication which link the cells or arenas and permits permeation and intermixture.¹⁴⁶ Interorganizational relationships are developed accordingly since there must be interaction among the cells of the matrix for the system to work. This interaction between and among them as well as the shared institutional framework represents the substance of the political process.¹⁴⁷

However, Elazar’s non-centralization neither suggests that there are no lines of authority within it nor that it is purely horizontal. There must be centers of power but not a single center of power. The choice is not between one center and none, but between one and others, with different ones taking precedence in different situations.¹⁴⁸ Elazar acknowledges that there could be a problem of choosing which of the many centers to be involved in which decisions and how, but argues that a distinction must be made between those governmental activities that require the participation of all and those which do not require joint participation.¹⁴⁹ While there is no magic formula to be applied automatically in each case, the starting point is the issue areas with

¹⁴³ *Ibid.* at 37-8.

¹⁴⁴ *Ibid.* at 225.

¹⁴⁵ *Ibid.* at 101.

¹⁴⁶ *Federalism: An Overview*, *supra* note 15 at 7 and 39-41.

¹⁴⁷ *Ibid.* at 39-40.

¹⁴⁸ “Federalism vs. Decentralization,” *supra* note 15 at 16-17. This is contrary to the idea proposed by Woodrow Wilson and others that political authority is essentially unitary in nature, that there is always a centre of power, and the key task of any inquiry into the conditions of government is to determine where in this system is that centre, in whose hands is self-sufficient authority lodged and through what agencies does that authority speak and act? See Ostrom, *supra* note 43 at 24.

¹⁴⁹ Elazar states that the Constitution provides a good guide on how to deal with this problem but does not have all the ultimate answers or the answers for all times. See “Federalism vs. Decentralization,” *supra* note 15 at 17.

overlapping jurisdictions.¹⁵⁰ For other cases where the parties have exclusive jurisdictions, there must be a consensus that the constituent units can do their own things unless a case is made to the contrary.¹⁵¹ Therefore, while under normal circumstances the elements in the matrix do work together to develop common policies and programs, the secret of the preservation of the non-hierarchical relationships within the network lies precisely in the right or duty of the elements not to act under certain conditions. Without that right or duty the search for consensus becomes one unending round of coercion on the part of one party or another.¹⁵²

1.4 The Federal Matrix Model and Other Models of Governance

The three known models of political organization are associated with the three major ways in which polities came into existence because the mode of founding a polity does much to determine the framework for its subsequent political life.¹⁵³ This comparison is necessary to understand the model of governance used in Alberta's energy resource development regulatory framework. These are: the matrix model (by covenant/choice), the pyramid model (by conquest/force), and the center-periphery model (by organic development/accident).

1.4.1 The Matrix Model

Covenant reflects the exercise of constitutional choice and meaningful participation in its design. The organizational expression of covenant is the non-centralized matrix which has no single center but rather multiple centers framed by a shared fundamental law, appropriate governmental institutions, and communication networks.¹⁵⁴ Thus, the formal structure of the federal system is

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Exploring Federalism*, *supra* note 1 at 2.

¹⁵⁴ *Federalism: An Overview*, *supra* note 15 at 13-14.

represented in its simplest form as a three-dimensional matrix consisting of a very large box representing the national government, divided into smaller boxes representing the states/provinces, which are in turn divided into an indefinite number of boxes representing the various local governments within the states/provinces.¹⁵⁵ Each box is further subdivided into its formal governmental components (the executive, legislative, and judicial with their internal subdivisions). This structural matrix is fixed by the Constitution plus the charters and legislation which flow from them and further define the organization of the federal system.¹⁵⁶ Power within them is diffused among many centers or the various cells within the matrix.¹⁵⁷ Rule is the rule of equals by equals and is designed to maintain that basic principle.¹⁵⁸ Each federal polity is therefore a matrix compounded of equal confederates who come together freely and retain their respective integrity even as they are bound in a common whole.

Overlaying the structural matrix is a system of games and complexes that are the sources of the federal system's dynamics. Any public or governmental activity can be considered a game and there can be various types of games based on governmental activity or function such as welfare, medicare, energy, and education.¹⁵⁹ There are an indefinite and fluid number of games and complexes within the federal system.¹⁶⁰ According to Elazar, the relationship between games and complexes can be conceptualized through the atomic theory. The game serves as the nucleus, and around the game/nucleus revolves various elements whose primary interests are attracted to it by a magnetic force stronger than other magnetic forces which may pull them towards other

¹⁵⁵ *Building Cities in America*, *supra* note 18 at 128.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Exploring Federalism*, *supra* note 1 at 4; *Federalism: An Overview*, *supra* note 15 at 8, Figure 1.

¹⁵⁸ *The Federalist* describes the three models as reflecting the three basic choices for regime building among humans since the beginning of time, and labeling them as "force," "accident," and "reflection and choice." See *Federalism: An Overview*, *ibid.* at 10.

¹⁵⁹ *Building Cities in America*, *supra* note 18 at 128.

¹⁶⁰ *Ibid.* at 129.

games.¹⁶¹ All these elements taken together represent the complex surrounding the game, thus, a complex consists of the aggregate of those elements whose major interests are in the game/nucleus.¹⁶² In this matrix model, the constitution comes first since it establishes the rule of the game for all to know and whose openness enables all in the polity to play. Administration exists only where necessary and it is divided among the different cells in the matrix with each cell primarily responsible for administering its arena.¹⁶³ The best product of the matrix model is a federal system and its excess is anarchy.¹⁶⁴ Elazar states that examples of federal systems that are non-centralized simple matrices are the United States, Canada, and Switzerland in that they are composed of constituent units with an over-arching government in which inequalities are so dispersed that the matrix remains whole.¹⁶⁵

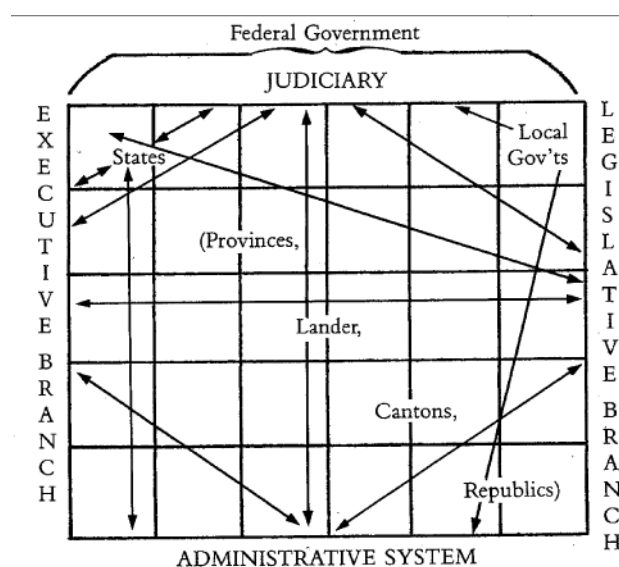


Figure 1: The Matrix Model¹⁶⁶

¹⁶¹ *Ibid.* at 128.

¹⁶² *Ibid.*

¹⁶³ *Federalism: An Overview*, *supra* note 15 at 12.

¹⁶⁴ *Ibid.*

¹⁶⁵ See *Self Rule/Shared Rule*, *supra* note 6 at 9.

¹⁶⁶ *Exploring Federalism*, *supra* note 1 at 37 Figure 2.3; *Federalism: An Overview*, *supra* note 15 at 8 Figure 1.

1.4.2 The Pyramid Model

Conquest, such as military conquests, internal revolutions, coups d'état, or conquest of a market by a major entrepreneur in case of economic regimes, tends to produce hierarchically organized regimes ruled in an authoritarian manner. The organizational expression is the pyramid model. The governing structure has the conqueror at the top, agents in the middle, and the people underneath making it difficult to achieve fully democratic governance. The goal is to control the top of the pyramid.¹⁶⁷ Power and authority are inevitably concentrated in or gravitate towards an apex and all other power centers are “levels” subordinated to that apex.¹⁶⁸ The most important aspect of governance is in its administration by top-down bureaucracy responsible to the ruler at the top of the pyramid. The politics that exist are the politics of administration topped by court politics which seeks to improve its position compared with the ruler. The law/Constitution is the least important element and where such a regime has been constitutionalized it is usually by charter, a grant from the ruler.¹⁶⁹ The best product of the pyramid model is an army and its excess is managerialism, whereby management teams that, in effect, became oligarchies sit at the top of the pyramid,¹⁷⁰ or totalitarian dictatorship.¹⁷¹

¹⁶⁷ *Exploring Federalism*, *ibid.* at 4; *Federalism: An Overview*, *ibid.* at 8.

¹⁶⁸ *Federalism: An Overview*, *ibid.* at 7-8, Figure 2.

¹⁶⁹ *Ibid.* at 11.

¹⁷⁰ Managerialism is an organizational response to the industrial revolution, typically American but with strong roots in the military and bureaucratic traditions of Russia and France. Politically, managerialism represents an effort to republicanize autocracy, whether in the immediate sense of the autocracy of the great entrepreneurs who built and ruled the great new industrial corporations, or in the older sense of imperial autocracy. In both cases, the founders can be considered “conquerors” who ruled autocratically but, in the end, unsatisfactorily, given changing times. The introduction of managerial structures was a means to transform autocratic rule without formally altering the hierarchical institutional structures built by the founders. The most articulate expressions of managerialism can be found in Max Weber's discussions of bureaucracy and in the writings of leading American proponents of scientific management. See “Harmonizing Government Organization,” *supra* note 64 at 51-54.

¹⁷¹ *Federalism: An Overview*, *supra* note 15 at 12.

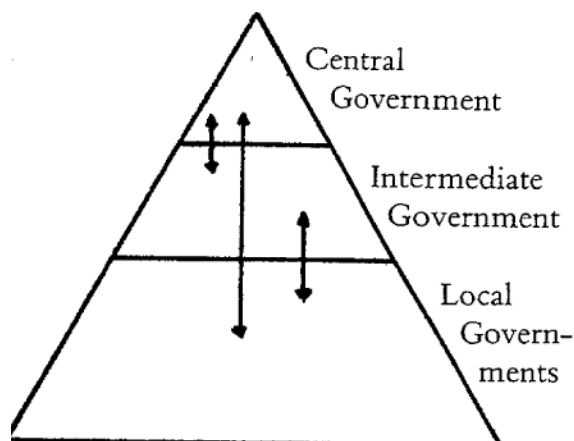


Figure 2: The Power Pyramid¹⁷²

1.4.3 The Center-Periphery Model

Organic evolution involves the development of political life from its beginning in families, tribes, and villages to larger polities in such a way that institutions, relationships, and power alignments emerge in response to the interaction between past precedent and changing circumstances. In the organic model, the body politic develops incrementally, *ad hoc*, on the basis of experience, circumstances, and the environment, leading to a seemingly “natural” division of the polity into political elite that dominates the political center and a periphery of those outside of the elite.¹⁷³ Organic evolution tends to produce oligarchic regimes which at their very best have an aristocratic flavor and at its worst are simply the rule of many by the few. Elites are formed by or gravitate to the center with greater or lesser ties to those on the periphery and govern with greater or lesser regard for the concerns of those on the peripheries. If the elites are more closely connected with the peripheries, the voices of the latter can be heard, if not the peripheries have no voice.¹⁷⁴ The goal is to control the center of power.¹⁷⁵ Politics is supreme but

¹⁷² *Exploring Federalism*, *supra* note 1 at 35 Figure 2.1; *Federalism: An Overview*, *ibid.* at 9 Figure 2.

¹⁷³ *Federalism: An Overview*, *ibid.* at 10.

¹⁷⁴ *Ibid.* at 8-9 Figure 3.

it is politics of oligarchic club. Administration is designed to do the bidding of politics so that it moves from the center outwards, and the Constitution is the traditions of the polity codified into law.¹⁷⁶ The best product of the center-periphery model is the Westminster Parliamentary system designed as a club, and its excess is Jacobinism whereby a revolutionary cadre controls the center in the name of what is good for the people on the peripheries.¹⁷⁷

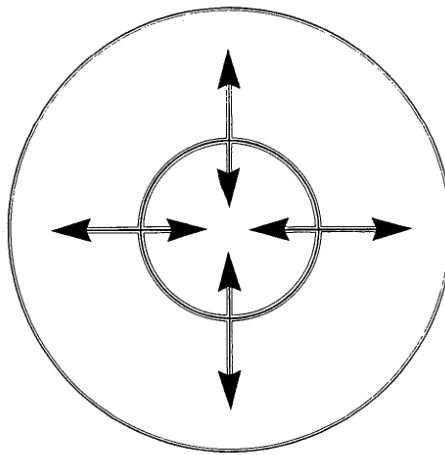


Figure 3: The Center-Periphery Model¹⁷⁸

The contrast between the matrix model, on the one hand, and the hierarchical and center-periphery models, on the other hand, is clear and instructive.¹⁷⁹ The matrix model stands in opposition to a hierarchical power pyramid and the organic center periphery where the center and the top are more important than the periphery and the bottom. The matrix model does not prefix importance because every arena, large or small, may be of importance for some particular

¹⁷⁵ *Exploring Federalism*, *supra* note 1 at 4.

¹⁷⁶ *Federalism: An Overview*, *supra* note 15 at 11.

¹⁷⁷ *Ibid.* at 12. The organic model is closely related to natural law in its political order and has proved most attractive to political philosophers because of this. *Exploring Federalism*, *supra* note 1 at 3.

¹⁷⁸ *Exploring Federalism*, *ibid.* at 36 Figure 2.2; *Federalism: An Overview*, *ibid.* at 9 Figure 3.

¹⁷⁹ *Federalism: An Overview*, *ibid.* at 10-11 Figure 5.

purpose, and the people (citizens) are one of the cells in the matrix.¹⁸⁰ In the pyramid model the people (citizens) are found below the power pyramid whereas in the organic model the people are on the peripheries and their voices can only be heard if they are more closely connected with the elites at the center. Both the pyramid model and the center-periphery model present problems for democracy.¹⁸¹ The development of technology and the space frontier, based on the principle that efficiency comes from a good communications network, has revealed the limits of a hierarchical approach to authority.¹⁸² Coordination cannot be only at the “top” or the largest arena because it is large and its parts are far apart. Coordination must involve the smaller arenas where closeness to the problem, and of the parts to one another, is an advantage although there is merit in the argument that the largest arena or the top offers the larger picture and takes the wider view.¹⁸³

1.5 Why Federalism?

According to Elazar, federalism is seen as both a means and an end. Some see federalism as a means to attain ends external to them, such as political integration, democracy, popular self-government, or the accommodation of diversity. This school of thought is not particularly interested in federalism in itself but in the utility of the federal arrangements to achieve what they consider larger goals. Thus their commitment to federal principles will exist only as long as they conceive them to be useful in attaining the larger objectives.¹⁸⁴ Others see in federalism an

¹⁸⁰ *Exploring Federalism*, *supra* note 1 at 199-200.

¹⁸¹ *Federalism: An Overview*, *supra* note 15 at 7-8.

¹⁸² “Federalism vs. Decentralization,” *supra* note 15 at 14.

¹⁸³ *Ibid.* at 18.

¹⁸⁴ *Exploring Federalism*, *supra* note 1 at 80. Among this school is K.C. Wheare who lists the conditions leading to federal union as: “the need for common defence, desire for independence from foreign powers, desire to gain economic benefits, some previous political association, similar political institutions, geographical closeness, similar social conditions, and the existence of political elites interested in unification.” It has been argued that Wheare’s list of conditions is not very informative. See *Unfulfilled Union*, *supra* note 2 at 11-12 citing C. Beard, *An Economic*

end in itself. This school holds that federalism is designed to produce the highest form of political and human relationships and therefore not a tool for achieving other goals but a goal in itself with the means of attaining it.¹⁸⁵ Thus, federalism has been applied to achieve political ends on four different levels: (i) to institute workable political arrangements;¹⁸⁶ (ii) to create a workable polity;¹⁸⁷ (iii) to establish a just polity;¹⁸⁸ and (iv) to achieve a just moral order.¹⁸⁹

As means to attain ends, federalism defines political justice and shapes political behaviour, and therefore the major means of reviving or preserving the advantages of small societies within more extensive polities.¹⁹⁰ The federal principle also offers a solution to political problems of organization and integration of political relationships. Thus, using the federal principle does not necessarily mean establishing a federal system in the conventional sense of a modern federal state.¹⁹¹ The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life.¹⁹² Consequently, federalism is a phenomenon that provides many options for the organization of political authority and power. As long as the proper relations are created, a wide variety of legal

Interpretation of the Constitution of the United States, 3rd ed. (New York: Free Press, 1965) arguing for economic motives; W.H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little Brown, 1964) 12-13 arguing for security motives; and R.D. Dikshit, *The Political Geography of Federalism* (New Delhi: Macmillan, 1975) 226-33.

¹⁸⁵ *Exploring Federalism*, *ibid.*

¹⁸⁶ Elazar states that this is the most modest of the goals and confederation and leagues can be used to achieve this end.

¹⁸⁷ Elazar states that this is a step beyond workable arrangements and can be achieved by modern federations.

¹⁸⁸ A workable polity is distinct from a just polity. There is a big difference between a polity whose major purpose is to handle certain tasks in an efficient manner, and a polity whose central concern is the pursuit of higher levels of justice *per se*. The most pronounced manifestation of this goal is found in the Latin American federalist movements which sought to introduce federal arrangements into polities without preexisting traditions of federalism on the grounds that political justice demanded it. See *Exploring Federalism*, *ibid.* at 106.

¹⁸⁹ *Exploring Federalism*, *ibid.* at 107. Elazar states that this is the ultimate goal of federalism as it offers the way to achieve justice in all its forms. Here federalism is not just a set of arrangements but a way of life that informs the entire civil society and establishes the basic character of relations within it.

¹⁹⁰ *Ibid.* at 1 and 6.

¹⁹¹ *Ibid.* at 11-12.

¹⁹² *Ibid.* at 12.

and political structures can be adapted to federal principles.¹⁹³ In this sense, federalism ensures “thinking federal.” “Thinking federal” means approaching the problem of organizing political and legal relationships from a federalist rather than a monist or centralist perspective.¹⁹⁴

The federal matrix model is polycentric by design, and its essence is conveyed in terms of “a womb that frames and embraces” and in terms of “a communications network that establishes the linkages that create the whole.”¹⁹⁵ The measure of political integration is the strength of the framework, not the strength of a center or top; both the whole and the parts can gain in strength simultaneously and must do so on an interdependent basis.¹⁹⁶ Political integration on a federal basis demands a particular set of relationships beginning with the relationship between power and justice.¹⁹⁷ These two concepts interact in that the organization and distribution of power are informed by some particular conception of justice whereas the pursuit of justice is shaped by the realities of power.¹⁹⁸

Federalism as a vehicle of political and societal organization is designed to prevent tyranny while facilitating governance.¹⁹⁹ It emphasizes relationships which lead to coordinative rather than superior-subordinate interactions, negotiated cooperation, and sharing.²⁰⁰ It is also consistent with human psychology in the way it encompasses and reflects the dynamics of personality and

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.* at 13.

¹⁹⁶ *Ibid.* at 14.

¹⁹⁷ *Ibid.* at 84. Politics deals with the organization of power on the one hand, (who gets what, when, and how?) and also concerned with the pursuit of justice with the building and maintenance of good polity on the other hand.

¹⁹⁸ *Ibid.* In the distribution and sharing of power, there is an implicit commitment to a conception of justice that holds, among other things, that a distribution of power is necessary and desirable.

¹⁹⁹ *Ibid.* at 29.

²⁰⁰ *Ibid.* at 78; “Urbanism and Federalism,” *supra* note 60 at 31.

interpersonal relations.²⁰¹ Federalism is as well consistent with human anthropology because of the covenant theory and the origin of human relationships. It has been shown that humans by their nature grant or withhold consent from the institutions and authorities that govern them, or the polities within which they are located, even when they are forced to obey. It has also been shown that humans compact with one another with regards to the distribution of authority and power whenever they are in the least bit free to do so, and even create contractual relationships when they are formally not free to do so.²⁰² Federalism therefore directs attention away from the nature of regimes to the character of political relationships.²⁰³

Federalism is considered a “mother” form of democracy.²⁰⁴ One of the enduring features of federalism is that it creates numerous points of choice, which in turn, increase the civic places where citizens can reflect and choose.²⁰⁵ The territorial expression of federalism ensures democracy. Federal systems are based on fundamental territorial division of power in such a way that territory becomes the basis for political action. Thus, the permanent boundaries of the subdivisions serve as a strong safeguard for diffusion of power and offer continued opportunities for diverse interests to find expression.²⁰⁶ The federal theory offers an alternative to monism.²⁰⁷ Federalism is considered an extraordinarily important element in maintaining and containing pluralism through its legally institutionalized or constitutionally embedded barriers as opposed to leaving so vital a task to chance, cultural or social dynamics.²⁰⁸ Federalism also maintains the

²⁰¹ *Exploring Federalism*, *ibid.* at 30.

²⁰² *Ibid.* at 31.

²⁰³ *Ibid.*

²⁰⁴ *Federalism: An Overview*, *supra* note 15 at 2.

²⁰⁵ Hawkins Jr., *supra* note 53 at 138.

²⁰⁶ *Exploring Federalism*, *supra* note 1 at 71 and 73.

²⁰⁷ *Ibid.* at 103.

²⁰⁸ *Ibid.* at 87 and 99. Elazar argues that the difference between federalism and pluralism is that pluralism may safeguard liberty but cannot be relied upon by itself unless properly institutionalized. Pluralism is more likely to

ecological basis that sustains democratic civil society by assuring public control over the exercise of private power where it threatens to affect the citizenry as a body.²⁰⁹

The central interest of true federalism is liberty in that it is designed to maintain effective government under conditions whereby the liberties of the participants to the federal bargain are maintained.²¹⁰ It seeks to do so, in part, by restricting and dividing governing powers and, in part, by giving the members to the compact (whether communities or polities) a participatory role in the exercise of those powers thereby allowing governance to the maximum extent required. Thus the combination of ends, such as liberty, participation, and governance, and the relationship between them is one of the defining characteristics of federalism.²¹¹ Federalism, as a political-legal device, can be used to restrain the growth of bureaucracy.²¹² Federalism also spreads economic development by inevitably spreading new resources over a number of centers.²¹³ The federal partnership provides the opportunity for experimentation and change as well as the necessary authority and flexibility for innovation on all planes of government.²¹⁴

sustain itself in polities in which strongly rooted primordial groups continue to dominate political and social life. Pluralism is defined here as the existence of multiple or plural ways of human expression built into the universe itself, whose existence is thereby legitimate and even necessary for the world to function. Example is territorial pluralism in the form of strong local government. This definition is said to follow that of William James, the great American philosopher of pluralism, in his *A Pluralistic Universe* (Cambridge, Mass.: Harvard University Press, 1977) cited in *Exploring Federalism*, *ibid.* at 277.

²⁰⁹ "Cursed by Bigness," *supra* note 37 at 293.

²¹⁰ *Exploring Federalism*, *supra* note 1 at 91.

²¹¹ *Ibid.* at 91. Federal liberty is liberty established by agreement. The content of any particular agreement may vary. See generally *ibid.* at 93-97.

²¹² Elazar argues that the modern government has reached a point where bureaucracies are not simply instruments of service to other elements in the society but have become self-generating. Bureaucracy has its own interests and problems and pursues its own goals even when it is manned by people with the best of intentions. See *ibid.* at 264; *Building Cities in America*, *supra* note 18 at 131.

²¹³ Elazar states that politics influences economics as well as vice versa; the way politics is structured affects the economic future of the polity. See *Exploring Federalism*, *supra* note 1 at 251-3.

²¹⁴ Hawkins Jr., *supra* note 53 at 134.

The great strength of federalism (the federal idea, the structures and processes that flow from it) lies in its flexibility or adaptability. Although the conventional discussion of federalism which focuses on its juridical understanding often emphasizes rigid division of powers, the federal principle has been successfully applied in many different forms under a variety of circumstances, and in a variety of political arrangements and relationships, thereby justifying its claim of flexibility.²¹⁵ There are many precedents of federalism. But, as Elazar has stated, we can do no more than learn from precedents where we cannot transplant them. Every region is unique. There is an utter necessity for inventing new legal-political devices that meet contemporary democratic standards. Every region will have to develop its own unique legal-political inventions.²¹⁶

1.6 Factors for the Success of Federalism

The first factor is the desire or will to employ federalism on the part of the polity involved.²¹⁷ However, the will for federalism is frequently paralleled, restricted, or aborted by other contradictory goals such as cultural, economic, military, political, or social which interfere with the implementation of federal principles.²¹⁸ Non-centralization is maintained to the extent that there is respect for the federal principle within each federal system. Further, federalism can exist only where there is a considerable tolerance for diversity and willingness to take political action through negotiation even when the legal power to act unilaterally is available. The prerequisite to action in a federal system is the ability to build consensus rather than the power to threaten coercion.²¹⁹ A federal society has to have sufficient homogeneity of fundamental interests, allow a great deal of latitude to local government in political operations, and place primary reliance

²¹⁵ *Exploring Federalism*, *supra* note 1 at 38.

²¹⁶ *Self Rule/Shared Rule*, *supra* note 6 at 11.

²¹⁷ *Exploring Federalism*, *supra* note 1 at 42.

²¹⁸ *Ibid.* at 42-3.

²¹⁹ *Ibid.* at 181.

upon collaboration.²²⁰ Therefore the successful establishment and maintenance of federalism requires a political environment conducive to popular government with the traditions of political communication, political cooperation, self-restraint, minimum use of coercion, and most of all, “thinking federal,” that is, being oriented towards the ideas and norms of republicanism and power sharing.²²¹

Second is said to be political culture. The viability of federal systems is directly related to the degree to which federalism has been internalized culturally within a particular civil society.²²² True federal systems manifest their federalism culturally, structurally and procedurally. Thus, the idea that society is made up by a series of interrelated compacts which allow the parties to come together for common purposes while retaining their respective integrities is deeply embedded in the cultures of authentic federal systems.²²³ Elazar argues that the imposition of ‘federal structures’ upon societies not attuned to federal relationships has rarely succeeded in creating genuine federal systems.²²⁴ On the other hand, some of the polities using federal arrangements sustain them despite lack of or inadequate constitutional guarantees because of culturally rooted support for the federal principle.²²⁵ Therefore federal principles sometimes take root even in

²²⁰ *Ibid.* at 191.

²²¹ *Ibid.* at 191-2. Switzerland is said to be a classic example of a polity that is federal to its core because its people “think federal” as a matter of second nature. See “Urbanism and Federalism,” *supra* note 60 at 31.

²²² See *Exploring Federalism*, *ibid.* at 192-197.

²²³ “Urbanism and Federalism,” *supra* note 60 at 30.

²²⁴ *Exploring Federalism*, *supra* note 1 at 78.

²²⁵ Some of the unions and consociations utilizing federal principles sustain those principles, despite seemingly inadequate constitutional guarantees, because of culturally-rooted support for them. The United Kingdom offers a good example of this. In Britain, political theorists began from the premise that polities were brought into being through political compacts, hence it was easy for them to envisage that a single nation or state could be divided into subsidiary polities, also contractual in formation, but with political rights stemming from ancient traditions of local self-government and individual liberties. They refer to biblical sources in support of this theory. The Netherlands is also a striking case where a historical commitment to local self-government is embodied both constitutionally in the form of its union and culturally through consociational arrangements. See “Urbanism and Federalism,” *supra* note 60 at 31 citing A. Lijphart, “Consociational Democracy” (1968/69) 21 *World Politics* 208; *Exploring Federalism*, *supra* note 1 at 78 and 141.

cultures emphasizing hierarchical relationships when the local cultures include strong traditional commitments to local autonomy within the constituent units, usually because the people have strong attachments to them.²²⁶ Successful federal systems thus seem to require an appropriate cultural basis.²²⁷ The next chapter discusses success factors of federalism in the Canadian political culture.

²²⁶ Germany and Austria in Europe and most Latin American federal systems are said to offer good examples of the possibilities and limitations of this alternate form of achieving a cultural basis for federal arrangements. See “Urbanism and Federalism,” *ibid.* at 31; *Exploring Federalism*, *ibid.* at 79.

²²⁷ See *Exploring Federalism*, *ibid.* at 79.

Chapter Two

Canadian Federalism

Canada has been described as one of the three classic examples of modern federalism in the world. This chapter reviews the Canadian model of federalism in search of the non-centralization that characterizes Elazar's federalism. The purpose is to show how the spirit and principles of federalism have permeated and transformed the Canadian system, due to the favourable culture and environment, regardless of the centripetal nature of its original conception and the unitary features of some of its traditional institutions. It also portrays the flexibility and adaptability of federalism to Canada's unique features, irrespective of the label federalism wears at any point in time. The findings support the thesis that conditions favorable for federalism are present in Alberta, and in fact the federal principle is being used functionally. The chapter starts with a discussion of Canadian federalism today and then gives a historical account of its original conception in the Macdonaldian era and its subsequent evolution. The chapter explores the nature of Canadian federalism and its institutions. The chapter concludes with suggestions for improving Canadian federalism.

2.1 Canadian Federalism Today

Canada has been described as a twentieth century carryover from the late modern-state building efforts, whose founders intended to be a centralized federation but instead has become a loose federation of highly independent provinces with leaders negotiating as equals with the federal government on most policy issues.¹ Regardless of the compartmentalization of federal and

¹ In fact, it was noted that K.C. Wheare questioned Canada should be considered a federal system at all. See D.J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987) at 12 [hereinafter *Exploring Federalism*] at 136 and 155 citing Richard Simeon, *Federal Provincial Diplomacy: The Making of Recent Policy in*

provincial jurisdictions in the Canadian Constitution, the realities of modern economic and social issues transcending jurisdictional boundaries have made the orders of government increasingly interdependent and compel them to provide solutions collaboratively.² It is now well recognized in Canada that the problems of modern government do not fall into the neat boxes of constitutional jurisdictions.³ The watertight compartments notion of federalism does not work in Canada anymore.⁴ For instance, geographic distance and significant immigration since the late nineteenth century have altered the character of urban centers giving rise to demands for services that do not fit comfortably into the traditional allocation of functions.⁵

Further, the life of the citizen is bifurcated and the orders of government overlap in the same citizen body, so that each order of government has a direct relationship with the citizens who directly elect representatives to each of the legislative bodies.⁶ The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at all planes.⁷ As authors in this field have noted, the activities of each plane of government often overlap and actions by one level can have major consequences for policies of the other. More

Canada (Toronto: University of Toronto Press, 1972); K. C. Wheare, *Federal Government*, 4th ed. (New York: Oxford University Press, 1964) at 18-20; and M. J. Esman, "Federalism and Modernization: Canada and the United States," (1984) 14 *Publius* 21.

² J.P. Meekison, H. Telford & H. Lazar, eds., *Canada: the State of the Federation 2002: Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004) 6 [hereinafter *Reconsidering the Institutions of Canadian Federalism*].

³ J. Chretien, "Address by Jean Chretien" (International Conference of the Forum of Federations, Mont Tremblant, Quebec, Canada, 6 October 1999) (1999) 29 *Publius* 11 at 13 [hereinafter "Address by Jean Chretien"].

⁴ H. Bakvis, G. Baier, and D. Brown, *Contested Federalism Certainty and Ambiguity in the Canadian Federation* (Oxford: Oxford University Press, 2009) at 7 [hereinafter *Contested Federalism*]. The notion of exclusivity and the reciprocal notion of non-encroachment by one level of legislature on the field of exclusive competence of the other gave rise to Lord Atkin's famous "watertight compartments" metaphor, where he wrote of Canadian federalism that "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure" in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 at 354 (P.C.). This sentence is from *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para. 34 [hereinafter *Canadian Western Bank*].

⁵ *Contested Federalism*, *ibid.* at 44.

⁶ *Ibid.* at 5.

⁷ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 66 [hereinafter *Reference re Secession of Quebec*].

importantly, this means that coherent policies in fields which cut across jurisdictions, or in which the policy instruments to deal with them are shared, can only be achieved if there is some degree of coordination, or of collaborative decision-making.⁸ This view gains support in the Supreme Court of Canada's recognition in the federal, provincial, and municipal laws, a tri-level regulatory regime for pesticides use. The Courts have endorsed this as the accepted model in the Canadian federal system.⁹ Consequently, Canadian federalism today is based on sharing and solidarity, and the idea of partnership is central to the Canadian approach.¹⁰ Interdependence, requiring considerable interaction between governments, has become the hallmark of Canadian federalism. It does not mean that one order of government exercises control over the other. It enables orders of governments to have a say in one another's activities, limits what governments can do on their own, and emphasize that they must pool or share their autonomy to collaborate.¹¹

Canadians are generally aware of the shared nature of power and decision-making in many policy fields.¹² The tension that Canadians witness sometimes is in part the outwards manifestation of the intergovernmental negotiation that is constant in a system of shared rule.¹³ According to former Prime Minister, Jean Chretien, "[w]hile we must respect each other's jurisdictions and powers, we need to work together. In Canada, we work very well together

⁸ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 6 citing R. Simeon, "Intergovernmental Relations in Canada Today: Summary of Discussion," in *Confrontation and Collaboration: Intergovernmental Relations in Canada Today*, R. Simeon ed. (Toronto: Institute of Public Administration of Canada, 1979) 4.

⁹ *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241 at para. 39 adopted in *Croplife Canada v. Toronto (City)* (2005), 254 D.L.R. (4th) 40 at para. 58.

¹⁰ Address by Jean Chretien, *supra* note 3 at 13.

¹¹ *Contested Federalism*, *supra* note 4 at xiv and 7.

¹² If only because they are routinely exposed to the wrangling and blame-shifting that comes with any sharing of governmental responsibility. The Provinces blame the federal government for the state of the health care system; the federal government harangues provincial governments on environmental issues such as climate change and cumulative effects; municipal governments plead for funds to improve the infrastructure and services that are ultimately essential to the prosperity of the country as a whole. See *ibid.*

¹³ *Ibid.*

despite what you may sometimes read, or even hear.”¹⁴ Thus, Chretien concluded that the essence of federalism is balance - a balance between different identities and a balance between local interests and larger interests.¹⁵ Over time, the Canadian federal experience has helped shape the Canadian personality. It has imbued Canadians with important values - instinctive tolerance, search for understanding and accommodation, appreciation of diversity, sense of solidarity, and commitment to dialogue.¹⁶

At the core of Canadian federalism is a commitment to recognizing regional and societal diversity and preserving self-government at a local level.¹⁷ Chretien’s speech appears to be an executive affirmation of the Supreme Court of Canada’s declaration on Canadian Federalism a year earlier in *Reference re Secession of Quebec*.¹⁸ The Supreme Court of Canada minced no words in stating that the principle of federalism runs through the political and legal systems of Canada, was a legal response to the underlying political and cultural realities that existed at Confederation, and continue to exist today.¹⁹ According to the Supreme Court, the federal structure of Canada facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to the diversity of interests.²⁰ Thus, federalism is for most Canadians inseparable from their image of their country.²¹ It is a fundamental attribute of the way in which Canada conducts its public

¹⁴ Address by Jean Chretien, *supra* note 3 at 13.

¹⁵ *Ibid.* at 12.

¹⁶ *Ibid.* at 13.

¹⁷ *Contested Federalism*, *supra* note 4 at 3.

¹⁸ *Reference re Secession of Quebec*, *supra* note 7 at paras. 57; *Patriation Reference*, [*Reference re Questions Concerning Amendment of the Constitution of Canada* as set out in O.C. 1020/80, [1981] 1 S.C.R. 753 at 905-9 [hereinafter *Patriation Reference*].

¹⁹ *Reference re Secession of Quebec*, *ibid.* at para. 55; *Canadian Western Bank*, *supra* note 4 at 21.

²⁰ *Reference re Secession of Quebec*, *ibid.* at para. 58.

²¹ G. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 5th ed. (Montreal: McGill-Queen's University Press, 2009) 1 [hereinafter *Unfulfilled Union*].

business. Even interest groups and political parties are structured federally, corresponding with the structures of government itself.²²

2.2 Original Conception of Canadian Federalism

Consistent with the covenantal political theory of federalism with its biblical roots, the term “Dominion of Canada” was inspired by Psalm 72 of the Bible which refers to “dominion from sea to sea and from the river to the ends of the earth.”²³ The term was suggested in 1864 by Sir Leonard Tilley²⁴ and embodied the vision of building a powerful, united, wealthy and free country that spanned a continent.²⁵ Whatever the motives behind the Canadian Confederation, the terms of what became Canada’s Constitution reflected a diversity of interests and motives and the ideological preferences of the colonial elites who attended the conferences at Quebec in 1865 and London in 1866.²⁶ Prominent among the ideologies was an enthusiasm for “a Constitution similar in principle to that of the United Kingdom,”²⁷ and a desire to avoid what were considered the undesirable aspects of the American Constitution.²⁸ Although the British Monarchy based on the hierarchical principle that political authority flows from the top downward had never before been combined with federalism, and in a sense seemed logically

²² *Ibid.* at 2.

²³ The title was written into the Constitution, was used officially for about 100 years. See Canada, Citizenship and Immigration Canada, *Discover Canada: the Rights and Responsibilities of Citizenship* (Ottawa: Citizenship and Immigration Canada, 2011) at 18 [hereinafter *Discover Canada*].

²⁴ An elected official and Father of Confederation from New Brunswick.

²⁵ See *Discover Canada, ibid.* at 18.

²⁶ *Ibid.* at 28 citing J. Pope, ed., *Memoirs of Sir John A. Macdonald* (Toronto: Oxford University Press, 1930) 242-43 [hereinafter *Memoirs*].

²⁷ This phrase appears in the preamble to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*) [hereinafter *Constitution Act, 1867*].

²⁸ John A. Macdonald in particular was said to be obsessed with the belief that the American Civil War might have been avoided if the American Constitution had granted only limited and specified powers to the individual states, rather than leaving them with residual powers not granted to the federal government. Macdonald had more favorable circumstances at the time of negotiating the Constitution than Alexander Hamilton of the United States whose views on federalism had been very similar to Macdonald’s. For more on this topic see *Unfulfilled Union*, *supra* note 21 at 28 citing *Memoirs*, *supra* note 26 at 242-43.

incompatible, it suited the kind of union that Macdonald and most of his colleagues wanted to create for Canada.²⁹

Consequently, the terms of the union embodied a centralist concept of federalism.³⁰ Legislative powers were said to be allocated so that the federal government could carry out the major motives of the Confederation.³¹ Parliament was given all legislative powers not specifically assigned to the provincial Legislatures.³² The federal government also retained sweeping powers to subdue the Provinces.³³ The concept was that the federal government would be subordinate to the British government and the Canadian Provinces would be subordinate to the federal government, with a British Governor General at the federal level and a federally appointed Lieutenant Governor in each Province, all of whom would have the power to “reserve” legislation for the final decision of the government that appointed him.³⁴ Further, the British government and the Canadian federal government respectively could disallow the legislation of the level of government immediately below them.³⁵

The judicial system revealed similar hierarchical notions. The federal government would appoint the judges of the provincial courts,³⁶ and it was understood, although unwritten, that the final court of appeal would be the Judicial Committee of the Privy Council which already exercised

²⁹ See generally *ibid.* at 28-29.

³⁰ In an 1868 letter Macdonald expressed his confidence that the centripetal forces would prevail as follows: “[t]he powers of the General Government are so much greater than those of the United States, in its relations with the local Governments, that the central power must win.” See *ibid.* at 33-4 citing J. Pope, ed., *Correspondence of Sir John Macdonald* (Toronto: Oxford University Press, 1921) 74-75 [hereinafter *Correspondence*].

³¹ *Unfulfilled Union*, *ibid.* at 30-31.

³² *Constitution Act, 1867*, *supra* note 27, s. 91 (the Peace, Order, and good Government clause).

³³ *Reference re Secession of Quebec*, *supra* note 7 at para. 55.

³⁴ The Lieutenant Governor has dual role as a federal officer and as the Chief Executive of the Province. See *Unfulfilled Union*, *supra* note 21 at 31 and 35 and *Constitution Act, 1867*, *supra* note 27, ss. 55 and 57.

³⁵ *Constitution Act, 1867*, *ibid.*, s. 56. See *Reference re Power of Disallowance & Power of Reservation (Canada)*, [1938] 2 D.L.R. 8, [1938] S.C.R. 71 (S.C.C.) [hereinafter *Reference re Power of Disallowance*].

³⁶ *Constitution Act, 1867*, *ibid.*, s. 96.

that function for all of the British Colonies.³⁷ These terms of the union embodied in the *Constitution Act*, 1867 led Wheare to conclude that Canada does not have a true federal Constitution and that the Canadian federal system was only partial.³⁸ Inherent in the Macdonaldian concept was the view that Canada was a nation with national interests. In order to pursue these national interests, the federal government was allocated extensive powers and the provincial powers were kept at a minimum with the intent that they not obstruct the pursuit of national interests. Macdonald's concept of federalism recognized that there are legitimate and genuine provincial, regional and local interests, but these are considered less important than the national interest. The task of representing these provincial, regional, and local interests was shared by both planes of government. The federal government represented the whole of the national interests, and a portion of provincial and local interests. Provincial governments represented only the portion of provincial and local interests that were not represented by the federal government.³⁹

2.3 Evolution of Canadian Federalism

In no time, the ideological preference of a Constitution "similar in principle to that of the United Kingdom" became unpopular, had little capacity to stir the masses, and became irrelevant as imperial ties grew weaker.⁴⁰ The reservation of legislation soon became unusual.⁴¹ The federal Parliament itself could not legislate in provincial areas of jurisdiction. It was also argued that virtually every provincial law which was disallowed by the federal government during the past fifty years would probably have been declared unconstitutional if passed by an American State

³⁷ *Unfulfilled Union*, *supra* note 21 at 31.

³⁸ Although he admitted that it functioned as a federal system in practice. See Wheare, *supra* note 1 at 18-20.

³⁹ See generally *Unfulfilled Union*, *ibid.* at 36-36 for the entire paragraph.

⁴⁰ *Ibid.* at 36-7.

⁴¹ Although the power was unexpectedly used in Saskatchewan as late as 1961. See *ibid.* at 31.

Legislature.⁴² The American States, at least after the fourteenth Amendment in 1869, enjoyed no more real autonomy than the Canadian Provinces.⁴³ Most importantly, the judicial interpretation of the *Constitution Act, 1867* transformed Macdonald's centralized quasi-federal Constitution, by which he hoped to avoid some of the perils of American federalism, into a federal Constitution not greatly different from that of the United States.⁴⁴ The Judicial Committee of the Privy Council ("Judicial Committee") in particular played a crucial role in undermining Macdonald's plans for a highly centralized federation,⁴⁵ and has been blamed by Canadian nationalists for weakening the federal government's ability to deal with national problems.⁴⁶

The broad interpretation of provincial powers by the Judicial Committee incrementally changed the dynamics of Canadian federalism from the original plan.⁴⁷ For example, in the 1892 decision of *Liquidators of the Maritime Bank vs. Receiver-General of New Brunswick*,⁴⁸ Lord Watson, a Scottish Conservative, who was the dominant influence on the Judicial Committee in the last decade of the nineteenth century laid down general rules for the interpretation of the *Constitution Act, 1867*.⁴⁹ Lord Watson declared that the *British North America Act* of 1867 had not altered the

⁴² *Ibid.* at 31. Some constitutional scholars contend that the federal power of disallowance has been abandoned: P. W. Hogg, *Constitutional Law of Canada* 4th ed. (Toronto: Thomson Carswell, 1997) at 120 cited in *Reference re Secession of Quebec*, *supra* note 7 at para. 55.

⁴³ See W.B. Munro, *American Influences on Canadian Government* (Toronto: Macmillan, 1929) 37 cited in *Unfulfilled Union*, *ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 47 citing R.A. Olmsted, *Decisions of the Judicial Committee of the Privy Council relating to the British North America Act, 1867 and the Canadian Constitution 1867-1954*, (Ottawa: Queen's Printer, 1954).

⁴⁶ *Unfulfilled Union*, *ibid.* at 72 citing B. Laskin, "Peace, Order and Good Government Re-examined," (1974) Canadian Bar Review XXV 1054-87; F. R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977).

⁴⁷ M. Papillon and R. Simeon, "The Weakest Link? First Ministers' Conferences in Canadian Intergovernmental Relations" in Meekison, Telford & Lazar, *supra* note 2 at 117 [hereinafter "The Weakest Link"] citing Canada, the *Report of the Royal Commission on Dominion-Provincial Relations*, vol. 1 (Ottawa: Queen's Printer, 1940) at 132-36, [hereinafter *the Rowell-Sirois Report*] for a discussion linking increased provincial influence to the establishment of regular federal-provincial collaboration.

⁴⁸ [1892] A.C. 437 [hereinafter *Liquidators*].

⁴⁹ *Unfulfilled Union*, *supra* note 21 at 49.

relationship between the Crown and the provincial governments, and that the object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs of common interest, with each province retaining its independence and autonomy.⁵⁰ Lord Watson's decision in *A.G. Ontario v. A.G. Canada*⁵¹ also had a practical effect of placing the federal and provincial planes of government on equal basis.⁵² In one of the judgments in the six "Bennett New Deal" cases,⁵³ Lord Atkin vaguely suggested that cooperation between the federal and provincial governments might resolve their conflict, but was not very explicit as to how the cooperation might be accomplished.⁵⁴

The Judicial Committee through their decisions placed their official stamp of approval on the American-style theory of federalism for Canada.⁵⁵ An independent inquiry was conducted to determine whether the distribution of powers in the 1867 Act reflected the intentions of the Fathers of Confederation, whether the Judicial Committee's interpretations had been faithful to those intentions and to the text of the Act, and whether any formal amendments were necessary. It reported that while the text of the Act was faithful to the intentions of the Fathers, the Judicial Committee had so completely distorted the meaning of the Act as to give Canada virtually a new Constitution.⁵⁶

⁵⁰ *Ibid.* at 50 citing *Olmsted*, *supra* note 45, 263-271; *Liquidators*, *supra* note 48 at para. 5.

⁵¹ [1896] A.C. 348.

⁵² *Unfulfilled Union*, *supra* note 21 at 50.

⁵³ See *Unfulfilled Union*, *ibid.* at 54-5.

⁵⁴ *Ibid.* at 56.

⁵⁵ *Ibid.* at 237.

⁵⁶ *Ibid.* at 57-8 citing Canada, Senate, session of 1939, Report by the Parliamentary Counsel Relating to the Enactment of the *British North America Act*, 1867, Any Jack of Consonance between its Terms and Judicial Construction of them and Cognate Matters. The Report was authored by W.F. O'Connor. However, G.P. Browne, in

The Supreme Court of Canada in 1875, established eight years after Confederation, demonstrated some independence in its early years but as time went on it increasingly deferred to the doctrines laid down by the Judicial Committee.⁵⁷ The Supreme Court has declared that the written text of the *Constitution Act, 1867* does not provide the entire picture of Canadian federalism.⁵⁸ The Canadian political and constitutional practice have consistently adhered to an underlying federal principle, and the written provisions of the Constitution have been interpreted in that light. According to the Supreme Court, although the federal power of disallowance was included in the *Constitution Act, 1867*, the underlying principle of federalism triumphed early. Thus, federalism as the dominant principle of Canadian constitutional law remains the central political/legal organizational theme, and the lodestar guiding Canadian Courts.⁵⁹

It has been noted that many of the tasks performed by the modern state, for example environmental regulation, are not explicitly enumerated in either of section 91 or 92 of the *Constitution Act*, and no conceivable reading of the *Constitution Act* would support the illogical distribution of tasks, functions, and powers between the two planes of government that has

his book, *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press, 1967) attempted to refute the O'Connor report, arguing that the Judicial Committee's decisions had been logical, consistent, and faithful to the terms of the *British North America Act*. Alan C. Cairns, in his article, "The Judicial Committee and its Critics," (1971) IV Canadian Journal of Political Science 301-45 admitted that while the Judicial Committee had its weaknesses (including its remoteness from Canada, its frequent changes of personnel, and its failure to explain its own motives) it had creatively adapted an over-centralized Constitution to a diversified country with most of its decisions, including those in the Bennett New Deal cases, which were in accordance with the wishes of most Canadians.

⁵⁷ *Ibid.* at 47. In *Reference re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373, the Supreme Court resurrected Viscount Haldane's interpretation of "Peace, Order and Good Government" as an emergency power rather than a residual power.

⁵⁸ *Reference re Secession of Quebec*, *supra* note 7 at paras. 56-7. However, almost three decades after the abolition of the Judicial Committee in Canada, the Supreme Court was accused of bias against the Provinces. The accusation was largely based on about half a dozen judgments between 1977 and 1981 against the Provinces pertaining to the sensitive policy areas of communications, language, and natural resources. See *Unfulfilled Union*, *supra* note 21 at 63. For more on the Supreme Court's bias towards centralization in the 1950s and 1960s, see also J. P. Meekison, H. Telford & H. Lazar, *The Institutions of Executive Federalism: Myths and Realities* (Kingston, ON: Queen's Institute of Intergovernmental Relations, 2003) 13-14 [hereinafter *Myths and Realities*].

⁵⁹ *Reference re Secession of Quebec*, *supra* note 7 at paras. 56-57; *Patriation Reference*, *supra* note 18 at 821.

actually emerged in practice.⁶⁰ To the extent judicial interpretation contributed to the shaping of Canadian federalism, it was instrumental in making the conditions favourable for the true federalism that emerged in Canada. The spirit of federalism once sowed, like the mustard seed, permeates and prevails where conditions are favourable. The Canadian federal Constitution was structured differently from the American model to avoid what was considered to be the American mistake. However, today, Canadian federalism has evolved very similar to the American model. The interaction of social forces and the federalism principles has resulted in significant disparity between the Macdonaldian concept in 1867 and the practice of federalism in Canada today.⁶¹

2.4 Non-Centralization in Canadian Federalism

Clearly, the Macdonaldian division of powers became a poor fit for the kinds of programs and services that Canadian citizens expect and demand.⁶² Similarly, some previous judicial constitutional interpretations have been found misguided and constitutional amending procedures proved too inflexible to permit essential changes.⁶³ The traditional institutional arrangements for intergovernmental relations proved less helpful and decision rules to resolve intergovernmental disputes are almost non-existent in the Canadian Constitution.⁶⁴ There was a dire need for a mechanism for coordination and cooperation between the federal and provincial governments especially with the growth in importance of policy areas exclusively under provincial

⁶⁰ *Reference re Secession of Quebec*, *ibid.* at 73.

⁶¹ *Contested Federalism*, *supra* note 4 at 44.

⁶² *Ibid.* at 12.

⁶³ The double failure of the Canadian Meech Lake and Charlottetown Accords to amend Canada's Constitution illustrates the point. *Ibid.* at xiii.

⁶⁴ *Ibid.*

jurisdiction.⁶⁵ However, due to the impact of the Macdonaldian concept, non-centralization became workable in Canada in various gradations.

2.4.1 Co-operative Federalism

At the turn of the 20th century and up to three decades following the Second World War, non-centralization was made operational to manage federal-provincial governments interdependencies through the administrative approach referred to as “co-operative federalism” (a phrase borrowed from United States). Administrative or co-operative federalism was very closely associated with the growth of conditional grants and shared cost programs.⁶⁶ It resulted in the proliferation of federal-provincial committees, councils, meetings, and other forms of contact at various levels of officialdom serving as forums for resolving intergovernmental problems in an administrative manner.⁶⁷ In all cases the federal spending power was the instrument that enabled the governments to work together.⁶⁸ Co-operative federalism was most likely successful if, among others, the officials who do the negotiating have real authority to speak on behalf of their governments; and there was not too much public interest in the matters at issue.⁶⁹ While the era of co-operative federalism was characterized by considerable policy interdependence among the orders of government, it was with varying degrees of hierarchy.⁷⁰

⁶⁵ “The Weakest Link,” *supra* note 47 at 116-7 citing the *Rowell-Sirois Report*, *supra* note 47 for a discussion linking increased provincial influence to the establishment of regular federal-provincial collaboration.

⁶⁶ *Unfulfilled Union*, *supra* note 21 at 221. The 1950s and 1960s characterized as the era of co-operative federalism, was the period when many of the federal-provincial shared cost social programs and equalization were introduced. *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 4-5.

⁶⁷ *Unfulfilled Union*, *supra* note 21 at 222. Sometimes these initiatives entailed a significant measure of federal leadership and coercion, such as medical insurance. In others the provinces were the driving force, such as hospital and diagnostic services insurance. Sometimes they are mutually agreed upon, such as the Canada Assistance Plan. See *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 4-5.

⁶⁸ *Reconsidering the Institutions of Canadian Federalism*, *ibid.*

⁶⁹ *Unfulfilled Union*, *supra* note 21 at 223 citing D. V. Smiley, *Constitutional Adaptation and Canadian Federalism Since 1945* (Ottawa: Queen’s Printer, 1970) at 111-18.

⁷⁰ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 4-5. It was stated that the co-operation of the provinces was frequently secured by the lure of “50-cent dollars.”

Apart from the underlying hierarchy this method became problematic because, as bureaucracies became larger, more powerful, more functionally specialized and more removed from partisan influence and pressure, they assumed increasingly autonomous roles in seeking accommodation with their counterparts.⁷¹ As specialists of various kinds came to predominate in certain sectors of the public service, they tended to discover that they held interests, goals, and assumptions in common with similar specialists at the other order of government, and that these took precedence over other considerations of intergovernmental relations and even constitutional propriety.⁷² Co-operative federalism resolved low profiled matters relating to the countervailing professional or program goals that cut across different orders of government and not on jurisdictional functions.⁷³ It tended to subordinate the power, status, and prestige of individual governments to programmatic objectives.⁷⁴

Moreover, due to the forging of specific intergovernmental links by different groups of specialized officials, cooperative federalism was characterized by fragmentation of authority within each order of government and absence of linkages between different issues and functional domains.⁷⁵ The lack of coordination and lack of public awareness led to a distrust of this approach and by the late 1960s administrative or co-operative federalism was already being transformed.⁷⁶ Intergovernmental conflicts were becoming too serious, too profound, and too sensitive to be safely entrusted to the managerial skills of subordinate officials.⁷⁷

⁷¹ *Unfulfilled Union*, *supra* note 21 at 222.

⁷² *Ibid.*

⁷³ *Ibid.* at 223.

⁷⁴ *Ibid.* at 222 and 223-4. Governments acquiesced in it for its flexibility and pragmatism and preferred it to seeking a clear judicial definition of jurisdictional boundaries.

⁷⁵ *Ibid.* at 225.

⁷⁶ Government could no longer control all the detailed activities of their departments. It was stated that Quebec nationalists argued that the proliferation of specialized and fragmented intergovernmental relationships, such as

2.4.2 Collaborative Federalism

Over the past quarter century, as the national government's fiscal contribution to provincial programs declined and became less conditional, the federal-provincial relationship became less hierarchical. This different kind of relationship, based on continued high levels of interdependence but greater parity among orders of government, was styled "collaborative federalism."⁷⁸ Collaborative federalism is said to be an "intergovernmental process by which national goals are achieved, not by the federal government acting alone or ... molding provincial behaviour through the exercise of its spending power, but by some or all of the 11 governments acting collectively."⁷⁹ Collaboration was described as "governments working together on a non-hierarchical basis in a way that reflects their interdependence."⁸⁰

Intergovernmental developments in social, environmental, internal trade, and First Nations policy fields between 1993 and 1997 reflected this kind of interaction.⁸¹ In 1999, the Auditor General of Canada noted an increase in what he termed "collaborative arrangements" or arrangements where "planning and decision-making is shared and governments were seeking joint solutions to common problems."⁸² However, it has been argued that in reality, Canada employs elements of co-operative, collaborative, and even classical federalism at any given time.

those that arose from shared-cost programs, was a potential menace to the integrity of their provincial state and its ability or willingness to defend its own interests. See *ibid.* at 221-2 and 225.

⁷⁷ *Ibid.*

⁷⁸ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 5.

⁷⁹ "The Weakest Link," *supra* note 47 at 114. citing H. Lazar, "Non-constitutional Renewal: Toward a New Equilibrium in the Federation" in H. Lazar, ed., *Canada: The State of the Federation 1997, Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1998) 25.

⁸⁰ Lazar, *ibid.*

⁸¹ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 8-9. The Social Union Framework Agreement signed by the federal government, all the provinces (except Quebec), and the two territories in February 1999, may be regarded as a kind of "Constitution" for, and a step towards, collaborative federalism.

⁸² J.M. Simmons, "Securing the Threads of Co-operation in the Tapestry of Intergovernmental Relations: Does the Institutionalization of Ministerial Conferences Matter?" in Meekison, Telford & Lazar, *supra* note 2 at 294 [hereinafter "Securing the Threads of Co-operation"].

Nonetheless, the Canadian federation will remain executive driven, and the need becomes particularly pronounced under collaborative federalism as it entails an intensification of the executive-to-executive process.⁸³

2.4.3 Executive Federalism

A distinctive feature of Canadian federalism is the emphasis on “executive federalism,” a pattern of interaction in which much of the negotiating required to manage the federation takes place between the executives of the orders of government.⁸⁴ Canada’s parliamentary system of government has had a powerful influence on the nature of its federalism.⁸⁵ The Prime Minister or Premier and Cabinet are all members of the federal Parliament or provincial Legislatures. They set the legislative agenda and by enforcing party discipline they can ensure the passage of the agenda.⁸⁶ This encourages executive dominance of the legislature at the federal and provincial levels.

This fusion of executive and legislative power in the Parliament meant that the intergovernmental process occurred at the executive level, having no other central institution for regional expression of views in national affairs.⁸⁷ The combination of parliamentary government and federalism led Donald Smiley to coin the term “executive federalism.”⁸⁸ Among the institutions of Canadian federalism, none has more influence on policy outcomes and the shape

⁸³ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 5 and 9. Classical federalism is Lord Atkin’s “watertight compartments” theory.

⁸⁴ *Contested Federalism*, *supra* note 4 at xii.

⁸⁵ *Ibid.* at 13.

⁸⁶ *Ibid.* at 14.

⁸⁷ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 6.

⁸⁸ *Ibid.* at 6 citing R.L. Watts, *Executive Federalism: A Comparative Analysis*, Research Paper No. 26 (Kingston: Institute of Intergovernmental Relations, 1989) 17.

of intergovernmental relations than executive federalism.⁸⁹ The importance of executive federalism stemmed not so much from the frequency of intergovernmental meetings but from the substantive decisions made by executives in these forums, including major social policies, economic and trade arrangements, and the revision of the Constitution itself.⁹⁰

2.5 Benefits and Problems of Executive Federalism

Executive federalism reinforces the government-to-government relations between orders of government and remains the core vehicle of intergovernmental relations in Canada.⁹¹ Because a limited number of actors are involved, it is easier to reach an agreement and intergovernmental agreements have become important elements of the Canadian governmental landscape especially with the Supreme Court of Canada's willingness to interpret them.⁹² It provides the only forum for expression and representation of regional interests. Executive federalism is therefore good for stability and can be an effective and beneficial way of managing conflicts in the federation.⁹³ Executive federalism was crucial in striking the original Confederation deal and in maintaining the stability of the federation over time.⁹⁴ It has also been central to determining the direction of Canadian federalism in a wide variety of policy areas, including federal-provincial financial relations, trade, health care and social policy.⁹⁵ It has continued to expand and deepen due to its

⁸⁹ *Contested Federalism*, *supra* note 4 at 14 citing D. V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987).

⁹⁰ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 6. Examples of issues resolved by executive federalism include the Canada and Quebec pension plans, tax-sharing, the financing of health, education and welfare, economic relations with the United States, regional development and investment, and the division of benefits from mineral resources. *Unfulfilled Union*, *supra* note 21 at 225.

⁹¹ *Contested Federalism*, *supra* note 4 at 14.

⁹² *Ibid.* at 15.

⁹³ *Ibid.*

⁹⁴ *Ibid.* at 16.

⁹⁵ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 15-16.

flexibility and capacity to quickly respond to new challenges and opportunities in public policy without the rigors of constitutional amendment.⁹⁶

Donald Smiley offered one of the most damning indictments against executive federalism:

My charges against executive federalism are these: First, it contributes to undue secrecy in the conduct of the public's business. Second, it contributes to an unduly low level of citizen-participation in public affairs. Third, it weakens and dilutes the accountability of governments to their respective legislatures and to the wider public. Fourth, it frustrates a number of matters of crucial public concern from coming on the public agenda and being dealt with by the public authorities. Fifth, it has been a contributing factor to the indiscriminate growth of government activities. Sixth, it leads to continuous and often unresolved conflicts among governments, conflicts which serve no purpose broader than the political and bureaucratic interests of those involved in them.⁹⁷

Executive federalism has especially been accused of eroding the power and influence of the legislature at both orders of government. Apart from proposals for major reforms to the constitution, parliament and provincial legislatures have been almost excluded from the processes of executive federalism. Due to the dominance of the executive in the parliamentary system, legislatures are weakened when they must legislate within the parameters of agreements reached by the executive in camera. Accountability to the legislature also suffers when executives of each government involved in an agreement can deny responsibility for undesirable features of the agreement by claiming they were insisted upon by the other governments involved.⁹⁸ Further, executive federalism may not be the best for transparency or accountability to the electorate.⁹⁹ The closed elitist nature of the executive network appears to concentrate

⁹⁶ *Ibid.* at 4.

⁹⁷ *Ibid.* at 6. R. Gibbins, "Shifting Sands: Exploring the Political Foundations of SUFA," in *Policy Matters/Enjeux publics*, 2, 3 (Montreal: Institute for Research in Public Policy, 2001) also argue that Parliament is locked out, the provincial and territorial legislatures are locked out, and so are Canadian citizens.

⁹⁸ *Unfulfilled Union*, *supra* note 21 at 228.

⁹⁹ *Contested Federalism*, *supra* note 4 at 15.

power in the hands of first Ministers (Prime Minister and Premiers) and the exclusivity of the intergovernmental process questions its legitimacy.¹⁰⁰ It has been suggested that citizens have a hard time identifying who specifically is responsible for the policies they live with.¹⁰¹ Thus, executive federalism appears to limit both the opportunities for citizens to participate directly in the making of public policy and more generally, their capacity to exercise control over their political representatives.¹⁰² Another view is that this approach encourages government by a “cartel” of federal-provincial elites, subordinating policy content to the imperative of consensus results in decisions that are vague, lowest common denominators.¹⁰³

Considerable time and effort have been expended to address the deficiencies of executive federalism.¹⁰⁴ Acknowledging that the Canadian system of government is dominated by the executive, authors have noted that any remedies not directly involving the executive were not likely to be successful.¹⁰⁵ Watts concluded that as long as Canada continues to combine parliamentary and federal systems, it will be difficult to eliminate executive federalism. Thus the focus should be on harnessing executive federalism in order to make it more workable.¹⁰⁶ For Dupre what matters is whether executive federalism provides the forum that is conducive, and perceived to be conducive, to negotiation, consultation and exchange of information; the

¹⁰⁰ *Ibid.* at xii.

¹⁰¹ *Ibid.* at 23 citing F. Cutler, “Government Responsibility and Electoral Accountability in Federations” (2004) 34 *Publius* 19.

¹⁰² *Ibid.* at 25.

¹⁰³ “Securing the Threads of Co-operation,” *supra* note 82 at 295 citing F.W. Scharpf, “The Joint Decision Trap: Lessons from German Federalism and European Integration” (1988) 66 *Public Administration* 239.

¹⁰⁴ The suggestions have ranged from disentanglement of the orders of government, reforming the traditional institutions to better represent provincial concerns and interests, to various proposals to improve the machinery of intergovernmental relations. See *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 6-7.

¹⁰⁵ *Ibid.* citing D. V. Smiley and R. L. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press, 1985) at 63; A. Cairns, *From Interstate to Intrastate Federalism in Canada*, Discussion Papers No. 5 (Kingston: Institute of Intergovernmental Relations, 1979).

¹⁰⁶ *Reconsidering the Institutions of Canadian Federalism*, *ibid.* at 7.

workability of executive federalism depends on the establishment of “trust ties” among intergovernmental decision-makers.¹⁰⁷

The chief, among other suggestions for improvement, is institutionalizing the key processes of executive federalism. In this regard, two types of executive federalism have been identified: “federal-provincial functional relations” and “federal-provincial summit relations”¹⁰⁸ and both have been analyzed with different types of Cabinet structure. In the departmentalized Cabinet structure, ministers are said to be endowed with a substantial measure of decision-making autonomy which redounds to the benefit of their departmental clients and bureaucracies. By contrast, the institutionalized Cabinet has various combinations of formal committee structures, established central agencies, and budgeting and management techniques combine to emphasize shared knowledge, collegial decision-making, and the formulation of government-wide priorities and objectives.¹⁰⁹ It was noted that, in general, the functional relations type of executive federalism operated more smoothly than summit relations, but summit relations could be improved by regularizing First Ministers’ Meetings.¹¹⁰

2.6 Preliminary Conclusion

From the foregoing, it is reasonable to conclude that the federal principle of non-centralization is present in Canadian federalism regardless of the centralized nature of its original conception and

¹⁰⁷ *Ibid.* at 7-8 citing J. S. Dupre, “Reflections on the Workability of Executive Federalism,” in R. Simeon ed., *Intergovernmental Relations* (Toronto: University of Toronto Press in co-operation with the Royal Commission on the Economic Union and Development Prospects for Canada, 1985) 1, 4 and 23.

¹⁰⁸ Such as the First Ministers’ Conference (“FMC”).

¹⁰⁹ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 8.

¹¹⁰ *Ibid.*

the unitary features of some of its traditional institutions.¹¹¹ Non-centralization is manifest, albeit with different labels,¹¹² in the whole body of intergovernmental collaboration at various gradations of institutionalization. Although the summit relations has not become as institutionalized as expected, intergovernmental developments do suggest that functional relations has become more fully established in several specific policy sectors.¹¹³ Interdependence has not only thrust the federal and provincial governments together, it is compelling new relationships with increased participants including territorial, municipal, and aboriginal governments.¹¹⁴ As the traditional institutions of the federation do not appear capable of handling intergovernmental relations, the burden of collaboration will continue to be borne by political executives.¹¹⁵ Developing appropriate institutions to accommodate these pressures and collaborations is one of the primary challenges for executive federalism.¹¹⁶ The next chapter examines how Canadian federalism has managed interdependencies between provincial and municipal governments.

¹¹¹ Elazar notes that Canada has non-centralized system. It has national government that functions powerfully in many areas for many purposes but not a central government controlling all the lines of political communication and decision making; provinces derive their authority directly from the people; structurally they are substantially immune to national interference; and functionally they share many activities with the national government but without forfeiting their policy-making roles and decision-making powers. *Exploring Federalism*, *supra* note 1 at 35.

¹¹² Co-operative federalism, collaborative federalism, and executive federalism. These all aim to achieve the same goal as the American "Partnership."

¹¹³ "Securing the Threads of Co-operation," *supra* note 82 at 286.

¹¹⁴ *Contested Federalism*, *supra* note 4 at 49.

¹¹⁵ *Reconsidering the Institutions of Canadian Federalism*, *supra* note 2 at 25.

¹¹⁶ *Ibid.*

Chapter Three

Municipal Government in Federal Systems

This chapter reviews the function of municipal government in federal systems, especially Canada, with a particular focus on Alberta. The purpose is to explain why it is necessary for host municipalities to be equal partners with the province for the common task of resolving socio-economic impacts of energy development on industry and host communities. The chapter shows that lack of constitutional status of municipalities in federal systems can be substituted with the practice of intergovernmental partnerships secured in constitutional conventions, political culture of federalism, and constitutional or regular statutes. While there has been an evolution in municipal law and policy in Alberta that moves towards embracing the federal principle, a deeper examination of the legislation reveals that the reform has not changed very much, especially in the energy development policy area. Notwithstanding the evolution municipalities, although more legally equipped than they were prior to 1994, are still far from being effective policy contributors despite their critical role in the society. They are still subject to provincial control through limitations and claw back provisions in Alberta's *Municipal Government Act* ("MGA")¹ and other powerful enactments such as the *Alberta Land Stewardship Act* ("ALSA")² discussed in detail in chapters 4 and 5 below.

The chapter explains the role and legal status of municipal governments in federal systems. It explores the relational status of Canadian municipalities with other planes of government, especially the provincial governments, to determine how non-centralization has been made operational in Canadian provinces. The discussion then narrows to provincial-municipal relations

¹ R.S.A. 2000, c. M-26.

² S.A. 2009, c. A-26.8.

in Alberta and the scope of municipal powers under the MGA. The doctrinal analysis of Part 2 of the MGA considers only areas relevant to energy resource development. The very brief analysis sets the stage for a detailed analysis in chapter 4 of the controversial scope of municipal powers over energy resource development in Alberta. It remains a live issue whether municipalities in Alberta can regulate energy resource development within municipal boundaries by virtue of their Part 2 general powers or specific powers under the MGA. Chapter 3 concludes with the effects of the reform of municipal enabling legislation in Alberta and whether it has indeed adopted the federal principles and improved coordination and cooperation between the province and its municipalities.

3.1 The Role of Municipal Government in Federal Systems

The modern era, mentioned in chapter one, witnessed the breakdown of the old aristocratic/feudal principles in favor of a new commitment to equality, the demand for the creation of a more democratic social and political order, and the concomitant need for the creation of new forms of local attachment and self-government.³ Accordingly, some of the interests of federalism in the modern era were to create more viable units of government to undertake new vast responsibilities, and to foster democracy by enhancing citizen participation in government.⁴ Since a character of federalism is territorial divisions of power, the territory itself is the basis for political action and legal division of power.⁵ Translating federal principles

³ D.J. Elazar, "Urbanism and Federalism: Twin Revolutions of the Modern Era" (1975) 5 *Publius* 15-17 [hereinafter "Urbanism and Federalism"].

⁴ *Ibid.* at 19.

⁵ According to Elazar, the federal system organizes people spatially so that they can make decisions through different centers, reflecting different scales of social complexity, thereby enabling them to express both their local and cosmopolitan views, their desire for limited government and expanded government services, their concern with the general welfare and with their own interests, simultaneously through different governmental units operating both in cooperation and in tension with one another. See D.J. Elazar, "Cursed by Bigness or toward a Post-Technocratic Federalism" (1973) 3 *Publius* 239 at 283 [hereinafter "Cursed by Bigness"].

into legal and political structures, real opportunities emerged for governmental arenas of all sizes and scope to act freely within the complexities of the whole, ranging from the immediately local to the most general and establishing compacts among them to safeguard these liberties.⁶ One of these new forms of governmental arena is the municipality. A municipality has been described as a political body formed by the residents of a particular region and having powers of a local nature that it can exercise autonomously.⁷ The existence of a municipality assumes: (a) a specific geographic region; (b) that this region is governed by its residents who elect the people to represent them; (c) powers of a local nature; and (d) a degree of autonomy that allows the municipality to exercise its powers, or at least a majority of them, freely without outside supervision, and which grants it its own source of revenue to do so.⁸

The place of municipalities in the intergovernmental system is not well understood.⁹ First, it is a mistake to assume that the technical satisfaction of service demands is the central goal of municipal government.¹⁰ The delivery of services is only a means for government to achieve the larger goal of building a good society, and the responses to these technical problems are

⁶ "Urbanism and Federalism," *supra* note 3 at 18-19; D.J. Elazar, *Building Cities in America : Urbanization and Suburbanization in a Frontier Society* (Lanham, MD: Hamilton Press, 1987) at 119 [hereinafter *Building Cities in America*]. This mosaic of governments allows the various points of view, and the contradictions which exist in the desires and interests of the citizens, to be expressed in different ways through each governmental plane. "Cursed by Bigness," *supra* note 5 at 283.

⁷ J. L'Heureux, "Municipalities and the Division of Powers" in R. Simeon ed., *Intergovernmental Relations* (Toronto: University of Toronto Press, 1985) 179 [hereinafter "Municipalities and the Division of Powers"].

⁸ *Ibid.*

⁹ J. Masson and E.C. LeSage Jr., *Alberta's Local Governments Politics and Democracy* (Edmonton: University of Alberta Press, 1994) at 26 [hereinafter *Alberta's Local Governments Politics and Democracy*].

¹⁰ "Cursed by Bigness," *supra* note 5 at 290-291. Municipal government is often misunderstood because there is little consensus on its goals. See *Alberta's Local Governments Politics and Democracy*, *ibid.* at 1. The very essence of municipal governments is a tension that runs through the whole study and practice of local government. A. Sancton, and R. A. Young, *Foundations of Governance: Municipal Government in Canada's Provinces* (Toronto, ON: University of Toronto Press, 2009) at 497 [hereinafter *Foundations of Governance*].

contingent upon the disposition of some sets of political and social concerns.¹¹ Second, local governments in federal systems exercise real power and continue to bear major responsibility for the conduct and administration of the domestic activities of government. They have made it possible for citizens to relate to governments that carry significant responsibilities and scaled to sizes more appropriate for communication.¹² Through the municipal governmental arena, federalism fosters a particular kind of communication between the governed and the governors, shapes the delivery of government services in the needed way, and serves as an antidote to political distance and size-intensified problems of government.¹³ Municipal government is said to be particularly important in Canada given the size of the country and the diversity of its people.¹⁴ By comparison, a bureaucracy of over two million civil employees divided into hundreds of agencies in a decentralized system is likely less capable of coordinating related programs on an interagency basis than municipal governments in a non-centralized system with its fewer departments that have the potential of communicating with one another.¹⁵ Third, as a legal and political unit, the municipality offers continued opportunities for diverse interests to exercise power and gain some measure of expression.¹⁶

Overall, as one of the focal points in the federal system, municipal government serves in five major capacities as: (a) acquirer of outside aid for local needs; (b) adapter of government

¹¹ Elazar argues that a city is people not only in the sense of the distribution of power but also in the sense that it necessarily reflects some conception of justice or the good commonwealth. *Building Cities in America*, *supra* note 6 at xv and xvii; “Cursed by Bigness,” *supra* note 5 at 290-1.

¹² “Cursed by Bigness,” *ibid.* at 282.

¹³ According to Elazar, the need for communication is a major one in a democratic society. Although technology seems to have reduced this problem, yet an average citizen must know whom to call and have the necessary resources. Just as political distance produced by geographic distances originally enhanced the importance of local government, political distance generated by population growth enhances their role today. Because of population increase, the actual distance between the governors and the governed has not changed significantly despite new technology for communication. *Ibid.* at 273-278 and 280 and 282.

¹⁴ “Municipalities and the Division of Powers,” *supra* note 7 at 182.

¹⁵ “Cursed by Bigness,” *supra* note 5 at 281.

¹⁶ “Urbanism and Federalism,” *supra* note 3 at 27.

functions and services to local conditions; (c) experimenter with new functions and services (or new twists for traditional ones); (d) initiator of governmental programs that spread across states and nation; and (e) a means by which a local community can secure an effective voice in governmental decisions that affect it (pay the ante necessary to sit in the game).¹⁷ As acquirer, municipal governments actively seek their communities' share of the limited resources to be distributed, as well as new investment opportunities. Municipalities play an important role in economic and investment matters by virtue of the services they offer and their powers over land use development and taxation.¹⁸ The role of municipal governments as economic drivers has come strongly to the fore in the governance of metropolitan regions. With high levels of urbanization, metropolitan regions have become the loci of economic productivity, and as such they have come to largely define the wealth and health of the nation.¹⁹ The local quality of life has become a prime determinant of the locational decisions made by investors and firms; thus municipal governments are vital for national competitiveness in the globalized economy as the locus of human capital and innovation.²⁰ The rise of the information economy, the digital revolution, international commerce, and vastly increased world trade and competition are leading to a concept termed "glocalism."²¹

¹⁷ *Building Cities in America*, *supra* note 6 at 141.

¹⁸ "Municipalities and the Division of Powers," *supra* note 7 at 192.

¹⁹ J. Kincaid, *Local Government and Metropolitan Regions in Federal Countries* (Montreal: McGill-Queen's University Press, 2009) at 4 [hereinafter *Local Government and Metropolitan Regions*].

²⁰ R. Gibbins, "Local Governance and Federal Political Systems" (2001) 53 *International Social Science Journal* 163 at 108, 167 and 169 [hereinafter "Local Governance and Federal Political Systems"]. It has been argued that cities have become the major drivers of economic prosperity. International cities, moreover, are now less willing to speak solely through their state or provincial governments as they now market themselves with less reference to their national or state-provincial location. With the recognition of the importance of large cities as the anchors of global city-regions, the traditional perspective has given way to the new perspective that global city-regions are the drivers of economic development and their national and subnational units are the bystander recipients of wealth generated by activities at the municipal level. *Foundations of Governance*, *supra* note 10 at 22.

²¹ Glocalism is a term used to describe the fact that as the economy becomes more international, the focus on comparative advantage shifts to local conditions. It was argued that the impact of globalization is felt most directly through the emergence of international cities as increasingly prominent features on the global landscape. Thus many states and provinces in mature federal systems pale in economic, social, and cultural power beside such cities as

As adapter, municipal governments adapt or modify existing governmental programs to meet local situations, acquire outside aids for carrying out policies and programs, and adapt those aids to their own local needs.²² Municipal government serves as initiator in situations where no readily available solution is apparent.²³ They develop policies and programs of their own within systems that are often too complex to allow them the luxury of isolation. For instance, population growth has brought new pressures for municipal governments on the front line, where citizens are impatient to get on with their lives and work.²⁴ Coupled with the emergence of the integrated postmodern service economy, municipal governments have to devise and incrementally advance services in response to demands by an increasingly mobile, educated, and observant public.²⁵ Their search for investment and involvement in local industrial development bring innovation.²⁶ As experimenter, a public program conceived locally is first tested locally before larger units of government adopt it in other communities.²⁷ A key advantage of federalism as a way of ordering political life is the presence of numerous communities and their governments that can experiment with solutions to pressing social, legal, political and economic questions.²⁸

The role of municipal government as a means of participating in the governmental process underlies all the other roles. Municipal governments exercise an array of executive and legislative powers including the power to levy taxes, regulate businesses, and determine land-use

Sydney, New York and Toronto. The notion of “glocalism” adds more weight to the suggestion that localities will become more important in the lives of citizens as a consequence of globalization. See C. Vander Ploeg, *Rationale for Renewal: The Imperatives Behind a New Big City-Provincial Partnership* (Calgary, AB: Canada West Foundation, 2005) at 42 [hereinafter *Rationale for Renewal*]; “Local Governance and Federal Political Systems,” *supra* note 19 at 167-168.

²² “Urbanism and Federalism,” *supra* note 3 at 25.

²³ *Building Cities in America*, *supra* note 6 at 143.

²⁴ “Cursed by Bigness,” *supra* note 5 at 283.

²⁵ J. Lightbody, *City Politics, Canada* (Toronto: University of Toronto Press, 2005) at 344-45 [hereinafter *City Politics*].

²⁶ “Municipalities and the Division of Powers,” *supra* note 7 at 192.

²⁷ *Building Cities in America*, *supra* note 6 at 143.

²⁸ *Rationale for Renewal*, *supra* note 21 at 20.

and various developments.²⁹ There is a strong argument that their impact on the daily lives of citizens is, at least, as much as that of other orders of government.³⁰ The municipal order of government is the one closest to and the most accessible by the people, the one in charge of the infrastructure of everyday life, and one of the primary sites for participation in democratic government.³¹ Therefore municipal government serves as the base of operations or a focal point within the governmental complex enabling a community to gain and maintain support, money, aid, recognition, representation, and other goals within the system.³²

It is through its government that a local community pays the *ante* required to sit in the governmental game.³³ They enable their residents to settle their own local problems, establish services that correspond to their own needs, and obtain the quality of life that corresponds to their preferences.³⁴ As such the municipality is a source of local independence, ensuring that its residents are represented, since opportunities for popular participation at the federal and provincial planes of government are rather limited.³⁵ Further, the populace has little hope of being able to influence decisions significantly. The citizen's feeling of impotence and frustration in this regard would increase were it not for municipalities which act as counterweight to the vast structure of the state.³⁶ Alexis de Toqueville, repeatedly quoted, once said that a nation may

²⁹ H. Bakvis, G. Baier, & D. Brown, *Contested Federalism Certainty and Ambiguity in the Canadian Federation* (Oxford: Oxford University Press, 2009) at 220 [hereinafter *Contested Federalism*].

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Building Cities in America*, *supra* note 6 at 143.

³³ *Ibid.*

³⁴ "Municipalities and the Division of Powers," *supra* note 7 at 182.

³⁵ *Ibid.* at 180.

³⁶ Although Canada is one of the most democratic countries in the world, participation by people in provincial and federal government is limited to voting every four to five years for a party, and for a leader who, in his party has an absolute majority, will govern like a king with the aid of a few ministers, advisors and civil servants. It was argued that this sort of democracy is no longer adequate as it originated in an era when the populace was relatively uneducated. On the municipal level, popular participation remains possible. See generally *ibid.* at 180-181.

establish a free government, but it cannot possess the spirit of liberty without municipal institutions.³⁷

3.2 Legal Status of Municipalities in Federal Systems

Despite the vital role they play in the social and economic well-being of a country as a whole the municipal plane finds no formal reflection in most federal constitutional design.³⁸ In the older federal systems, as in Canada and United States, the essential bargain is between a general government and state/provincial governments.³⁹ In such cases, municipal governments occupy a constitutionally subordinate position and have been legally described as the creatures of their states or provinces.⁴⁰ The legal lives of municipal governments in United States and Canada was shaped by ironclad grip of Dillon's Rule initiated by the ruling of an Iowa State judge, John Dillon, who declared in 1868 that: "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy." Regarding the power relationship between states and their local units Dillon was said to have formulated the rule as follows: (1) there is no common-law right of local self-government; (2) local entities are creatures of the state, subject to creation and abolition at the unfettered discretion of the state (barring state constitutional limitations); (3) localities may exercise only those powers expressly granted; (4) localities are mere tenants at the will of the legislature.⁴¹

³⁷ *City Politics*, *supra* note 25 at 373 citing A. de Toqueville, *Democracy in America* Vol. I (London: Oxford University Press, 1946 [1835]) chapter 5.

³⁸ "Local Governance and Federal Political Systems," *supra* note 20 at 167.

³⁹ D.J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987) at 187 [hereinafter *Exploring Federalism*].

⁴⁰ *Ibid.*

⁴¹ See *City of Clinton v. Cedar Rapids and Missouri River Railroad* (1868), 24 Iowa 455.

Judge Thomas Cooley of the Michigan Supreme Court did not share Dillon's construction of local governments and had held that local governments had an inherent right of self governance. But Dillon's Rule enjoyed the most legal and popular support. As a result, reformers encouraged state legislatures to enact, or place on the ballot through referendum, constitutional or statutory provisions that gave the municipal government powers to tax, legislate, provide services, and otherwise meet the various needs of local citizens. In response, the municipal government home rule was granted by constitutional provisions in thirty-six states and by statute in eight states in United States of America.⁴² Accordingly, the state or provincial government is the source and central authority for all the municipal governments within its boundaries and the state/provincial legislature serves as the constituent assembly for municipal governments, creating and defining them, limiting or extending their powers, and delimiting the forms of government they could adopt.⁴³

The marginalization of municipal governments in the constitutional and institutional structures of some federal states has been questioned.⁴⁴ As discussed below, the Supreme Court of Canada has recognized municipal governments as democratic institutions and an order of government more attuned to the immediate needs and concerns of the citizens. The Supreme Court also declared a tradition of strong local government as an important part of the Canadian democratic experience.⁴⁵ Beginning in 1994, some Canadian municipal enabling statutes have recognized municipalities as a distinct order of government.⁴⁶ Given its recognition and role as an integral

⁴² See generally, *Local Government and Metropolitan Regions*, *supra* note 19 at 373.

⁴³ *Building Cities in America*, *supra* note 6 at 144.

⁴⁴ "Local Governance and Federal Political Systems," *supra* note 20 at 167.

⁴⁵ Per LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 at para. 33 (S.C.C.) and *114957 Canada Ltee (Spraytech, Societe d' arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, (2001) 200 D.L.R. (4th) 419 at para. 49 [hereinafter *Spraytech*].

⁴⁶ Especially, British Columbia and Ontario.

part of federal governance system, municipal government ought to be legally recognized as a partner in government.⁴⁷ If municipal government is about collective choices that represent the will of the community in respect of its future direction, with a vision of its place in the state, province or country and an appreciation of its policy needs, it should be given the opportunity to enter intergovernmental policy arenas and negotiate successfully to achieve its objectives since it has the legitimacy that comes through democratic processes.⁴⁸ As a community of people endowed with political and legal authority in matters over which it has jurisdiction, municipalities should not be constantly controlled by other administrative authorities.⁴⁹ Municipal governments in federal polities, through their duly constituted governments, should be allowed to participate as bargainers in the issues affecting them.⁵⁰

This thesis acknowledges the real limitations to absolute local control in a complex interdependent federal system and does not advocate such concept. In fact, one of the insights of federalism is that completely autonomous community control has grave disadvantages, as it is likely to lead to social polarization, intense political conflict within units that are too small to limit the struggles of faction, and ultimately rule by tyranny or oligarchy.⁵¹ Moreover, the arguments for small-scale community are counterbalanced by arguments for the efficiencies of larger-scale governmental activity in certain fields.⁵² Therefore the emphasis of the federal idea is not on absolute local control, but on non-centralization comprising partnership, negotiation, and sharing which offer a way to achieve most if not all desired objectives.⁵³

⁴⁷ *Local Government and Metropolitan Regions* *supra* note 19 at 3-4.

⁴⁸ *Foundations of Governance*, *supra* note 10 at 498.

⁴⁹ "Municipalities and the Division of Powers," *supra* note 7 at 180.

⁵⁰ *Building Cities in America*, *supra* note 6 at 119.

⁵¹ "Cursed by Bigness," *supra* note 5 at 294.

⁵² *Building Cities in America*, *supra* note 6 at 131.

⁵³ *Ibid.*

Elazar has argued that no municipal government, not even New York City, can “go it alone.”⁵⁴ Municipal governments, as part and parcel of the federal system, no longer function in isolation from one another or from the other planes of government.⁵⁵ Municipal governments have to cope with the reality that the interdependencies of the modern age have changed the nature of some state functions.⁵⁶ Thus municipal functions have become inseparably linked, not only with each other, but with functions of state/provincial and national governments. In urban centers citizens’ concerns about pollution, crime, poverty, and inadequate infrastructure resonate with all orders of government.⁵⁷ The interdependences place a greater burden on all governments in a federal system to act more harmoniously, to manage conflict better, and to cooperate more effectively when required.⁵⁸ More frequently, the response is some form of partnership arrangement, among the planes of government involved, which permits the representatives of each a say and sometimes a veto.⁵⁹ While every governmental plane may be involved in all governmental activities, each has its own locus of power and control that jointly provide focal points for the organization of the system.⁶⁰

The implications of a federal constitutional-legal framework for municipal government are many and varied.⁶¹ Municipal government seems to have a more secure place in constitutional convention and political culture than it does in written constitutional text.⁶² In some older federal

⁵⁴ *Ibid.* at 124.

⁵⁵ *Ibid.* at 137.

⁵⁶ *City Politics*, *supra* note 25 at 344-45.

⁵⁷ *Local Government and Metropolitan Regions*, *supra* note 19 at 107.

⁵⁸ *Contested Federalism*, *supra* note 29 at 220.

⁵⁹ See *City Politics*, *supra* note 25 at 349-350 citing C. Leo, “The State in the City: A Political-Economy Perspective on Growth and Decay” in J. Lightbody ed., *Canadian Metropolitics: Governing Our Cities* (Toronto: Copp Clark, 1995) 27 at 36-37.

⁶⁰ *Building Cities in America*, *supra* note 6 at 138.

⁶¹ *Exploring Federalism*, *supra* note 39 at 187.

⁶² “Local Governance and Federal Political Systems,” *supra* note 20 at 163.

systems non-centralization and territorial democracy are made operationally effective by intergovernmental partnerships based on a near universal sharing of functions among governments on all planes.⁶³ This involves a whole complex of deep-seated governmental and political arrangements designed to recognize and accommodate national and local interests. Those arrangements preserve the basic integrities of the several governments that participate in the system, while mobilizing sufficient energy to maintain and develop positive public programs.⁶⁴

In the United States, for example, even with the increased role of the state and national governments in local affairs the cultural bias towards local self-government has survived regardless of who stimulates or finances them.⁶⁵ The basic non-centralized relationship between the national government and the states was extended *de facto* through the political process to municipal governments and was affirmed *de jure* in the overwhelming majority of state Constitutions through local home rule provisions.⁶⁶ Accordingly American municipal governments, although they remain theoretically the creatures of their states, have gained a substantial measure of entrenched legal and political powers because they have been able to capitalize on the spirit of non-centralization in their day-to-day operations and in their bargaining with other governments.⁶⁷ Thus, structurally, the American governmental partnership consists of the national government, the states, and the duly constituted units of municipal governments

⁶³ "Urbanism and Federalism," *supra* note 3 at 33-4.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 188-9.

⁶⁶ *Ibid.* at 187.

⁶⁷ *Ibid.* at 188 citing M. Grodzins, *The American System: A New View of Government in United States* (Chicago: Rand McNally, 1966); P. Ylvisaker, *Intergovernmental Relations at the Grassroots* (Minneapolis: University of Minnesota Press, 1956); "Urbanism and Federalism," *supra* note 3 at 25.

within the states.⁶⁸ Municipal governments became partners in the American system because as governmental units they can “pay the ante” to sit in on the governmental game.⁶⁹ In this respect local governments, no matter how limited in power and scope, are more real from a legal, political and governmental point of view.⁷⁰ The result is a partnership that, while by no means perfect, has endured productively since the founding of the American republic.⁷¹

Elazar argues that this American way of partnership has made much of the old “home rule” argument obsolete, as it was predicated on the possibility of separating functions by governmental “level.”⁷² Therefore the old home rule expectations are replaced by a federal theoretical framework more appropriate to current conditions, and properly applied to contemporary problems.⁷³ Further, it is a known fact that the powers of municipal government under any grant of authority by states, whether restricted or expansive, can be affected and altered by statutory or constitutional amendment, although constitutional changes are more difficult to enact than statutory changes.⁷⁴

⁶⁸ Although the basic forms of the partnership are set forth in the American Constitution, the actual character of the federal system is delineated and made functional only “partly” by the federal constitutional devices. *Building Cities in America*, *supra* note 6 at 124-5.

⁶⁹ Elazar states that the national government pays through its superior fiscal capabilities and funding powers, the states pay by being the keystone in the governmental arch in most domestic activities under the Constitution, and the local governments pay by constituting government for themselves and for their special local interests, therefore by their very existence as legal entities they must be allowed to sit in when they choose. See *ibid.* at 124 and 127.

⁷⁰ *Ibid.* at 124.

⁷¹ *Ibid.* at xxii.

⁷² *Ibid.* at 124.

⁷³ *Ibid.* at xxiv. Home rule was a concept designed to introduce, by compact, what the English tradition of government denies in principle, the right to local governmental autonomy.

⁷⁴ *Ibid.*

In contrast to the American local government, Elazar observed that Canada, of all federal systems, provides the least recognition of local self-rule formally or in practice.⁷⁵ Canada has a long tradition of control of municipal governments and their activities.⁷⁶ Constitutionally, “Municipal Institutions in the Province” fell within matters which provincial legislatures “may exclusively make Laws.”⁷⁷ Consequently municipal governments are said to have inferior or subordinate legal status because they enjoy only powers delegated to them by provincial legislature.⁷⁸ Because Canadian provinces do not have separate constitutions as the American States, the framework within which municipalities operate is established by regular statutes amenable to amendment at any time.⁷⁹ Municipal Acts (or their equivalents) lay out the governance structures of municipalities and enumerate their functions. Other provincial enactments also prescribe, affect or proscribe the activities of municipal government.⁸⁰

The scope of provincial control over municipalities is largely unfettered, and municipal responsibilities, boundaries or powers, financial resources, including abolishment of individual

⁷⁵ Elazar concludes that it was on this basis that several Canadian provincial governments have felt free to unilaterally consolidate municipalities under single governments or to reorganize existing municipal jurisdictions into metropolitan federations, steps which would not be tolerated in either United States or Switzerland despite the legal powers of the States and Cantons to do so. See *Exploring Federalism*, *supra* note 39 at 189. According to Elazar, such actions, based as they are on notions of hierarchy and the conceptions of administrative efficiency that flows from such notion, fly in the face of the realities of a system of diffused power where efficiency demands a matrix of authoritative jurisdictions. See *Building Cities in America*, *supra* note 6 at 119.

⁷⁶ *Local Government and Metropolitan Regions*, *supra* note 19 at 107.

⁷⁷ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*), s.92(8). Rogers argues that five powers support the legal foundation of municipal government in Canada: s. 92(2) - Direct taxation within the Province; s.92(7) – The establishment, maintenance, and management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province other than Marine Hospitals; s.92(9) – Shop, Saloon, Tavern, Auctioneer, and other licenses, in order to the raising of a revenue for provincial, Local or Municipal purposes; and s. 92(10) – Local works and undertakings. See I. M. Rogers, *The Law of Canadian Municipal Corporations* 2nd ed. (Toronto: Thomson Canada Ltd, 2003) vol. 1.

⁷⁸ F. Hoehn, *Municipalities and Canadian Law Defining the Authority of Local Government* (Saskatoon: Purich Publishing, 1996) 1.

⁷⁹ *Local Government and Metropolitan Regions*, *supra* note 19 at 113.

⁸⁰ *Ibid.*

municipalities, can be altered by votes of the provincial legislature.⁸¹ Unlike an American State, a Canadian province does not have rigid separation of powers and the executive's majority in the legislature is often overwhelming.⁸² Therefore no matter how large or self important they may be, municipal governments may not pursue innovative policy choices (even if validated by electors' demands or legitimized by the relevant policy community) should the respective province's legislation not specifically permit them to do so.⁸³

Historically, from the *Municipal Corporations (Baldwin) Act* of 1849 until 1993, the practice in Canadian municipal enabling statutes, modeled on the Dillon's Rule discussed above, was to narrowly define, detail or itemize specific powers granted to municipalities.⁸⁴ Consequently, the courts adopted the "express authority doctrine" as the traditional approach to interpreting municipal enabling statutes. The courts scrutinized municipal powers so intensely that any valid exercise of municipal authority must be founded on a provision of the enabling statute.⁸⁵ The legal constraints placed on the exercise of municipal powers were both legislative and judicial in origin.⁸⁶

⁸¹ Library of Parliament, *Municipalities, the Constitution, and the Canadian Federal System* (Background Paper) by M. Dewing, W.R. Young & E. Tolley (Ottawa: Library of Parliament Parliamentary Research Service, 2006) at 2 [hereinafter *Municipalities, the Constitution*] citing H. M. Kitchen and M. L. McMillan, "Local Government and Canadian Federalism," in R. Simeon, ed., *Intergovernmental Relations* (Royal Commission on the Economic Union and Development Prospects for Canada, No. 63) (Toronto: University of Toronto Press, 1985) at 220.

⁸² G. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 5th ed.. (Montreal: McGill-Queen's University Press, 2009) at 228-229 [hereinafter *Unfulfilled Union*].

⁸³ *City Politics*, *supra* note 25 at 345-346.

⁸⁴ *Local Government and Metropolitan Regions*, *supra* note 19 at 113. Prior to the Canadian Confederation in 1867, Upper and Lower Canada were united by the 1841 *Act of Union*, which provided the two colonies with responsible government. One of the major pieces of legislation to emerge at that time was the *Baldwin Act* of 1849, which established the role, function, and structure of municipalities. A defining feature of the *Baldwin Act* was its prescriptive nature outlining precisely and specifically what municipalities could and could not do. Most provincial statutes enabling municipal governments derived their essence from the *Baldwin Act*. See *Rationale for Renewal*, *supra* note 21 at 10 and 23.

⁸⁵ Hoehn, *supra* note 78 at 1.

⁸⁶ S.M. Makuch, N. Craik, & S.B. Leisk, *Canadian Municipal and Planning Law* 2nd Edition (Toronto: Thomson Canada Ltd., 2004) 75.

The express authority doctrine modeled on the Dillon's Rule was applied in Canada in 1895 by the Ontario Court of Appeal in *Merrit v. Toronto (City)*,⁸⁷ was formally adopted in 1906 by the same court in *Ottawa Electric Light Co. v. Corporation of Ottawa*⁸⁸ and confirmed by the Supreme Court of Canada in *Verdun (City) v. Sun Oil Co.*⁸⁹ One of the consequences of the Dillon's Rule was that general powers/welfare clauses in enabling statutes did very little to enhance municipal jurisdiction and were rarely effective.⁹⁰ In *Morrison v. Kingston (City)*⁹¹ the court, called upon to interpret the municipal power to make regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided in the Act, stated:

...These topics are entirely removed from the sphere of legislation of municipal councils. The power to legislate for the "welfare" of the inhabitants is too vague and general to admit of definition. It may mean so much that it probably does mean very little. It cannot include powers that are otherwise specifically given, nor can it be taken to confer unlimited and unrestrained power with regard to matters in which a conditional power only is conferred upon the subsidiary Legislature.

Thus, it was frustrating for municipalities, where specific provisions of the enabling legislation relate to the subject matter of a bylaw and yet fall short of expressly authorizing it, that specific provisions will serve to exclude recourse to the general grant.⁹²

⁸⁷ (1895), 22 O.A.R. 205 (C.A.).

⁸⁸ (1906), 12 O.L.R. 290 (C.A.) at 299 where Garrow J.A., quoting Dillon on Municipal Corporations, held that, "The rule of construction to be followed is, I think, correctly set forth in Dillon on Municipal Corporations, 4th ed., sec. 89, where he says: "it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others, first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." a summary of the rule not at variance, I think, with the cases referred to in the judgment of the learned Chancellor as I understand them."

⁸⁹ [1952] 1 S.C.R. 222 at 228.

⁹⁰ Hoehn, *supra* note 78 at 2-3 citing *Ward v. Edmonton (City)*, [1932] 3 W.W.R. 451 (Alta. S.C.) as one of the rare occasions where such general power clauses were helpful.

⁹¹ [1937] 4 D.L.R. 740 at 744 (C.A.).

⁹² Hoehn, *supra* note 78 at 7.

However, things began to change by the 1990s when the Supreme Court of Canada had the opportunity to review the operation of the Dillon's Rule and the efficacy of a general power clause in *R v. Greenbaum*.⁹³ The court pronounced that municipal bylaws are to be read to fit within the parameters of the empowering provincial statutes where the bylaws are susceptible to more than one interpretation. This became known as the expansive interpretation/benevolent approach. It has been argued that the decision in *Greenbaum* did not change the *status quo*, since the rejection of all four sections of the *Municipal Act* relied on by the municipality as sources of authority for the bylaw was consistent with the Dillon's Rule and the express authority doctrine.⁹⁴ Yet it cannot be denied that this case heralded an awakening, albeit slightly, of judicial recognition of the nature and role of municipal government. In light of the concurrent application by the courts of the "express authority doctrine" and the "benevolent approach" to municipal enabling statutes, what ensued was conceptual confusion and inconsistency.⁹⁵ While paying lip service to benevolent construction, the courts still adhered to the Dillon's Rule.

Recognizing this chaos and the distinct nature of modern municipal government, the Supreme Court of Canada in a series of decisions, without abandoning the requirement for express authority for the exercise of municipal powers, adopted what came to be known as the rational or purposive approach. Thus, in *Shell Canada Products Ltd. v. Vancouver (City)*,⁹⁶ the Supreme Court applied the purposive approach to interpret the general power clause and thus enunciated the "municipal purpose" test. The court considered whether the municipal bylaw based on a general welfare clause has sufficient municipal purpose to be *intra vires*. It concluded that the

⁹³ [1993] 1 S.C.R. 674, 100 D.L.R. (4th) 183 [hereinafter *Greenbaum*].

⁹⁴ Hoehn, *supra* note 78 at 7.

⁹⁵ Makuch *et al.*, *supra* note 86 at 85.

⁹⁶ [1994] 1 S.C.R. 231 at paras. 97-100 [hereinafter *Shell*].

purpose of the municipal resolutions, which affected matters beyond the boundaries of the City without any identifiable benefit to its inhabitants, was unrelated to the achieving the intent and purpose of the enabling legislation. The Supreme Court of Canada was called upon yet again⁹⁷ in *114957 Canada Ltee (Spraytech, Societe d' arrosage) v. Hudson (Town)*⁹⁸ to rule on a bylaw passed pursuant to a general power clause in the *Cities and Towns Act* of Quebec. The court, applying the purposive approach more broadly than usual, expanded the general welfare powers conferred by municipal enabling legislation. The court concluded that the bylaw was *intra vires* the municipal jurisdiction based on the general power to regulate matters pertaining to health, safety and general welfare for municipal purposes.

The purposive approach was firmly endorsed as the proper approach to the interpretation of municipal powers by the Supreme Court in *United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)*.⁹⁹ Bastarache J. acknowledged that the evolution of the modern municipality has produced a shift to the proper approach to interpretation which empowers municipalities, and this interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. More recently the Alberta Court of Queen's Bench has held that, when reviewing the decisions of an elected municipal council, unelected courts must respect the limits of their role in a democracy and to only interfere in the decisions of an elected council to the extent necessary to uphold constitutional values and statutory limitations and to ensure that the municipal council acted legally and reasonably.¹⁰⁰ In this regard, reasonableness means that courts must respect the responsibility of elected representatives to serve the people who elected

⁹⁷ See also *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, (2000), 9 M.P.L.R. 3(d) 1 (S.C.C.).

⁹⁸ *Spraytech*, *supra* note 45.

⁹⁹ [2004] S.C.J. No. 19 (S.C.C.) at paras 6-8, online: QL [hereinafter *United Taxi*].

¹⁰⁰ *Northland Material Handling Inc. v. Parkland (County)*, 2012 ABQB 407 at para. 38 [hereinafter *Northland*].

them and to whom they are ultimately accountable.¹⁰¹ The broad and purpose approach now seems to be the trend in judicial interpretation of municipal powers in Canada.¹⁰²

While Courts point to the modern drafting style of municipal legislation for the recent evolution in judicial approach to interpretation of municipal statutes, it was also argued that the modern legislative drafting style was a legislative response to the Dillon's Rule.¹⁰³ An example of the modern municipal legislative drafting style, and indeed the first of its kind in Canada, is Alberta's 1994 MGA of which its modern features and significance are examined below. Since then sweeping reforms have been implemented in other provinces, notably British Columbia, Ontario, and Manitoba.¹⁰⁴ The broad thrust of the reforms was to increase municipal autonomy by laying out general purposes for local government, granting wide spheres of jurisdiction, and conferring natural person powers that allow more latitude in business matters.¹⁰⁵ Particularly, the British Columbia statute¹⁰⁶ reduced provincial oversight, stipulated that amalgamations would require the consent of affected communities, and mandated consultation with the Union of British Columbia Municipalities prior to making major functional or financial changes.¹⁰⁷ In Ontario the amendments also mandated the province to consult with municipalities in accordance

¹⁰¹ *Catalyst Paper Corp. v. North Cowichan (District)* (2012), 34 Admin. L.R. (5th) 175, 2012 SCC 2 at para. 19.

¹⁰² In *Croplife Canada v. Toronto City*, [2005] O.J. No. 1896, at para. 37, online: QL, Feldman, J.A. of the Ontario Court of Appeal applied this approach to uphold the City of Toronto's bylaw regulating the use of pesticides passed under the general power clause of the new Ontario *Municipal Act*, 2001, S.O. 2001, c.25. The court declared that absent an express direction to the contrary in the enabling legislation the jurisprudence from the Supreme Court is clear that municipal powers, including general welfare powers, are to be interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of the municipality and its inhabitants. See also *Holowatiuk v. Beaver County*, [2008] A.J. No. 570, ABQB 290 where the Alberta Court of Queen's Bench stated that the traditional approach to municipal legislation was changed in 1994, when Alberta adopted the current MGA which now gives municipalities broad powers to legislate as it sees fit within certain 'spheres of jurisdiction.'

¹⁰³ *Local Government and Metropolitan Regions*, *supra* note 19 at 113.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Community Charter*, SBC 2003, c 26, Part 9 - Governmental Relations.

¹⁰⁷ *Local Government and Metropolitan Regions*, *supra* note 19 at 113.

with a memorandum of understanding entered into with the Association of Municipalities of Ontario.¹⁰⁸

3.3 Relational Status of Canadian Municipalities

The constitutional recognition of the municipal plane as an order of government is substituted with the practice of intergovernmental relations which is said to reflect more closely the place and role of municipal governments in the Canadian federal system.¹⁰⁹ While intergovernmental relations in Canada have been dominated by the federal-provincial-territorial relationship, some form of relations occurs between these planes of government and municipal governments.

3.3.1 Federal-Municipal Relations

While the thesis focuses primarily on Municipal-Provincial Relations, this section briefly touches upon federal-municipal relations for background context. Municipal relations with the federal government, which are often interfered by provincial governments, cover a narrow range of policy areas.¹¹⁰ Provincial governments are said to jealously guard the constitutional arrangements that give them exclusive control over municipalities; they become suspicious whenever the national government offers a program or aid to municipalities.¹¹¹ They fear the national government will increase its area of influence and have consistently resisted any direct and formal federal involvement with municipal government, including the establishment of any federal department or agency with a mandate to deal directly with municipal governments.¹¹²

¹⁰⁸ *Municipal Act*, 2001, S.O. 2001, c. 25 s.3; *Local Government and Metropolitan Regions*, *ibid.*

¹⁰⁹ *Local Government and Metropolitan Regions*, *ibid.* at 4.

¹¹⁰ *Ibid.* at 120.

¹¹¹ *Municipalities, the Constitution*, *supra* note 81 at 1; *Alberta's Local Governments Politics and Democracy*, *supra* note 9 at 57.

¹¹² *Alberta's Local Governments Politics and Democracy*, *ibid.* at 57; *Municipalities, the Constitution*, *ibid.* at 4. In March 1971, a federal Minister of State for Urban Affairs was appointed to take on responsibility not only for the Canada Mortgage and Housing Corporation ("CMHC"), but also for a newly created federal Ministry of State for

However, because of the broad range of federal activities that impinge on local areas, the provinces have not been able to prevent *ad hoc* contact between federal departments and the municipalities.¹¹³ Such linkages have followed informal and functional lines.¹¹⁴ The most common vehicle of relations has been fiscal entanglement, the ability of national governments to spend their tax revenues as they see fit, regardless of the constitutional division of legislative authority.¹¹⁵ The relationship involves municipal governments qualifying for federal spending programs. Typically, there is no regulation involved except that municipalities have to adhere to federal guidelines in areas of federal jurisdiction such as airport safety and policing for national security.¹¹⁶ Examples of this pattern are the trilateral infrastructure programs in which the federal, provincial and municipal governments jointly fund infrastructure projects.¹¹⁷ Following their failure to achieve constitutional recognition over several decades of struggle, and the resistance of provinces to institutionalization of federal-municipal relations, municipal governments and their organizations have concentrated on lobbying for pragmatic solutions and

Urban Affairs ("MSUA"). This ministry had a mandate to: plan, coordinate and develop new urban policies; integrate federal urban priorities with other federal policies and programs; and develop coordinating intergovernmental relationships. The provinces, particularly Quebec, remained skeptical of the new agency and wary even of practical adjustments that might lead to intrusions into their jurisdiction. Although the provinces agreed to send delegations to the first tri-level meeting organized by the MSUA in November 1972, they viewed the tri-level process with suspicion and saw the meetings as one means of providing *de facto* recognition to the municipalities as a third order of government with a legitimate relationship to the federal government. MSUA was later abolished on 31 March 1979. See *Municipalities, the Constitution*, *ibid.* at 7-9.

¹¹³ *Municipalities, the Constitution*, *ibid.* at 5; "Local Governance and Federal Political Systems," *supra* note 20 at 163.

¹¹⁴ *Municipalities, the Constitution*, *ibid.*

¹¹⁵ Gibbins cites United States as a good example where the national government has used its spending power to nurture complex and extensive engagements with local governments. See "Local Governance and Federal Political Systems," *supra* note 20 at 163.

¹¹⁶ *Local Government and Metropolitan Regions*, *supra* note 19 at 120.

¹¹⁷ "Local Governance and Federal Political Systems," *supra* note 20 at 166. Two national tripartite conferences bringing together the federal, provincial and municipal governments of Canada have been recorded. The first was held in Toronto 1972. The second was in Edmonton 1973. The third planned for the end of 1976 was cancelled when the provincial governments refused to take part and none has been called since then. See "Municipalities and the Division of Powers," *supra* note 7 at 202.

specific services. At the federal level, the Federation of Canadian Municipalities (“FCM”) is the voice of all municipalities in Canada.¹¹⁸

3.3.2 Provincial-Municipal Relations

Canadian municipalities’ primary relationship has always been with the provincial governments.¹¹⁹ The provincial-municipal interface is not at all similar to the federal-provincial one. While the federal government works with a single set of ten provinces, each with generally similar operations and responsibilities, the provinces do not confront such simplicity in their own relations with their municipal governments.¹²⁰ The relationship between provincial governments and their municipalities has been strained from the municipal struggle for constitutional recognition and municipal efforts at direct relations with the federal government.¹²¹ However some provinces have undertaken various levels of reform of the provincial-municipal relations.

Some authors argue that regardless of the reforms, municipalities still work their legal and policy processes within the complexities of a hierarchically structured intergovernmental state.¹²² With the ever-changing provincial policy framework and unilateral actions affecting and constraining them, municipal governments continue to seek a “seat at the table” to discuss affairs important to

¹¹⁸ A national organization founded in 1976 whose purpose is to further the goals of municipalities and to facilitate cooperation between municipalities and the two senior planes of government. The FCM’s predecessor was the Canadian Federation of Mayors and Municipalities which was formed by the merger of municipal and mayoral associations in 1937 to lobby the federal government for financial aid for the unemployed, and improved economic conditions just prior to the Second World War. *Alberta’s Local Governments Politics and Democracy*, *supra* note 9 at 57. The FCM reorganized and established a series of task forces to devise a municipal point of view on national issues that affect its members. These task forces and their yearly policy statements assist the FCM in lobbying on an issue-by-issue basis with the relevant federal authority. *Municipalities, the Constitution*, *supra* note 81 at 14.

¹¹⁹ *Local Government and Metropolitan Regions*, *supra* note 19 at 120.

¹²⁰ *City Politics*, *supra* note 25 at 368-370.

¹²¹ *Contested Federalism*, *supra* note 29 at 221 citing K. Good, “Urban Regime – Building as a Strategy of Intergovernmental Reform: The Case of Toronto’s Role in Immigrant Settlement” (Canadian Political Science Annual Meeting, Saskatoon, 2007) [unpublished].

¹²² *City Politics*, *supra* note 25 at 342.

them.¹²³ They must ceaselessly adapt to provincial policy innovations which arise not only from the main supervisory ministry, the Ministry of Municipal Affairs, but also from many other provincial departments and regulatory agencies.¹²⁴ Arguably, formally and practically, municipal-provincial relations remain hierarchical.¹²⁵ There is no equality in the relationship between the province and the municipal plane of government. In fact, Canada's provinces are unitary systems and within each province the centralization of power is almost complete.¹²⁶ The ubiquitous descriptor phrase for the overall pattern is "control and guidance,"¹²⁷ and municipal governments serve as agents that implement provincial policy.¹²⁸

Further, provincial control of municipalities is sometimes nuanced through delegation of power to provincially created quasi-independent regulatory agencies whose responsibilities also constrain or impinge on local initiatives and activities especially in sensitive policy areas of provincial interest such as land use, environmental protection, and natural resources as discussed in detail in chapter 4 below.¹²⁹ Particularly troubling to municipal government is the lack of consultation by the province and provincial agents. Many of the provincial decisions are made with inadequate or no consultation with municipalities as discussed in detail in chapter 5 below.¹³⁰ Thus, municipal concerns and insight are largely ignored and programs turn out less satisfactory.¹³¹ Provincial insensitivity to local interests and opinion has been described as "quite

¹²³ *Local Government and Metropolitan Regions*, *supra* note 19 at 107.

¹²⁴ *Ibid.* at 119.

¹²⁵ *Ibid.* at 120.

¹²⁶ *Contested Federalism*, *supra* note 29 at 221.

¹²⁷ It was argued that the development of better policy geared to coherent, comprehensive municipal-provincial relations has never been high on any provincial "to do" list. Municipal governments are more often dismissed by the provinces in more modern cinematic terms as bumbling comic sidekicks. *City Politics*, *supra* note 25 at 371-372.

¹²⁸ *Foundations of Governance*, *supra* note 10.

¹²⁹ *Local Government and Metropolitan Regions*, *supra* note 19 at 119; *City Politics*, *supra* note 25 at 401.

¹³⁰ Kitchen and McMillan, *supra* note 81 at 231.

¹³¹ *Ibid.*

irksome.”¹³² While municipalities face new challenges such as rapid growth and related issues of infrastructure deficits and the socio-economic costs, the municipal-provincial relationship has not kept pace.¹³³

On the other hand, it has been argued that provincial supervision is expected in order to reduce failure since municipalities vary in size and the resources available to them.¹³⁴ Further, the provinces are better equipped to deal with local issues of broader impact.¹³⁵ It was also noted that in practice, consultations where entrenched make the formal override of municipal authority rare.¹³⁶ Each government tries to rally support for its demands and objectives, but neither one can afford sustained conflict.¹³⁷ Further, municipalities being repositories of expertise in important fields like planning, physical infrastructure, waste management, and recreation, have established relationships with all kinds of local non-governmental organizations, which are increasingly important in governance.¹³⁸ Accordingly, municipal-provincial relationship in Canada although sometimes conflictual, must be judged overall as generally cooperative.¹³⁹ It continues to be one of incremental change through asymmetric mutual accommodation.¹⁴⁰

¹³² *Ibid.*

¹³³ K. Roberts & R. Gibbins, *Apples and Oranges? Urban Size and the Municipal-Provincial Relationship* (Calgary, Alta.: Canada West Foundation, 2005) at 2 [hereinafter *Apples and Oranges*].

¹³⁴ Kitchen and McMillan, *supra* note 81 at 231.

¹³⁵ *Ibid.*

¹³⁶ *Local Government and Metropolitan Regions*, *supra* note 19 at 119.

¹³⁷ *Ibid.* at 122.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* at 122.

¹⁴⁰ *Ibid.* at 123. It was suggested that entrepreneurial municipalities benefit more from the reforms while smaller municipalities are still under provincial supervision, therefore it could be assumed that larger municipalities are less subordinate to provincial authorities than smaller ones. E. Brunet-Jailly & J.F. Martin, *Local Government in a Global World Australia and Canada in Comparative Perspective* (Toronto: University of Toronto Press, 2010) 26.

3.3.3 Mechanisms for Provincial-Municipal Relations

For municipal-provincial relations, the normal channel for most activities is the responsible provincial department.¹⁴¹ The responsible provincial department for municipal government is usually the department of Municipal Affairs. This official-to-official interaction is routine and the most common and institutionalized form.¹⁴² The mandates of the department vary and municipal government matters are often combined with other activities of the department. The minister of Municipal Affairs has many prerogatives that relate to specific matters of municipal activity such as intervening in intermunicipal disputes, providing municipalities with information on the assessment of property, and inspecting matters connected with the management, administration, or operation of a municipality.¹⁴³ Larger municipalities have specialists in intergovernmental relations who report either to the chief administrative officer or to the mayor and whose role is to fix municipal problems by dealing with provincial officials and politicians.¹⁴⁴ At the political level, mayors often communicate with and sometimes conduct business with ministers and ministerial aides.¹⁴⁵

Another channel for municipal authorities is to appear before legislative committees when these provincial bodies are considering measures that affect some or all municipalities.¹⁴⁶ High-level

¹⁴¹ Municipalities deal with the many functional departments that affect them, environment, recreation, heritage, natural resources, transportation, and so on. See *Municipalities, the Constitution*, *supra* note 81 at 5.

¹⁴² *Local Government and Metropolitan Regions*, *supra* note 19 at 121.

¹⁴³ *Foundations of Governance*, *supra* note 10 at 425. In Alberta, the department has been organized in four principal divisions: (i) Local Government Services Division, (ii) Public Safety Division, (iii) Public Library Services, and (iv) Corporate Strategic Services Division. The Local Government Services Division further comprises three sub-branches: (a) Municipal Services, (b) Assessment Services, and (c) Special Areas Board. See online: Municipal Affairs homepage <http://www.municipalaffairs.alberta.ca/am_Our_Business_Units.cfm>.

¹⁴⁴ *Local Government and Metropolitan Regions*, *supra* note 19 at 121.

¹⁴⁵ *Ibid.*

¹⁴⁶ These are formal avenues but also lend to quiet lobbying. See *ibid.* In 1984, then Minister of Alberta Municipal Affairs Julian Koziak was quoted to have said, while defending the government's refusal to meet with the executives of a municipal association, "the decision-making body of our government is the caucus, not cabinet ...we have 75 members of caucus, each of whom are equally important in terms of the political scheme of things in this province."

meeting with Members of Legislative Assembly (“MLAs”) who at some time had held municipal office is another conduit for provincial-municipal relations.¹⁴⁷ Municipal authorities consider it important to have access to and be on good terms with their MLA who is their principal spokesperson and advocate in the provincial legislature and, in theory, a conduit for flow of information between the province and each municipality.¹⁴⁸

Because most provinces contain many municipalities sharing common interests on many issues, municipal governments also depend on municipal associations to make known their collective views about policy.¹⁴⁹ Municipal associations afford them the power of collective action,¹⁵⁰ through their role as the voice of municipal government in the intergovernmental arena.¹⁵¹ They serve as conduit between their members and other governments, particularly in a nonpartisan municipal system.¹⁵² The association’s annual conference is the focal point for intergovernmental relation and consultation as it typically features an address by a minister, sometimes the premier or prime minister, and a host of resolutions that form the main agenda for discussions between

See *Alberta’s Local Governments Politics and Democracy*, *supra* note 9 at 42 citing *Municipal Counsellor* 29:12 (November/December 1984).

¹⁴⁷ *Ibid.*

¹⁴⁸ However, it was observed that the relationships of MLAs with big city councils are much different from their relationships with small municipal councils. For each of Alberta’s two largest cities there are nearly as many MLAs as there are members of council. MLAs in the same political party often work out common provincial-municipal strategies and meet with council members to discuss city problems. It was noted that the long-time mayor of Lethbridge, Andrew Anderson, had extensive contacts with politicians in the provincial government as well as with the city’s MLA. During his term in office, a university was established in the city, the downtown core was redeveloped, and the city’s rail lines were relocated. See *Alberta’s Local Governments Politics and Democracy*, *ibid.* at 47-48.

¹⁴⁹ *Local Government and Metropolitan Regions*, *supra* note 19 at 121.

¹⁵⁰ There are also a number of associations representing municipal staff members such as Municipal Managers, Clerks, and Treasurers, Finance Officers, Engineers and Administrators. These associations perform many of the same functions as any other interest or professional group except that they are obviously smaller and more specialized. *Foundations of Governance*, *supra* note 10 at 14 and 45.

¹⁵¹ *Local Government and Metropolitan Regions*, *supra* note 19 at 6.

¹⁵² *Alberta’s Local Governments Politics and Democracy*, *supra* note 9 at 40. The association also mediates differences between its members and, in some cases, functions as a cooperative buying agency that provides goods and services at substantially reduced costs for the members. *Ibid.* citing D. Siegel, “Provincial-Municipal Relations in Canada: An overview” (1980) 23 *Canadian Public Administration* 281 at 314. See also *Foundations of Governance*, *supra* note 10 at 428-429.

the association executives and the government for the next year.¹⁵³ These gatherings remain significant and democratic insofar as they are open processes whereby member municipalities bring resolutions for governmental action or for approval of the membership.¹⁵⁴

Formally or informally municipal associations also play a role in the legislative process.¹⁵⁵ A classic example in provincial-municipal relations by means of municipal association is the Association of Municipalities of Ontario (“AMO”) which lobbies and negotiates with the province on behalf of its members about legislation, finances, and other matters of concern.¹⁵⁶ AMO’s unusual feature which is also its strength is its mandate to represent all Ontario municipalities.¹⁵⁷ In most other provinces, there are several associations representing different types of municipalities (urban, rural, counties, villages).¹⁵⁸ For instance, Alberta has two principal municipal associations: the Alberta Association of Municipal Districts and Counties (“AAMD&C”) and the Alberta Urban Municipalities Association (“AUMA”).¹⁵⁹ The presence of strong associations provides municipalities with a significant amount of countervailing power

¹⁵³ *Alberta’s Local Governments Politics and Democracy*, *ibid.*

¹⁵⁴ *Foundations of Governance*, *supra* note 10 at 429. The public has become aware of Alberta Urban Municipalities Association’s policy positions as a result of the media attention given its annual convention’s “Bear Pit” session, a no-holds-barred question and answer period with government ministers whose departments have extensive dealings with municipalities. To keep the session honest, an outside person is brought in to moderate it. See *Alberta’s Local Governments Politics and Democracy*, *ibid.* at 42.

¹⁵⁵ In Alberta when the Municipal Statutes Review Committee was established in 1987 to review *the Municipal Government Act*, the Alberta Urban Municipalities Association (“AUMA”), the Alberta Association of Municipal Districts and Counties (“AAMD&C”), and the Alberta Association of Improvement Districts were asked to make nominations to the committee. See *Alberta’s Local Governments Politics and Democracy*, *ibid.* at 41.

¹⁵⁶ *Ibid.* at 45. One of AMO’s major achievements was the negotiation of a Memorandum of Understanding (“MOU”) with the Ontario province in which the province agreed to consult with the municipal sector (through the AMO) before it made changes that affect municipalities. *Ibid.* at 46 citing Ontario and the Association of Municipalities of Ontario, Memorandum of Understanding, Schedule C, ss. 1.4, 1.5, online: Municipal Affairs homepage <<http://www.mah.gov.on.ca/Page5022.aspx>>.

¹⁵⁷ Except Toronto and a few others that opted out. See *Foundations of Governance*, *supra* note 10 at 47.

¹⁵⁸ *Ibid.* at 46.

¹⁵⁹ *Ibid.* at 427. Although the two largest cities, Edmonton and Calgary, often work separately in the promotion or defense of their Interests they are well represented in the governing councils of the AUMA. Four board members (two each from the principal cities) are appointed and not elected by the membership, and there is a regular rotation of big city candidates into the presidential nomination pool. *Ibid.* at 427-428.

and a balancing of provincial oversight; the provinces usually listen to an organization with size and status and are likely not to dismiss its concerns lightly.¹⁶⁰

While there are benefits from municipal associations, it has been observed that municipal associations do not have the representative nature of governments and are not responsible to the electorate.¹⁶¹ Further, the interest of the associations may be too broad or varied and may not adequately represent the individual member municipalities, as seen in the case of Toronto, Calgary and Edmonton. Municipalities in their very nature are not homogeneous; they are rural or urban, large or small, wealthy or poor, and consequently are often in disagreement about goals and policies.¹⁶² Accordingly, the associations cannot convey the variety of opinions which characterize municipalities.¹⁶³ They necessarily represent the will of the majority of their members with the consequence that the interests of individual municipalities become blurred.¹⁶⁴ Municipal associations also risk becoming information agencies of the provincial governments rather than true representatives of their municipalities.¹⁶⁵ A close working relationship generally develops between provincial departments and municipal associations to the benefit of both, since

¹⁶⁰ The negotiation of the MOU is clear evidence of the status of the AMO. *Ibid.* at 45 and 48.

¹⁶¹ "Municipalities and the Division of Powers," *supra* note 7 at 201; L.D. Feldman & K. A. Graham, *Bargaining for Cities: Municipalities and Intergovernmental Relations: An Assessment* (Toronto: Institute for Research on Public Policy, 1979) at 21-27 cited in *Alberta's Local Governments Politics and Democracy, supra* note 9 at 40 & 54.

¹⁶² The associations' own internal tensions are caused primarily by the division between large and small municipalities. For instance, in most policy areas the concerns of small towns and villages are different from those of large cities. It is therefore difficult for the association to take firm positions on many issues and some proposals are compromises stated only in the most general terms. Therefore, despite strength in numbers, the association is always at risk of splintering. See *Alberta's Local Governments Politics and Democracy, ibid.* at 40 and 42.

¹⁶³ Single associations deal with its diversity by having caucuses within, representing several different types of municipalities, which have their own structures and even hold separate conferences geared to their specialized memberships. *Ibid.* at 44, 46, 428 and 490.

¹⁶⁴ They must either seek and give expression to the lowest common denominator of opinion among the membership, thereby losing their effectiveness, or make more specific demands on behalf of the majority at the expense of diversity. *Ibid.* at 40; "Municipalities and the Division of Powers," *supra* note 7 at 201.

¹⁶⁵ *Alberta's Local Governments Politics and Democracy, ibid.* Skillful politicians and administrators may be able to change the direction of a municipal association so that it becomes a vehicle for the dissemination of the provincial government's viewpoint rather than the articulator of a municipal position. See *ibid.*

it reduces acrimony and conflict.¹⁶⁶ Some authors question whether an association is able to maintain its independence working so closely with the province.¹⁶⁷ It was argued that it tends to serve the provincial government's interests to accept the existence of municipal associations, to consult them, and to use them as a mechanism for furthering the province's viewpoint.¹⁶⁸

3.4 Municipal Government in Alberta

Municipal government in Alberta has been described as a hybrid of British, American, and Canadian institutions.¹⁶⁹ It was stated that this adoption of features of both presidential and parliamentary systems has created a hodgepodge of government structures and municipal-provincial relationships.¹⁷⁰ As one of Canada's most urbanized provinces,¹⁷¹ pressures induced by Alberta's economic boom have revealed weaknesses in existing institutional arrangements, especially those relating to land-use, development and growth management.¹⁷² Relations between the province and municipalities have further been strained by the headlong economic activities.¹⁷³ Population growth, especially in smaller communities, has led to inevitable stresses

¹⁶⁶ *Ibid.* at 41.

¹⁶⁷ Thus, it has been noted that "there is some evidence to suggest that ... municipal associations in Canada have fallen under the influence of their respective senior government." Feldman & Graham, *supra* note 163 at 24.

¹⁶⁸ In fact, it was alleged that since the AUMA has been controlled by politicians from smaller urban centers, the Lougheed government in Alberta attempted to neutralize the political power of large cities by ensuring that all municipal policy issues were fed into the government through the association. Capitalizing on the uneasy alliance between its large and small member municipalities and the compromises that had to be made on difficult issues, the province did not see the AUMA as a major threat. See *Alberta's Local Governments Politics and Democracy*, *supra* note 9 at 40-43 citing D. Higgins, *Local and Urban Politics in Canada* (Toronto: Gage, 1986) at 79.

¹⁶⁹ *Alberta's Local Governments Politics and Democracy*, *ibid.* at 1.

¹⁷⁰ *Ibid.*

¹⁷¹ Roughly two-thirds of the province's municipal population resides in municipalities categorized as cities and a little over half the population lives within the corporate boundaries of the two largest cities. See *Foundations of Governance*, *supra* note 10 at 389.

¹⁷² *Ibid.* at 384.

¹⁷³ *Ibid.*

on the system requiring new infrastructure, repairs or upgrade of existing ones, and more effective delivery of a host of services.¹⁷⁴

3.4.1 Brief History of Provincial-Municipal Relations in Alberta

The provincial government has never established an institutionalized mechanism to relate with municipal government and to coordinate the efforts of the various provincial departments dealing with municipalities.¹⁷⁵ Instead, *ad-hoc* committees composed of government ministers and municipal association representatives have been formed in response to specific problems.¹⁷⁶ Examples include the 1959 Provincial-Municipal Advisory Committee, Premier Manning's 1962 Public Revenue and Expenditure Committee, and Premier Lougheed's Provincial Municipal Finance Council.¹⁷⁷ Premier Getty's 1988 Provincial-Municipal Premier's Council was dedicated to bringing together "the idea, concepts, and directions... [which] will underline that spirit of co-operation and of partnership which exemplifies our [provincial] relationship with municipalities."¹⁷⁸ The Getty government also committed to an extensive review of the municipal statute with an intention to establish a new type of municipal legislation and, putatively, a new provincial-municipal relationship.¹⁷⁹ Time ran out for the Getty premiership before this could be accomplished. However, detailed draft legislation emerged from an extended

¹⁷⁴ The same has intensified intermunicipal conflicts between core, suburban, and exurban municipalities in the metropolitan areas and urban and rural municipalities elsewhere. *Ibid.* at 389.

¹⁷⁵ *Alberta's Local Governments Politics and Democracy*, *supra* note 9 at 45.

¹⁷⁶ *Ibid.*

¹⁷⁷ At the 1984 AUMA annual convention, members passed a resolution asking the provincial government to formalize its relationship with AUMA through a "mechanism" to ensure the government consulted with the association on major municipal issues. Dismissing the resolution, the Minister of Municipal Affairs announced the formation of another *ad-hoc* committee with municipal association representation to establish a formula for municipal borrowing and debt guidelines. *Ibid.* at 45-46 citing W. Walchuck, *Alberta's Local Governments: People in Community Seeking Goodness* (Edmonton: Alberta Department of Municipal Affairs, 1987) at 91-93 and 43; 1984 AUMA Annual Convention Resolution No. B1 with the Response by the Government of Alberta.

¹⁷⁸ Membership comprised the premier, four cabinet members, and representation from the AUMA, the AAMD&C, and the Improvement Districts Association of Alberta. The Council met twice between January 1988 and January 1990. *Alberta's Local Governments Politics and Democracy*, *ibid.* at 28 and 46.

¹⁷⁹ Foundations of Governance, *supra* note 10 at 423.

consultation with citizens and the municipal authorities through the Municipal Statutes Review Committee.¹⁸⁰ While Premier Klein's program of fiscal responsibility and smaller government resulted in the revision and passage of the draft municipal legislation, the government cut its administrative and financial support to the municipal sector.¹⁸¹ With the Klein model, municipalities were said to be freer *de jure* (in law) but poorer in fact and saddled with additional responsibilities.¹⁸²

Despite the reforms of the new MGA, the Minister's Provincial/Municipal Council on Roles and Responsibilities in the 21st Century was established in November 2001 to clarify roles and responsibilities, resolve issues, and recommend improvements in the provincial-municipal relationship.¹⁸³ The municipal representatives succeeded in having the council's scope expanded to include resources and thereafter, it was known as the 3Rs Council.¹⁸⁴ The 3Rs Council engaged the Canada West Foundation to conduct a study of the municipal-provincial relations.¹⁸⁵ However, the report of the study did not reflect a consensus of its membership. Consequently,

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.* at 423-424.

¹⁸³ Members consisted of the then minister of municipal affairs, Guy Boutilier, the mayors of Calgary and Edmonton, the presidents of the AUMA and AAMD&C, a representative from the Alberta Economic Development Authority, and three members of the Legislative Assembly. See Alberta, *Report to the Minister of Municipal Affairs, The Minister's Council on Municipal Sustainability* (Edmonton: Department of Municipal Affairs, 2007) at 5 <<http://www.assembly.ab.ca/lao/library/egovdocs/2007/alma/161349.pdf>> [hereinafter *MCMS Report*]; J. Garcea & E.C. LeSage Jr. eds., *Municipal Reform in Canada: Reconfiguration, Re-empowerment, and Rebalancing* (Don Mills, ON: Oxford University Press Canada, 2005) at 71 [hereinafter *Municipal Reform in Canada*].

¹⁸⁴ *Foundations of Governance*, *supra* note 10 at 411.

¹⁸⁵ R. Gibbins, L. Berdahl, & C. Vander Ploeg, *Foundations for Prosperity: Creating a Sustainable Municipal-Provincial Partnership to Meet the Infrastructure Challenge of Alberta's 2nd Century*, (Calgary: Canada West Foundation, 2004) [hereinafter *Foundations for Prosperity*]. The Report recommended, among others, that: (a) municipalities and the province make a mutual commitment to eliminating the municipal infrastructure debt and its causes by 2015; (b) a Municipal Infrastructure Council be established, with the task of defining (by June 2005) a mix of infrastructure-financing instruments from new municipal tax tools, legislated provincial revenue sharing, and phased provincial withdrawal from the education property tax that would be in place by December 2005; and (c) the province lead in engaging the federal government in municipal-infrastructure finance. See also *Foundations of Governance*, *supra* note 10 at 412.

only the infrastructure recommendation emerged in the Council's closing document.¹⁸⁶ The Klein government continued to grapple with problems, as policy innovations desperately needed to address urban and many other issues exacerbated by the booming economy, went unaddressed.¹⁸⁷ It was noted that the government invested in municipal infrastructure and other underfunded aspects of municipal government but otherwise seemed oblivious, or simply unconcerned with these relational problems.¹⁸⁸ The 3Rs initiative lapsed with a change of ministers.¹⁸⁹

The Minister's Council on Municipal Sustainability ("MCMS") was inaugurated in 2005 to examine options for strengthening the partnership between the provincial government and municipalities, and for enhancing the long-term sustainability of municipal governments in the province.¹⁹⁰ The Stelmach government elected in 2006 inherited the MCMS.¹⁹¹ The MCMS 2007 report recommended three main areas of provincial and municipal roles and responsibilities, new municipal revenue sources, and intermunicipal cooperation. The report also recommended twelve other issues ranging from land-use planning and growth management to dispute resolution and regional services delivery.¹⁹² In its official response the provincial government accepted in principle, seven of the twelve recommendations of the MCMS, rejected two and referred three for further consultation.¹⁹³ As part of the MCMS review the province introduced

¹⁸⁶ *Foundations of Governance*, *ibid.*

¹⁸⁷ *Ibid.* at 423-4.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.* at 412.

¹⁹⁰ *Ibid.* The Minister's Council consisted of the then new minister of municipal affairs, Rob Renner, the presidents of the Alberta Urban Municipalities Association and the Alberta Association of Municipal Districts and Counties, and the mayors of Calgary and Edmonton. *MCMS Report*, *supra* note 183 at 1 and 5.

¹⁹¹ *Foundations of Governance*, *supra* note 10 at 424.

¹⁹² *MCMS Report*, *supra* note 183 at 2-3.

¹⁹³ Government of Alberta, News Release, "Managing growth pressures, Province responds to report of the Minister's Council on Municipal Sustainability" (16 July 2007). Among those rejected were: (i) the recommendation

major new grants for municipalities in its 2007 and 2008 budget.¹⁹⁴ These provincial government initiatives suggested a new era in provincial-municipal relations in which the province is more attentive to, and engaged in, municipal policy issues. Regardless, it has been argued that the MCMS recommendations rejected or held in reserve by the government spoke volumes about future municipal policy direction.¹⁹⁵

In sum, the relationship between the province of Alberta and its municipalities has been strained, marked by suspicion and antagonism as opposed to a spirit of partnership in public service.¹⁹⁶ The study commissioned by the 3R Council, *Foundation for Prosperity*,¹⁹⁷ laid the foundation for a new governance partnership in Alberta that will better equip municipalities for the challenges in Alberta's second century. The basis of the recommendation is that healthy communities, as the foundations upon which individual and provincial successes are built, are essential for other provincial goals to be achieved, including energy resource development.¹⁹⁸ Therefore to ensure healthy, vital, and sustainable communities and province, Albertans need a

that the concept of 'economic rent' and resource-royalty rates should include costs incurred by municipal governments in supporting resource development - Recommendation #11; (ii) that municipalities should be provided with powers to raise revenues directly from resource developers - Recommendations #4, 9 and 12; and (iii) that a long-term agreement should be signed between the province and municipalities to ensure a stable funding and policy framework. The recommendations accepted by the government included land-use planning and growth-management models, intermunicipal development plans to enhance intermunicipal cooperation, financial assistance to small municipalities that have minimal planning capacity, and more funding to address infrastructure deficit. See *Foundations of Governance*, *supra* note 10 at 425.

¹⁹⁴ *Ibid.* at 413. The council's work was a key factor that led to the provincial announcement in 2007 of a major new long-term funding initiative called the Municipal Sustainability Initiative ("MSI"). See Alberta, *Building on Strength: A Proposal for Municipal Sustainability for Alberta* (Report of the Municipal Sustainability Strategy Working Group) (Alberta: Municipal Affairs, 2010) at 3. The Municipal Sustainability Strategy Working Group ("MSSWG") was created by the Stelmach government in 2009 with a mandate to develop a municipal strategy to improve the long-term viability of Alberta municipalities. Unlike its predecessors, did not address issues relating to provincial-municipal intergovernmental relations.

¹⁹⁵ *Foundations of Governance*, *ibid.* at 424.

¹⁹⁶ *Rationale for Renewal*, *supra* note 21 at 10.

¹⁹⁷ *Foundations for Prosperity*, *supra* note 185.

¹⁹⁸ *Ibid.* at 1.

new provincial-municipal partnership reflecting the modern roles of municipal governments and the interdependent relationships in which these governments exist.¹⁹⁹

The Government of Alberta acknowledges the role of municipal government, in the province's 20 year strategic plan, *Today's Opportunities, Tomorrow's Promise*, and has committed to redesigning its relationship with them.²⁰⁰ The plan states that "Alberta in 2025 will be a place where municipalities and the provincial government work in fair partnership to serve their constituents."²⁰¹ This is a picture that captures the values of Albertans, values that have shaped the province and its unique place in Canada over the previous century.²⁰² The very functioning of Alberta's system must continually be reassessed in light of the fundamental values it was designed to serve.²⁰³ Alberta can seize the opportunity for national leadership by creating a partnership model for Canadians across the country as they address the increasingly complex challenges facing local communities, industry and economic investment.²⁰⁴ What is required is a provincial-municipal partnership model which protects the legitimate interests of the province without unduly hampering local governance.²⁰⁵ The province has a stake in rebuilding the municipal-provincial relationship. The goals outlined in its 20-year strategic plan can only be met through constructive and meaningful collaboration with municipal governments.²⁰⁶ A new provincial relationship is needed for all municipalities in Alberta with a structure recognizing

¹⁹⁹ *Ibid.* at 2.

²⁰⁰ Library of Legislative Assembly, *Today's Advantage, Tomorrow's Promise: Alberta's Vision for the Future; Today's Opportunities, Tomorrow's Promise: A Strategic Plan for the Government of Alberta* (Budget 2005 Document) (Edmonton, AB: Library of Legislative Assembly, 2003-2004) at 1-2 and 12 <<http://www.assembly.ab.ca/lao/library/egovdocs/alpm/2004/143704.pdf>>

²⁰¹ *Ibid.* at 3-4.

²⁰² *Ibid.* at 4.

²⁰³ *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at para. 23 [hereinafter *Canadian Western Bank*].

²⁰⁴ *Foundations for Prosperity*, *supra* note 185 at 2.

²⁰⁵ Kitchen and McMillan, *supra* note 81 at 231.

²⁰⁶ *Apples and Oranges*, *supra* note 133 at 22.

commonalities across all municipal governments, but flexible enough to accommodate differences in need and circumstance.²⁰⁷

3.4.2 Municipal Government Powers under the Alberta *Municipal Government Act*

The present Alberta MGA evolved from a number of statutes, based on the Dillon's Rule,²⁰⁸ creating, empowering and regulating different aspects of municipal government even before the confederation.²⁰⁹ The objective here is to show the progression of municipal enabling legislation overtime, based on various models of governance, in response to changes in time and events. As indicated in the introduction to this chapter, this sets the stage for a detailed analysis of municipal powers over energy development in chapter 4 below. A significant change in local government legislation in Alberta came in 1956 after the discovery of oil in the Leduc area in 1947 and oil companies engaged in massive exploration efforts across the province which brought about migration and settlement of hundreds of people into the area.²¹⁰ The Alberta legislature in response to this occurrence passed the *New Towns Act*²¹¹ which provided an interim form of government for these communities pending their capability for self-government as villages, towns or cities.²¹²

²⁰⁷ *Ibid.* and at 24-25. On the effect of size in structuring the proposed partnership model, a case for new municipal-provincial template for the "big cities" see *Rationale for Renewal*, *supra* note 21.

²⁰⁸ See *supra* note 41 and accompanying text.

²⁰⁹ For a complete review of the history of the legislation governing municipalities prior to 1968 see F.A. Laux, *Planning Law and Practice in Alberta* 3rd ed. (Edmonton: Juriliber, 2005) chapter 1.

²¹⁰ This occasioned a demand for schools, water, sewer, parks; it was not feasible to incorporate these settlements as conventional villages and towns and the settlements that were already incorporated had so much increase in the populace beyond the capability of existing councils. Laux, *ibid.* at 1-13.

²¹¹ S.A. 1956, c. 39.

²¹² The provincial government offered special financial assistance to these communities but at the price of more stringent supervision and control. Laux, *supra* note 209 at 1-13.

Another change came in 1968 when the Alberta legislature enacted the first *Municipal Government Act* (“MGA”).²¹³ The MGA retained the existing forms of local units but conferred on all of them the same powers and duties.²¹⁴ Nevertheless, there were still numerous statutes governing the affairs of municipal government including a separate *Planning Act* discussed in detail in chapter 4.²¹⁵ By the 1980s Alberta municipal legislation had become so voluminous and complex with a myriad of amendments to the several statutes bearing on municipalities.²¹⁶ The tangle of municipal legislation and the general dissatisfaction in the provincial-municipal relations prompted the review and update Alberta’s municipal legislation.²¹⁷ The provincial government established the Municipal Statutes Review Committee (“MSRC”) in 1985 mandated to reform and modernize municipal government by making recommendations on legislation appropriate for municipal government in the twenty-first century.²¹⁸ The committee set out to create a legislative milieu in which municipal government could enter into new forms of partnerships regardless of political boundaries. The goal was (a) to enlarge their law-making and regulatory powers to enable them to “respond to the great issues of the day,” and (b) remove the

²¹³ S.A. 1968, c. 68, to replace the *Municipal Districts Act*, S.A. 1918, c. 49; *Towns and Villages Act* S.A. 1934, c. 49; and *City Act* S.A. 1950, c. 7.

²¹⁴ Cities were given a few unique powers. See Laux, *supra* note 209 at 1-14. The Act was essentially a merger of several former Acts applied to different forms of municipal units and its objective was consolidation it therefore reflected a legislative scheme drawn from the 1940s and earlier. See E.C. LeSage Jr., “Municipal Reform in Alberta: Breaking Ground at the New Millennium” in Garcea & LeSage Jr., *supra* note 185 at 59 [hereinafter “Municipal Reform in Alberta”].

²¹⁵ For instance, assessment, planning and taxation were contained in separate Acts. G. Thomas, “Re-Inventing the Role of local Governments in Alberta” (*Planning and Development Reform in Alberta Understanding Bill 32*, Insight Conferences Calgary, October 3, 1995 and Edmonton, October 5, 1995) [unpublished] [hereinafter “Re-Inventing the Role of local Governments in Alberta”].

²¹⁶ Alberta, *Municipal Government in Alberta: A Review of Yesterday and Today – A Proposal for Tomorrow* (Report of the Municipal Statute Review Committee) (Edmonton: Department of Municipal Affairs, 1989) [hereinafter *Municipal Government in Alberta*].

²¹⁷ It was stated that Premier Getty announced his intention to review the legislation in his government’s first Throne Speech (1986) and repeated the pledge in the next Throne Speech that followed the 1986 provincial elections. See *Municipal Reform in Canada*, *supra* note 183 at 60 n3.

²¹⁸ K. Wakefield, *Alberta Municipal Law & Commentary* (Canada: LexisNexis, 2006) 3; “Municipal Reform in Alberta,” *supra* note 214 at 59 citing Ministerial Order MO 728/87, referenced in Alberta, *Municipal Government in Alberta: A Municipal Government Act for the 21st Century* (Report of the Municipal Statute Review Committee) (Edmonton: Department of Municipal Affairs, 1991) [hereinafter *A Municipal Government Act for the 21st Century*].

rigid organizational structures in favor of more local autonomy allowing them to “easily adapt to emerging management techniques and practices.”²¹⁹ After much consultation with the municipal government actors and several reports, the MSRC produced in its final report.²²⁰ The report was an ambitious and novel draft statute tabled in the Legislative Assembly in 1992 as government Bill 51 which however died on the order paper.²²¹

In 1994, after further public consultation, the proposed new statute was reintroduced in the Legislature as Bill 31 which was passed and came into effect on January 1, 1995.²²² The 1994 MGA was further amended in September 1995 when the *Planning Act* was consolidated into the MGA as Part 17.²²³ The current MGA is divided into eighteen Parts (Parts 1-17 and Part 15.1). Currently, the five types of municipal units existing under the MGA are: municipal districts, villages, towns, cities, and specialized municipalities.²²⁴ Most of the powers and duties conferred

²¹⁹ Laux, *supra* note 209 at 1-14 quoting Alberta, *The Municipal Government Act: Local Autonomy, You Want It, You Got It* (Report of the Municipal Statute Review Committee) (Edmonton: Department of Municipal Affairs, 1990) [hereinafter *You Want It, You Got It*].

²²⁰ *A Municipal Government Act for the 21st Century*, *supra* note 218.

²²¹ Laux, *supra* note 209 at 1-14; According to LeSage, Bill 51 was viewed as jurisdictional reform within two broad reform objectives; the first of which was to increase the jurisdictional autonomy and operating freedom of municipalities, and the second of which was to enhance good governance. “Municipal Reform in Alberta,” *supra* note 214 at 60.

²²² *Municipal Government Act*, S.A. 1994, c. M-26.1. Some of the content of Bill 51 was retained in Bill 31. For example, the purposes of a municipality section (now section 3) was altered, the list of general bylaw-making spheres was shortened from eleven to eight. The percentage of population in municipalities under ten thousand required to effect a valid petition was lowered, provisions for in camera meetings were narrowed, and the proposal for a local governance commission was deleted. “Municipal Reform in Alberta,” *ibid.* at 61. Bill 31 also included substantial new parts relating to property assessment, taxation, tax recovery, and selected other matters that were previously in other numerous legislation bearing on municipalities.

²²³ S.A. 1995, c. 24.

²²⁴ Summer villages are no longer included in the types of municipalities which can be created because the power to create new summer villages has been repealed by the 1995 amendment to the MGA (S.A. 1995, c. 24, ss. 11 and 12) but existing ones are allowed to continue under the grandfathering provision, section 89.1 of the MGA. Another type of organization is ‘hamlet’. A hamlet is not a municipality but an unincorporated community with recognized boundaries which may be designated as such by the council of a Municipal District or Specialized Municipality or by the Minister in case of an Improvement District. An example of a hamlet is Sherwood Park in Strathcona County. See Laux, *supra* note 209 at 1-15; Wakefield, *supra* note 218 at 53-54.

under the Act apply to all these units and are exercised by or through their elected councils,²²⁵ although some unincorporated areas continue to be administered by the Minister of Municipal Affairs in the form of Improvement Districts.²²⁶

The MGA was said to have achieved two primary objectives, the first of which was the consolidation into one statute of multiple statutes dealing with various aspects of municipal governance,²²⁷ and the second of which was the modernization and liberalization of municipal powers by removing some of the historic restrictions on municipalities.²²⁸ The second objective was achieved by making a general grant of powers to municipalities, replacing the Dillon's practice of itemizing each power granted to municipalities. The Minister of Municipal Affairs explained in a discussion guide that the new Act allows a municipality to "do anything it needs to do to carry out the purposes of municipal government unless the ability to do it is limited by legislation."²²⁹ The novel features geared towards municipal autonomy and operating freedom are found throughout the Act but most notably in Parts 1 and 2 set out below in Schedule "A" of the thesis.

Section 3 sets out the purposes of a municipality: "(a) to provide good government; (b) to provide services, facilities or other things that, in the opinion of council, are necessary or

²²⁵ It is noteworthy that counties have disappeared as a type of municipal government unit in Alberta; they are now, in law, municipal districts, although they are allowed to retain their county names by section 89 of the new MGA. See Laux, *ibid.* at 1-16.

²²⁶ Part 15 of the new Act replaced the *Improvement District Act* and allows the Minister to do that which an elected council may do under the Act or any other enactment. However, only a handful of improvement districts continue to exist for limited purposes and all are within federal or provincial parks. See *ibid.*

²²⁷ The MGA repealed or consolidated a total of twenty-six Acts between 1995 and June 2004. See "Municipal Reform in Alberta," *supra* note 214 at n8.

²²⁸ Wakefield, *supra* note 218 at 3.

²²⁹ *Alberta's Local Governments Politics and Democracy*, *supra* note 9 at 455 citing Alberta, Department of Municipal Affairs, *A New Municipal Government Act for Albertans* (Edmonton: Department of Municipal Affairs, 1992) at 3.

desirable for all or a part of the municipality; and (c) to develop and maintain safe and viable communities.” It has been suggested that the three major distinct and even contradictory components constituting the framework of a municipality under the 1994 MGA are: a provider of good government, a body corporate, and a natural person.²³⁰ The corporate aspect pertains to administration and liabilities to third parties; the natural person transacts business and the government aspect plays the traditional role of legislator and regulator in the public interest in addition to taxation powers.²³¹ Section 3, which replaced a general welfare provision in the predecessor Act, has been criticised as a limitation on the powers of a municipality rather than a broad grant of authority as it serves as a guide for those proposing municipal initiatives or those scrutinizing them.²³² Each view of section 3 seems to have a place in the current developments in jurisprudence.²³³ In *114957 Canada Ltee (Spraytech, Societe d’arrosage) v. Hudson (Town)*²³⁴ the Supreme Court applying the broad and purposive approach upheld the impugned municipal bylaw so long as it was passed for a municipal purpose.²³⁵ However, the Supreme Court of Canada had noted in *Shell Canada Products Ltd. v. Vancouver (City)*,²³⁶ that such a provision places a “territorial limit” on council’s jurisdiction, as council can have regard for matters beyond its boundaries in exercising its powers but must have as its purpose benefit to the citizens of the municipality.²³⁷

²³⁰ See B. Inlow, “Overview of the Municipal Government Act” (Dealing with Municipalities New Municipal Government Act, Legal Education Society of Alberta Edmonton, 29 November 1994 and Calgary 28 November 1994) at 3 [unpublished].

²³¹ The legislative and enforcement powers are beyond the authority of a natural person. *Ibid.* at 5.

²³² *Ibid.*; “Municipal Reform in Alberta,” *supra* note 214 at 61.

²³³ See also *Kornelsen and Oil Sands Hotel (1975) Ltd. v. Wood Buffalo (Regional Municipality)* (18 July 1997), McMurray 9713-006957 (Alta. Q.B.) [unreported]; aff’d by [1998] A.J. No. 370 (Alta. C.A.) [hereinafter *Kornelsen v. Wood Buffalo*].

²³⁴ [2001] 2 S.C.R. 241, (2001) 200 D.L.R. (4th) 419, *supra* note 45.

²³⁵ Municipal purposes have been held to be sufficiently broad to include the holding of a plebiscite by a municipality on the removal of video lottery terminals from lounges and nuclear disarmament. See Wakefield, *supra* note 218 at 10 citing *Kornelsen v. Wood Buffalo* and *Brad v. Edmonton (City)* (1983), 202 A.R. 321 (Q.B.).

²³⁶ [1994] 1 S.C.R. 231 at paras. 97-100, *supra* note 96 [hereinafter *Shell*].

²³⁷ *ibid.*

Sections 4 and 5 seem to emphasize that the powers of a municipality are those given to them by legislation, therefore municipalities have no inherent or residual powers.²³⁸ Section 6 confers natural person powers on municipalities except as limited by ‘enactment.’²³⁹ The effect of section 6 appears to be that municipalities have been freed to carry on business like a natural person.²⁴⁰ This appears to codify common law as Alberta courts had held under the old municipal legislation that municipalities could not use their general powers of contract to expand the conditions in a development agreement beyond those specifically authorized by statute.²⁴¹ The Act further clarifies the relationship between the natural person powers and the general bylaw powers. Thus, notwithstanding the requirement to act by bylaw, a municipality may do something under its natural person powers although the thing could be done by a bylaw.²⁴² The restriction to this freedom is that the power to enforce bylaws, through the creation of and punishment for offences, does not apply to a bylaw passed pursuant to the natural person powers.

Section 7 describes the legislative powers of municipalities by providing the general jurisdiction to pass bylaws compressed into eight descriptive phrases referred to as “spheres of jurisdiction.” The concept of spheres of jurisdiction was said to have been drawn from

²³⁸ Municipalities in Canada have no abstract or original powers but purely statutory corporations. They are in contrast with their English counterparts which are common law corporations having inherent authority and jurisdiction derived from the very nature of the corporation itself being created by Crown charter. See Rogers, *supra* note 77 at 310. See also Wakefield, *supra* note 218 at 11-12; and Inlow, *supra* note 230 at 8. Inlow states that this is an express override of the *delegatus non potest delegare* and a welcome recognition of the complexity of larger municipalities.

²³⁹ S. 1(j) defines ‘enactment’ as including federal and Alberta statutes and regulations, and s. 1(t) defines ‘Natural person powers’ as the capacity, rights, powers and privileges of a natural person.

²⁴⁰ It has been suggested that when combined with section 3, the freedom to pursue corporate activity to further the purposes of the municipality is extraordinary. “Municipal Reform in Alberta,” *supra* note 214 at 62.

²⁴¹ *Whissell v. Edmonton (City)*, [1984] 25 M.P.L.R. 204 (Q.B.); 274099 *Alberta Ltd. v. Sturgeon No. 90* (Municipal District), [1990], 3 M.P.L.R. 2(d) 265 (C.A.); *Bristol Developments (Alberta) Ltd. v. Sturgeon* (Municipal District), [unreported] March 27, 1992 (Alta. Q.B.) per Cooke J.

²⁴² MGA, *supra* note 1, s.11. This section applies despite s.180(2) which states that if a municipality is required or authorized to do something by bylaw, it may only be done by bylaw. Municipalities can also act by resolutions.

federalist theory for the purpose of defining areas in which municipalities would have general freedom to make local laws within their own boundaries.²⁴³ It was suggested that the description of “spheres of jurisdiction” is predicated on the theory that legislation would not dictate how municipalities would regulate within their jurisdiction, but simply described what municipalities could do but not how it would be done.²⁴⁴ Without restricting the jurisdictional sphere in section 7, section 8 describes the powers of municipalities within their legislative sphere, i.e., what municipalities can do in a bylaw such as regulating, prohibiting, dividing activities and businesses into different classes and discriminating among the classes, providing for a system of licenses, permits and approvals as well as fees for them. Thus section 8 defines the scope of municipal powers to pass bylaws under the broad provisions of section 7.²⁴⁵

Further, the new power to prohibit compliments the previous power to regulate thereby giving municipalities an important new tool to aid local governance.²⁴⁶ Historically, courts made a distinction between the “prohibition” of a trade or business and its “regulation.” The effect was that a power to regulate did not include the power to prohibit, and in the absence of an express power of prohibition there was no right to generally prohibit certain kinds of business. Thus, bylaws which totally prohibited a business were *ultra vires* if made under a regulatory power.²⁴⁷ With the new power to prohibit, such bylaws would be valid provided the subject of

²⁴³ *Municipal Reform in Canada*, *supra* note 183 at 311-312. The spheres to which general bylaw making authority is extended to municipalities under the MGA includes: (a) safety, health and welfare of people and the protection of people and property; (b) people, activities, and things in, on, or near a public place or place that is open to the public; (c) nuisances, including unsightly property; (d) transport and transportation systems; (e) business, business activities, and persons engaged in businesses; (f) services provided by or on behalf of the municipality; (g) public utilities; (h) wild and domestic animals and activities in relation to them; and (i) enforcement of all bylaws.

²⁴⁴ See Inlow, *supra* note 230 at 10.

²⁴⁵ “Municipal Reform in Alberta,” *supra* note 214 at 63.

²⁴⁶ *Ibid.*

²⁴⁷ *Toronto (City) v. Virgo* (1895), 1895CarswellOnt 45 (Ontario P.C.), online: WL; *Hall v. Moose Jaw (City)* (1910), 1910 CarswellSask 48 (Sask. K.B.) online: WL.

the bylaw is not exempted from municipal powers or restricted in other parts of the MGA or other enactments.

Section 9 provides another liberal interpretative guide for constructing the general powers to pass bylaws.²⁴⁸ The section specifically states that the general bylaw powers in sections 7 and 8 are stated in general terms to: (a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under the MGA or any other enactment, and (b) enhance the ability of councils to respond to present and future issues in their municipalities. Section 9 is said to be an express admonition to all involved that the lawmaking powers conferred on municipal council are to be regarded as ‘broad’ specially designed to ‘enhance’ the abilities of councils to respond to present and future issues.²⁴⁹ By clarifying the purpose of such grant of general powers, section 9 appears to liberate municipalities and tends to avoid the fate that has befallen earlier general grants of powers.²⁵⁰

Notwithstanding the broad intentions of the legislature section 10, which is discussed in detail in chapter 4 below, provides an important qualification to the general spheres of jurisdiction in section 7, the broad scope of those powers in section 8, and the broad interpretative guide in section 9. The effect of section 10 is that, if a bylaw could be passed both under the spheres of jurisdiction and powers in sections 7 and 8, and also under a specific bylaw making power in other parts of the MGA or other enactments, any conditions or limitations in the specific bylaw

²⁴⁸ Wakefield, *supra* note 218 at 10.

²⁴⁹ Laux, *supra* note 209 at 1-15 n55.

²⁵⁰ Hoehn, *supra* note 78 at 9. This provision is regarded as a final complement to the suite of legislative provisions that boost municipal autonomy and flexibility. “Municipal Reform in Alberta,” *supra* note 214 at 63.

making power would apply, and the bylaw if passed under the general power will be of no force and effect to the extent that it is inconsistent with the specific bylaw making power.²⁵¹ By this provision the legislature or executive can claw back at any time the general jurisdiction and broad scope of powers granted to municipal governments in Part 2 through specific provisions in other parts of the MGA and other enactments touching upon municipal issues. The provision in section 10 was described in *Croplife Canada*²⁵² as “the Rule against Circumvention” which means a rule prohibiting a municipality from using the general bylaw power to circumvent restrictions, on its ability to pass bylaws on a particular subject-matter, contained in specific powers.²⁵³ For this reason general clauses may not, as a rule, be invoked to enlarge powers given with respect to a specific subject matter.²⁵⁴ A specific section of a statute prevails over a general one and where the former contains a restriction it prevails over the latter which is silent as to the regulation.²⁵⁵

Further limiting the broad grant of powers in Part 2 are sections 12 and 13. Section 12 limits the geographical validity of bylaws to the boundaries of the municipality except where one municipality agrees with another under an inter-municipal arrangement or where legislation so specifies that a bylaw would not be so limited.²⁵⁶ Section 13 ensures paramountcy of provincial enactments over municipal bylaws. Thus the province could take back with one hand, through powerful enactments like the ALSA,²⁵⁷ what it had seemingly delegated with the other hand.²⁵⁸

²⁵¹ Wakefield, *supra* note 218 at 19.

²⁵² *Supra* note 102.

²⁵³ *Ibid.* at paras. 40 and 48.

²⁵⁴ Rogers, *supra* note 77 at 396.

²⁵⁵ *Ibid.*

²⁵⁶ This provision, however, has been held not to limit municipal referenda on questions such as nuclear disarmament or gaming issues which have been found by the courts to be proper municipal purposes. Wakefield, *supra* note 218 at 20 citing *Kornelsen v. Wood Buffalo*, *supra* note 233.

²⁵⁷ *Supra* note 2 discussed in detail in chapters 4 and 5.

The remainder of the Act, except Part 17, covers specific municipal powers and regulatory procedures relating to the formation and dissolution of municipalities, council and council committee meetings, assessment and taxation, municipal organization and administration, finance and budget, liability along with other legal issues, and miscellaneous matters. As indicated above, the province's intention of promoting greater autonomy and flexibility was not concluded with the passage of the 1994 legislation. Bill 32, passed as *Municipal Government Amendment Act*, 1995,²⁵⁹ brought the whole of a reconstituted *Planning Act* into the compendium as Part 17.²⁶⁰ Part 17 grants specific powers to municipal authorities over land use planning and development and is reviewed in detail in chapter 4.

3.5 Preliminary Conclusion

Municipal government may not be the most important plane of government, but there is no denial that it has been an important one within the Canadian federal system,²⁶¹ and remains crucial in achieving Alberta's goals. Municipalities may not have constitutional status, but the Supreme Court of Canada has stated that Canadian federalism is not simply a matter of literal interpretation of laws. The Constitution, though a legal document, serves only as a framework for life and political action within a federal state, in which the courts have rightly observed the importance of cooperation among government actors to ensure that federalism operates flexibly.²⁶² The task of maintaining the balance of powers in practice falls to all governments.²⁶³

²⁵⁸ *Foundations of Governance*, *supra* note 10 at 25 citing D. Tang, M. Kovacevic, & R. Seyffert, "Ontario's New Municipal Act: An Overview" (2002) *Municipal World* 19–22.

²⁵⁹ S.A. 1995, c. 24.

²⁶⁰ *Municipal Reform in Canada*, *supra* note 183 at 63.

²⁶¹ *Ibid.* at 337.

²⁶² *Canadian Western Bank*, *supra* note 203 at para. 42.

²⁶³ *Ibid.*

While Canadian intergovernmental relations were limited to federal-provincial relations for a long time, there is evidence that the spirit of federalism has permeated the system to extend intergovernmental relations to municipal governments. Examples are the MOU for coordination between municipal organizations and the provinces of Ontario and British Columbia enshrined in their respective enabling legislation, and the various tripartite agreements on various policy areas such as infrastructure. The analysis so far has also shown that the spirit of federalism is emerging in Alberta. Examples are the *ad hoc* provincial-municipal ministerial councils comprising the responsible minister (usually the minister of Municipal Affairs) and representatives of various municipal associations, as well as the 1994 MGA intended to provide municipalities with greater administrative flexibility.²⁶⁴

However, Alberta lags behind in institutionalizing any mechanism for provincial-municipal relations. There is no provincial-municipal institutional decision-making forum in Alberta. While the innovations in the 1994 MGA represent a departure from Dillon's Rule,²⁶⁵ there is little to suggest that the reforms have had any major effect on the nature of provincial-municipal relationship either in terms of form or dynamics.²⁶⁶ The fundamental nature of the 'superior-subordinate' relationship between municipal governments and the provincial government remains essentially unchanged.²⁶⁷ The current municipal-provincial relationship in Alberta has

²⁶⁴ "Municipal Reform in Alberta," *supra* note 214 at 57.

²⁶⁵ *Supra* note 41 and accompanying text.

²⁶⁶ *Rationale for Renewal*, *supra* note 21 at 13.

²⁶⁷ *Ibid.* It was argued that despite all the innovative provisions, Alberta's legislation did not explicitly identify municipalities as an order of government. While declaring municipal government as an order of government may be without true constitutional meaning, the fact that it was legally recognized by legislation seems to be one of acknowledging the fundamental importance of municipal governments. *Municipal Reform in Canada*, *supra* note 183 at 310-311.

been described as the province acting as an order of government with municipal governments as administrative units of the provincial government.²⁶⁸

True federalism produces intergovernmental cooperation as a means of guaranteeing municipalities a meaningful role in governance.²⁶⁹ The principle of federalism also facilitates the pursuit of collective goals.²⁷⁰ The Supreme Court of Canada has stated that the fundamental objectives of federalism include fostering cooperation among governments and legislatures for the common good.²⁷¹ What is being advocated is a partnership which would enable Alberta municipalities to better address the shared interests of the province and local governments, better respond to the current and future challenges, and to become full participants in sharing the burden of leadership.²⁷² To the extent that the provincial and municipal government will collaborate, especially as equal partners, it will become necessary to develop institutions to support their collaboration.²⁷³ The MCMS has suggested the development of a long-term framework agreement between the province and municipal representatives as a means to formalize the terms of such a revised framework.²⁷⁴ The next chapter explores the crucial role of municipal government in the context of energy development, the scope of municipal powers over planning and development under Part 17 of the MGA, and provincial-municipal relations or coordinative mechanisms in this policy area.

²⁶⁸ *Rationale for Renewal*, *supra* note 21 at 6.

²⁶⁹ “Urbanism and Federalism,” *supra* note 3 at 33.

²⁷⁰ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 59.

²⁷¹ *Canadian Western Bank*, *supra* note 203 at para. 22.

²⁷² *Rationale for Renewal*, *supra* note 21 at 6.

²⁷³ J.P. Meekison, H. Telford & H. Lazar, eds., *Canada: the State of the Federation 2002: Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004) at 23[hereinafter *Reconsidering the Institutions of Canadian Federalism*].

²⁷⁴ *MCMS Report*, *supra* note 183 at 13.

Chapter Four

The Governance Framework for Energy Development in Alberta and the Role of Municipalities

This chapter analyzes Alberta's regulatory framework for oil and gas, especially oil sands, development. The purposes of this quest are several. The first is to determine to what extent municipal authorities are involved in the regulatory process to ensure that socio-economic challenges of these projects are resolved early in the process. The doctrinal analysis of the relevant provisions of the *Municipal Government Act* ("MGA")¹ and the *Alberta Land Stewardship Act* ("ALSA")² in this chapter adds clarity to the unresolved scope of municipal powers over energy development in Alberta. The second is to identify the model underlying Alberta's regulatory framework and expose the gaps created by the model to which the federal principle of non-centralization may be used to fill. Third, this chapter is the first step in identification of the problem in Alberta's regulatory framework.

The chapter begins with a brief discussion of the importance of oil and gas, especially oil sands, to Alberta and how Alberta struggled for about twenty-five years to obtain control over its natural resources. This explains the rationale for provincial control over regulation of energy development projects. The thesis categorizes the regulatory bodies involved in approving energy projects to show that municipalities are among the Category B regulatory institutions whose jurisdictions are limited and may or may not be triggered. It then examines in detail municipal jurisdiction over land use and development in order to determine the scope of municipal powers to regulate socio-economic challenges arising from oil and gas and oil sands development within

¹ R.S.A. 2000, c. M-26.

² S.A. 2009, c. A-26.8.

municipal boundaries. The chapter then discusses the various stages of the oil and gas approval process in Alberta, focusing on the oil sands, with a view to locating the forum and mechanism for resolving socio-economic challenges. The chapter then analyzes the relevant provisions of the ALSA to determine if that legislation has improved coordination of municipal and provincial jurisdiction over energy development projects. Unfortunately, the chapter answers in the negative.

The chapter concludes that municipal power to regulate municipal matters relating to energy development is highly circumscribed; therefore socio-economic challenges of energy projects are not resolved at the municipal approval stage if at all triggered. There is little or no coordination by the province and its regulatory bodies with host municipalities on energy development matters. The result is that there is no forum or mechanism in the regulatory framework where socio-economic challenges are resolved, or at least a firm commitment to resolution made, by responsible governments prior to or at the time of project approvals. This is a significant gap in the framework. The chapter concludes that the ALSA has not provided the needed model and principles that will likely help fill the gap in the framework.

4.1 The Importance of Oil and Gas Resources in Alberta and the Place of Oil Sands in Alberta's Energy Reserves

Energy, especially oil and gas as the engine of Alberta's economy, account for almost a third of the revenue allocated under the provincial budget and just over half of the value of the total exports.³ The oil and gas sector employs, directly and indirectly, nearly one in every six workers

³ N. Vlavianos & C. Thompson, "Alberta's Approach to Local Governance in Oil and Gas Development" (2010) 48 Alta. L. Rev. 55 at 56. In 2011, Alberta exported about 1.3 million barrels per day (bbl/d) of crude oil to the United States (U.S.), supplying 15 percent of U.S. crude oil imports, or 7 percent of U.S. oil demand. For all these statistics

in Alberta.⁴ Average Alberta GDP growth from 2002 to 2012 was 2.9 per cent, compared with a Canadian average of 2.0 per cent. This is forecast to continue to grow at a trend of 3.0 per cent from 2014 to 2022.⁵ Clearly, encouraging investment in oil and gas in Alberta is a priority for government to achieve its goals of global energy leadership.

Alberta's oil sands play a very important role in this goal of energy leadership. Bitumen production accounted for 78 per cent of Alberta's total crude oil and bitumen production in 2012.⁶ Alberta's oil sands have been described as "Canada's greatest buried energy treasure."⁷ The oil sands underlie 140,200 square kilometers (54,132 square miles) of land in the Athabasca, Cold Lake and Peace River areas of northern Alberta. Together these oil sands areas contain an estimated 168 billion barrels (established reserves) of crude bitumen.⁸ This makes Alberta's oil sands the third-largest proven crude oil reserve in the world, next to Saudi Arabia and Venezuela.⁹ Only 5.3 percent of the initial established crude bitumen reserves have been produced since commercial production started in 1967.¹⁰ The Energy Resources Conservation Board ("ERCB" which was replaced by the Alberta Energy Regulator ("AER" or Regulator) on

see generally online: Alberta Energy homepage <<http://www.energy.gov.ab.ca/OurBusiness.asp>> and Alberta Energy, "Facts and Statistics," *ibid.* <<http://www.energy.gov.ab.ca/OilSands/791.asp>> [hereinafter "Facts and Statistics"]

⁴ According to the Canadian Association of Petroleum Producers ("CAPP") oil and gas investment spending in Canada was \$34 billion in 2009 and \$40 billion was forecast for 2010. See *ibid.* <<http://www.energy.gov.ab.ca/OilSands/793.asp>>

⁵ Alberta, Energy Resources Conservation Board, *ST98-2013: Alberta's Energy Reserves 2012 and Supply/Demand Outlook 2013–2022* (Calgary: Energy Resources Conservation Board, 2013) [hereinafter *ST98-2013*] at 8.

⁶ *Ibid.* at 2.

⁷ *Ibid.*

⁸ Compare with the remaining conventional crude oil reserves of 1.7 billion barrels. Alberta, Energy Resources Conservation Board, *Alberta's Energy Industry Overview: Statistical information* (Calgary: Energy Resources Conservation Board, June 2012) at 2, ERCB homepage <http://www.energy.gov.ab.ca/Org/pdfs/Alberta_Energy_Overview.pdf> [hereinafter *Alberta's Energy Industry Overview*].

⁹ Online: Alberta Energy homepage <<http://www.energy.gov.ab.ca/News/oilsands.asp>>

¹⁰ *ST98-2013*, *supra* note 5 at 9. Commenced with Great Canadian Oil Sands (Suncor) in 1967, Syncrude in 1978, the Alberta Oil Sands Project (Shell Muskeg River Mine and Shell Scotford Upgrader) in 2003, and the Horizon Project (CNRL) in late 2008 and produced upgraded bitumen in 2009.

June 17, 2013)¹¹ estimated that oil sands capital expenditures are predicted to increase to \$21.6 billion in 2013 and peak in 2015 at \$23.4 billion.¹² In 2012, Alberta produced 704 million barrels of crude bitumen. New projects are being added every year and production is projected to reach 3.8 million barrels per day by 2022.¹³ As of January 2013, there were 127 active oil sands projects in Alberta, out of which six mining projects have been approved and currently producing bitumen.¹⁴ Many new *in situ* projects have been announced and are proceeding through the application process, and accelerated development schedules have been added for existing and approved projects.¹⁵ Forecasts indicate that this will continue to be the case for the foreseeable future.¹⁶

In the fiscal year 2011/12, the Alberta government collected about \$4.5 billion in royalties from oil sands projects.¹⁷ In addition to royalties, the provincial government receives tax revenues from corporate and personal income taxes from the oil sands sector and spin off industries.¹⁸ Municipalities in the oil sands regions and elsewhere also receive property tax from the oil sands industry located within their jurisdiction.¹⁹ The oil sands, and spin off industries, are the largest sources of employment in the province. In fact, labour supply is not sufficient to meet demand

¹¹ The legislative and policy changes of 2013, after the thesis has been written pursuant to the *Responsible Energy Development Act* (“REDA”), S.A. 2012, c. R-17.3, did not affect the substantive analysis in this thesis. Therefore the AER and ERCB are used interchangeably throughout the thesis. The impact of the recent changes is discussed in chapter 6 below.

¹² *ST98-2013*, *supra* note 5 at 8.

¹³ *Ibid.* at 10.

¹⁴ See online: Alberta Energy Homepage <<http://www.energy.gov.ab.ca/OilSands/791.asp>>.

¹⁵ *ST98-2013*, *supra* note 5 at 10.

¹⁶ Alberta Energy, *Investing in our Future: Responding to the Rapid Growth of Oil Sands Development Final Report* by D. Radke, (Edmonton: Department of Energy, 29 December 2006) at 4, online: Alberta Energy homepage <<http://www.energy.alberta.ca/pdf/OSSRadkeReportInvesting2006.pdf>> [hereinafter *Investing in our Future*].

¹⁷ Online: Alberta Energy homepage <<http://www.energy.gov.ab.ca/OilSands/791.asp>>

¹⁸ See generally *Investing in our Future*, *supra* note 16 at 4.

¹⁹ MGA, *supra* note 1, Part 9: Assessment of Property.

and this challenge will continue as the pace of development increases.²⁰ Growth is projected to increase as these activities strengthen, and continued investment in oil sands mining, upgrading, and in situ projects will continue to drive the overall Alberta economy.²¹ The importance of oil sands to the province is clear.

4.2 Provincial Jurisdiction over Oil and Gas Resources in Alberta

The extent of federal control and ownership of natural resources was a primary irritant in the relations between the federal government and the western provinces from the beginning.²² The special role of natural resources in Canadian federalism goes that far back, since the ability to draw on the revenues accruing from ownership of resources was crucial to the viability of the provinces as fiscal entities.²³ Alberta was created as a province in 1905 but was only able to obtain control over its natural resources from the federal government in 1930 by virtue of the natural resources transfer agreements with the Prairie Provinces.²⁴ Pursuant to that agreement Alberta owns the mineral rights in approximately 81 percent of Alberta's 66 million hectares.²⁵ While an urgent concern in 1930 was conservation of oil and gas, as the Turner Valley field was being rapidly depleted by unregulated drilling and the flaring of vast quantities of natural gas,²⁶ it was the discovery of significant quantities of oil at Leduc in 1947 that engendered the energy

²⁰ *Investing in our Future*, *supra* note 16 at 21.

²¹ *ST98-2013*, *supra* note 5 at 8.

²² S. Blackman *et al.*, "The Evolution of Federal/Provincial Relations in Natural Resources Management" (1994) 32 *Alta. L. Rev.* 511 at 512.

²³ *Ibid.* at 512.

²⁴ *Constitutional Act, 1930*, Appendix II, No. 26. See also *The Alberta Natural Resources Act* S.C. 1930, c. 3. Prior to the agreements, all Crown lands, mines and minerals, natural resources and royalties incidental thereto within these provinces were vested in the Crown and administered by the Government of Canada for the purposes of Canada. By virtue of the agreements, Alberta and the other Prairie Provinces became equal with the other provinces that carried ownership of natural resources into the Confederation.

²⁵ Alberta Energy, *Alberta Oil Sands Tenure Guidelines*, (Edmonton: Department of Energy, 14 August 2009) at 1-2 [hereinafter *Oil Sands Tenure Guidelines*].

²⁶ The wasteful chaos led to the creation of the Turner Valley Conservation Board in 1932, which after several metamorphoses became the present day AER. See Blackman *et al.*, *supra* note 22 at 513.

wars which ensued between the provinces and the federal government.²⁷ Alberta wanted to use oil and gas development as a springboard to escape from a precarious dependence on agriculture whereas the federal government wanted to use the discoveries, in particular the West's natural gas, to build the country.²⁸

Fortunately, the federal-provincial confrontations over energy policy coincided with the amendment of Canada's Constitution in 1982.²⁹ Given the sensitivities regarding federal actions in the energy sector, natural resources management became an issue on the agenda for constitutional reform. This led to the addition of section 92A resource amendment to the *Constitution Act, 1867*³⁰ and a formula for future constitutional amendments to the *Constitution Act, 1982*.³¹ The final version of section 92A: (a) confirms the provinces' exclusive legislative authority over exploration, development, conservation and management of non-renewable resources; (b) gives provinces new jurisdiction over interprovincial trade in resources, provided that there is no discrimination in price or supply for interprovincial export, and provided that federal legislation in the same area is paramount; (c) and gives provinces new jurisdiction to impose indirect taxation on resources, provided the taxes do not discriminate between production

²⁷ For the federal-provincial energy wars and constitutional struggles from 1947 to 1985 see Blackman *et al.*, *ibid.* from 513.

²⁸ *Ibid.* at 514.

²⁹ *Ibid.* at 521.

³⁰ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

³¹ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11. In *A.G. Man. v. A.G. Can. (Reference re Amendment of the Constitution of Canada)*, [1981] 1 S.C.R. 753 at 760, the Supreme Court of Canada held that, the federal government's "unilateral" action was unconstitutional in that it went against Canadian constitutional conventions and offended federalism. "A substantial degree of provincial consent—to be determined by the politicians and not the courts—was conventionally required for the amendment of the Canadian Constitution. The convention existed because the federal principle could not be reconciled with a state of affairs where the federal authorities could unilaterally modify provincial legislative powers." See also Blackman *et al.*, *supra* note 22 at 521-23 citing J. Meekison, *et al.*, *Origin and Meaning of Section 92A of the 1982 Constitutional Amendment on Resources* (Montreal: The Institute for Research on Public Policy, 1985) at 15 and Appendix A in W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61 Can. Bar Rev. 715 at 733-34.

for interprovincial export and production for provincial use. With section 92A, the constitutional jurisdiction of Alberta over energy and natural resources in Alberta became conclusive.³²

It is against this backdrop that Alberta's energy regulatory framework is perceived as highly influenced by its historical context. Authors have argued that the twenty-five year struggle to acquire control over resources in Western Canada has left a residue of suspicion that informs natural resource policies in Alberta to the present day.³³ Alberta's energy regulatory framework is motivated, in part, by the fear of losing control over its natural resources and the need to prevent federal encroachment on the province's jurisdiction. During the Lougheed administration it was noted that Premier Lougheed preferred to keep personal control over energy matters.³⁴ Arguably, the fear of federal intrusion through the federal spending powers and financial aids to municipalities in part explains Alberta's reluctance to grant municipalities significant decision-making powers over energy matters, having not succeeded in totally severing federal-municipal relations.³⁵

Authors have also argued that Alberta's position on federalism has been informed by a strong sense of "pragmatism." This is exemplified by Alberta's acceptance of federal control when the

³² *Constitution Act, 1982*, *supra* note 31, ss. 38(2) and (3) and 92A; Blackman *et al.*, *ibid.* at 523-24. Other constitutional provisions also authorize provincial regulation and management of natural resources. Section 109 grants the province proprietary rights over the lands, mines and minerals it owns. Section 92(5) of the constitution grants provinces exclusive jurisdiction over the management and sale of public lands. Further, section 92(10) gives provinces legislative authority over "local works and undertakings" (other than those connecting two provinces, or those extending beyond provincial boundaries). Section 92(13) grants powers in relation to "property and civil rights in the province," and section 92(16) grants exclusive provincial jurisdiction generally over "all matters of a merely local or private nature in the province." Taken together, these provisions grant Alberta extensive legislative and regulatory jurisdiction regarding the management and development of Alberta's oil sands, as well as the commercial, environmental and other aspects of oil sands operations. *Ibid.* at 30-3105 to 30-3106. See also A.R. Lucas, "Natural Resource and Environmental Management: A Jurisdictional Primer" in *Environmental Protection and the Canadian Constitution* (Edmonton: Environmental Law Centre, 1987).

³³ Blackman *et al.*, *supra* note 22 at 533.

³⁴ *Ibid.* at 519.

³⁵ See chapter 3, section 3.3.1.

National Oil Policy of the pre-1973 period was coincident with the province's own immediate interests, and Alberta's strong resistance when the National Energy Program was hostile to those interests.³⁶ Alberta's pragmatic approach to federalism likely explains Alberta's *ad hoc* approach to institutional problems relating to oil and gas development. The province appears to prefer relating with the most affected party, after the fact, to solve problems rather than institutionalized coordination of processes grounded in federal principles and protected by law. The next section discusses Alberta's oil and gas regulatory framework to show its centralist model of governance over energy resources and development.

4.3 Governing Institutions and Regulatory Bodies in Alberta's Oil and Gas Regulatory Framework

Several institutions have oversight of, or some connection with approving, oil and gas activities in Alberta. Figure 4 below (the Energy Industry Authorization Overview)³⁷ from the provincial *Upstream Oil and Gas Authorizations and Consultation Guide*,³⁸ intentionally or unintentionally, depicted a categorization of some of these institutions. In Figure 4, the recognized bodies with primary authority over upstream oil and gas activities, including oil sands, in the province were: (a) Alberta Department of Energy ("Alberta Energy"), (b) the Alberta Energy Regulator³⁹ ("AER" or Regulator, formerly the ERCB), (c) former Alberta Environment and Water

³⁶ This theme of pragmatism was also said to run through Alberta's varying degrees of attachment to the market as a regulator of natural resources trade. Blackman *et al.*, *supra* note 22 at 533. The National Energy Program ("NEP") was introduced by the federal government in October 1980, unilaterally imposed a schedule of small staged increases in the prices of oil and natural gas, put a wellhead tax on natural gas, and set a production tax on oil and gas revenues causing Alberta to withhold approval for two major oil sands projects. Alberta challenged this at the Supreme Court of Canada in *Reference Re Proposed Federal Tax on Exported Natural Gas*, (1982), 136 D.L.R. (3d) 385 (S.C.C.) See Blackman *et al.*, *supra* note 22 at 519-520.

³⁷ Another version of Figure 4 is properly captioned "Energy Industry Authorization Overview" see online: Energy Resources Conservation Board homepage<<http://www.ercb.ca/about-us/what-we-do>>

³⁸ Energy Resources Conservation Board, *Upstream Oil and Gas Authorizations and Consultation Guide*, (Calgary: Energy Resources Conservation Board, 26 October 2010 incorporating revisions to May 13, 2011) at 7 [hereinafter *The Guide*]. The scope of this thesis does not cover the federal regulatory regime and authorities.

³⁹ Pursuant to the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3, *supra* note 11.

(“AEW”), and (d) former Alberta Sustainable Resource Development (“SRD”). However, under the Redford regime, AEW and SRD merged to become Environment and Sustainable Resource Development (“ESRD”).⁴⁰ Further, from June 17, 2013, an enhanced Policy Development and Policy Assurance system was created for Alberta’s energy sector. The former policies of Alberta Energy and the ESRD, in relation to air, water, and land management for the conservation, extraction, processing and transportation of energy resources, are integrated under the Policy Development branch and overseen by a Policy Management Office (“PMO”).⁴¹ The regulatory functions performed by the ESRD and the ERCB, such as project review and authorization, compliance monitoring, enforcement, facilities abandonment and site reclamation/remediation, in respect of oil, natural gas, oil sands and coal (the energy resource activities) are integrated under the Policy Assurance branch and overseen by a new single regulator, the AER.⁴²

An important, but not very obvious, primary authority is the Lieutenant Governor in Council by virtue of its key roles in approving major oil sands projects. The first key role is through the initial Preliminary Disclosures, required after the sale of mineral rights, which initiates a review and decision on the project in principle, in terms of the timing, location, form, or any other

⁴⁰ Government of Alberta, News Release, “New Cabinet team focused on growing Alberta’s future, New structure to change the way government does business” (8 May 2012).

⁴¹ In the summer of 2013 the Alberta Responsible Energy Policy System (“AREPS”) was launched to bring together policies, regulations and pieces of legislation, from the Alberta Energy Regulator, the departments of Energy and Environment and Sustainable Resource Development. See online: Alberta Energy Homepage <<http://areps.energy.gov.ab.ca/>>

⁴² Ultimately, the AER is now responsible for energy resource developments from initial application to reclamation. ESRD retains regulatory functions under its legislation for all other sectors except upstream oil, gas, oil sands and coal sectors. ESRD will still administer the *Public Lands Act*, *Environmental Protection and Enhancement Act* and *Water Act* for non-energy resource projects. It continues to be responsible for ensuring environmental outcomes are met through clear policy direction/development and evaluation of the effectiveness of the regulatory system. See Regulatory Enhancement Project Environmental Questions and Answers, online: Alberta Energy Homepage <<http://www.energy.alberta.ca/Initiatives/RegulatoryEnhancement.asp>>

essential feature of the proposal.⁴³ The second key role is through authorization to the regulatory Board to grant oil sands approvals.⁴⁴ Further, with the advent of the Land-Use Framework and the *Alberta Land Stewardship Act* (“ALSA”),⁴⁵ other institutions with significant powers over land uses and development are the Lieutenant Governor in Council and the Stewardship Commissioner in charge of the Land-Use Secretariat discussed below.

Figure 4 also shows other provincial departments and agencies having some indirect oversight of oil and gas matters, at least to the extent they ensure that oil and gas activities do not inhibit their own mandates. These include the Ministries of Culture, Health, Transportation, Tourism Parks and Recreation, and Human Services. Then there are municipal governments with the general mandate to regulate land uses within municipal boundaries. In Figure 4, the Energy Industry in the mid-center with arrows pointing to the institutions from which industry has to obtain development approvals and clearances. The bodies at the upper and lower center, Alberta Energy and the ERCB (“category one”), held the main key to every oil and gas project. While Alberta Energy sells mineral rights and collects royalties and other fees, the ERCB was responsible for development approvals and facilities licenses. The bodies at the upper and lower right side, Alberta Environment and Sustainable Resource Development (“category two”), had regulatory oversight of the environment and public lands to ensure that those are not adversely affected by oil and gas activities. They were *sine qua non*, in that, without environmental permits, and surface rights (if Crown land), an oil and gas project will not proceed.⁴⁶ The bodies on the left

⁴³ Energy Resources Conservation Board, Directive 023 - *Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project* (01 September 1991) at 3 [hereinafter Directive 023].

⁴⁴ *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, ss. 10(3)(a) and (4) and 11(3)(a) and (4).

⁴⁵ S.A. 2009, c. A-26.8, *supra* note 2.

⁴⁶ Consultation with the public and First Nations (for social license) is a compulsory step in the AER’s Category A approval process.

side (“category three”) have connection with oil and gas activities only if triggered. Therefore the jurisdiction of provincial departments such as Culture, Health, Transportation, Tourism Parks and Recreation would arise when a project affects their areas of mandate such as historic resources, sour gas in proximity to residences, resources located in a provincial park, or a highway may be impacted. Under the new Policy Development and Policy Assurance system, categories one and two bodies have been merged to form a new “Category A.” Category three institutions have become “Category B.”

From Figure 4, it is noticeable that Category A bodies control and wield significant powers over oil and gas activities in Alberta. Category B bodies, except municipalities in mid-left, are autonomous within their own legislated mandates and regulate those aspects of oil and gas projects that touch upon their jurisdiction by permits or clearances. The involvement of municipalities is not quite like that of the other Category B provincial institutions and this is discussed in detail in section 4.4 below to determine municipal role in regulating municipal matters that pertain to oil and gas development. Another observation from Figure 4 is that while the energy industry stands in the middle connected to regulatory bodies by arrows, the regulatory bodies all stood alone, far apart, without any connecting wires between and among them. While this observation appears to have been partially cured by the merger of functions under the new Policy Development and Policy Assurance system,⁴⁷ a deeper look in chapters 5 and 6 below reveals that a significant gap remains in the level of coordination employed in Alberta’s oil and gas regulatory framework.

⁴⁷ Establishing a single regulator is said to be part of a larger integrated resource management system, which the Alberta government is enhancing to ensure each piece of the system – policy development, policy assurance, monitoring, reporting – are connected. See Regulatory Enhancement Project Environmental Questions and Answers, online: Alberta Energy Homepage < <http://www.energy.alberta.ca/Initiatives/RegulatoryEnhancement.asp> >

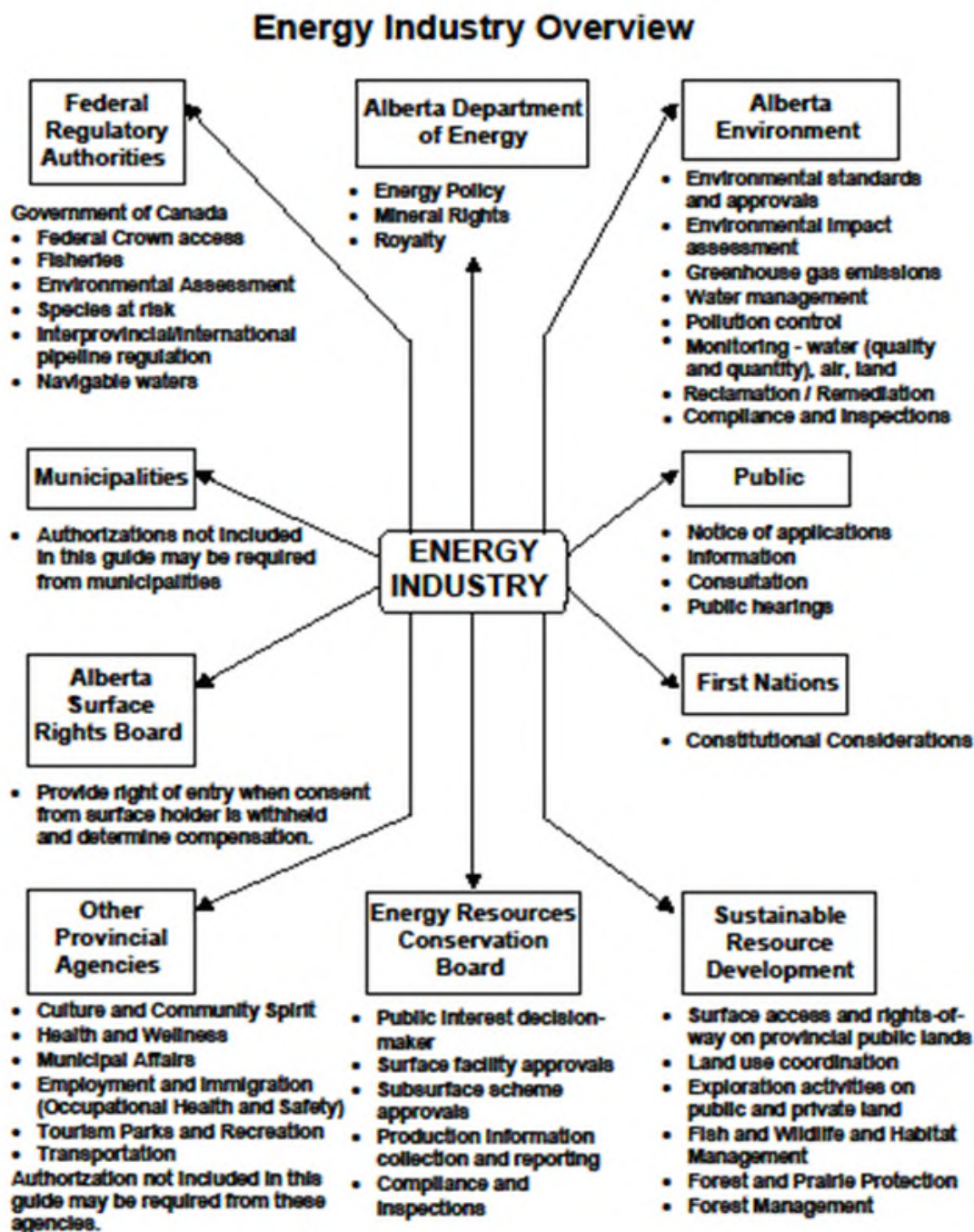


Figure 4: Energy Industry Authorization Overview (source: *Upstream Oil and Gas Authorizations and Consultation Guide*)

4.4 Municipal Jurisdiction in Oil and Gas Development in Alberta

4.4.1 Brief History of Municipal Planning and Development Legislation in Alberta

Municipalities have statutory jurisdiction over planning and development of land pursuant to planning and development legislation. This part briefly traces the evolution of the planning legislation in Alberta and the rationale behind the amendments and consolidation into the new model MGA in 1995. This part buttresses Alberta's pragmatic and reactive approach to what is apparently an institutional problem. There appears to be similarities between the events in the 1960s and the current events in the 2000s, and similarities in provincial responses to these problems in both eras.

Similar to the current situation in the Regional Municipality of Wood Buffalo ("RMWB"), massive exploration efforts across the province in 1947 brought about migration and settlement of hundreds of people into the area resulting in demand for schools, water, sewer, parks and other necessities. At that time it was not feasible to incorporate these settlements. Conventional villages and towns, and the settlements that were already incorporated had so much increase in the populace beyond the capability of existing councils.⁴⁸ Among the various actions taken by Alberta in response to the growth problem was the enactment of the *Planning Act*.⁴⁹ Amendments to the *Planning Act* between 1964 and 1973 did not resolve the controversy and discontent about land use planning and regulation. The new conservative government at the time commissioned an investigation into new planning legislation that would serve as a foundation for planning and regulation of land use in Alberta into the 1980s and beyond.⁵⁰ A working paper in

⁴⁸ F.A. Laux, *Planning Law and Practice in Alberta* 3rd ed. (Edmonton: Juriliber, 2005) at 1-13.

⁴⁹ S.A. 1963, c. 43, which introduced Regional Planning Commissions and Regional Plans, a concept reintroduced under the current Land-Use Framework and established by ALSA. See Laux, *ibid.* at 1-36.

⁵⁰ Ferederick Laux and Noel Dant. See Laux, *ibid.* at 1-38 and 1-40.

the form of a draft bill was issued in 1974 entitled ‘Towards a New Planning Act for Alberta’ (also known as the Red Book).

Similar to the current Land-Use Framework,⁵¹ a task force called the Alberta Land Use Forum was commissioned to make recommendations on the issues in the proposed new *Planning Act*.⁵² The Land Use Forum Report and its responses resulted in a draft bill tabled in the Legislature in 1976, became the 1977 *Planning Act*⁵³ and underwent further amendments in 1980 and 1991.⁵⁴ In September 1995 the *Planning Act* was consolidated into the new model MGA as Part 17 and the Regional Planning Commissions and Regional Plans were dropped. Part 17, said to be in accordance with the liberating federal theory of the new MGA, was the result of a public consultation (the *Planning Act* Review) which concluded that Alberta’s planning legislation should be delayed and deregulated. Thus, Bill 32 which passed as the *Municipal Government Amendment Act, 1995*⁵⁵ sought to increase local autonomy, reduce duplication and competition among authorities in the planning regime, and streamline approval processes. Bill 32, by eliminating the Alberta Planning Board, the Regional Planning Commissions and the entire provincial and regional planning structure, to a greater extent gave municipal land use and

⁵¹ Discussed below in chapter 5, section 5.5.2.

⁵² Laux, *supra* note 48 at 1-41.

⁵³ S.A. 1977 c.89 effective April 1, 1978. The Act enhanced powers of the provincial government in planning matters of provincial concern. The Lieutenant Governor in Council’s regulation-making power was enlarged. Regional Planning areas to be controlled by Regional Planning commissions were created. The Act also granted the Minister of Municipal Affairs power to monitor and approve Regional Plans, and appoint members of the Regional Planning commissions. See Laux, *supra* note 48 at 1-43 to 1-45.

⁵⁴ Versions of the *Planning Act* in chronological order include S.A. 1991, c.28; R.S.A. 1980, c.P-9; S.A. 1977, c.89; R.S.A. 1970, c.276; and S.A. 1963, c.43.

⁵⁵ S.A. 1995, c. 24 consolidated the *Planning Act* into the MGA as Part 17.

development powers over to municipalities under Part 17.⁵⁶ By contrast, the ALSA discussed in detail below, has re-established Regional Plans and supporting institutions.

As part of the new model MGA, some applauded Part 17 for placing primary responsibility for planning and land uses in the hands of politically accountable municipal authorities in recognition of planning's political nature and the profound impact of planning decisions on the character and nature of a local community.⁵⁷ Some saw it as the best means of streamlining the multiple approvals needed from diverse public agencies for certain kinds of development projects, particularly those in the environmental protection and those regulating oil, gas and other natural resource industries.⁵⁸ Others perceived Part 17 as an attempt to strike a balance between the competing objectives of effective local control over land use and the promotion of provincial and regional interests.⁵⁹ The retention of significant authority by the province in Part 17 is said to be a reflection of the need to provide coordinated responses to issues that extend beyond municipal boundaries.⁶⁰ Certainly, as recent events in the oil sands industry have shown, there is a dire need for coordination of planning and development matters within and beyond municipal boundaries.

⁵⁶ E.C. LeSage Jr., "Municipal Reform in Alberta: Breaking Ground at the New Millennium" in J. Garcea & E.C. LeSage Jr., eds., *Municipal Reform in Canada: Reconfiguration, Re-empowerment, and Rebalancing* (Don Mills, ON: Oxford University Press Canada, 2005) at 64 and 69-70 [hereinafter "Municipal Reform in Alberta"] citing J. Masson and E. LeSage, *Alberta's Local Governments Politics and Democracy* (Edmonton: University of Alberta Press, 1994) 417; and P.S. Elder, "Alberta's 1995 Planning Legislation" (1995) 6 J.E.L.P. 23-58. See also Laux, *supra* note 48 at 1-42.

⁵⁷ S.M. Makuch, N. Craik, & S.B. Leisk, *Canadian Municipal and Planning Law* 2nd Edition (Toronto: Thomson Canada Ltd., 2004) at 162.

⁵⁸ Laux, *supra* note 48 at 2-2.

⁵⁹ F. Hoehn, *Municipalities and Canadian Law Defining the Authority of Local Government* (Saskatoon: Purich Publishing, 1996) at 128.

⁶⁰ Makuch *et.al.*, *supra* note 57 at 167.

However, the main issue is whether the mechanism provided in Part 17 achieves the goal of coordination and cooperation, which the federal principle of non-centralization advocates, if that is the legislative intent of Part 17. This is a crucial question dominating the rationale for a detailed look at some key provisions in Part 17 and their relationship with other Parts of the MGA. It is necessary to determine the scope of municipal powers as a named regulatory body over oil and gas development, to determine the extent of cooperation and partnership between municipal and provincial authorities in their regulatory functions, and to locate the forum where critical challenges facing oil and gas development are addressed and resolved by governments responsible.

4.4.2 Overview of Municipal Powers over Planning and Development under Part 17 MGA

Part 17 starts with a definition section and specifically sets out the purposes of the Part,⁶¹ suggesting some sort of distinction from the other Parts of the MGA. In short, Part 17 is all about planning for, and regulation of, development of land in Alberta.⁶² The three main components of the legislative framework for municipal planning and development under Part 17 are policy, operations, and appeal.⁶³ Municipalities establish planning policy by adopting statutory plans and land use bylaws; policies are put into operation by municipally appointed planning authorities who make decisions on various authorization applications; and these administrative decisions are appealed to Appeal Boards established under the MGA.⁶⁴ Municipal authorizations under Part 17 have two key aspects: authorization for the subdivision of land and the permission to develop

⁶¹ MGA, *supra* note 1, ss. 616 and 617.

⁶² Development here comprises subdivision of land, construction of structures on the land, and the use to which the land is put. See Laux, *supra* note 48 at 2-3.

⁶³ Alberta, *The Legislative Framework for Municipal Planning, Subdivision, and Development Control* (Edmonton: Department of Municipal Affairs, February 1997 updated March 2002) at 2 [hereinafter *Legislative Framework*].

⁶⁴ *Ibid.* at 2.

land.⁶⁵ Subdivision approvals allow partition of large lots into smaller registerable lots while development permits allow development of land in accordance with legislated uses.

Development is broadly defined as:

- (a) an excavation or stockpile and the creation of either of them;
- (b) a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, over or under land;
- (c) a change of use of land or building or an act done that results in or is likely to result in a change in the use of the land or building, or
- (d) a change in the intensity of use of land or building or an act done that results in or is likely to result in a change in the intensity of use of the land or building.⁶⁶

[Emphasis added].

The meaning of “building” is also very broad and includes anything constructed or placed on, in, over or under land.⁶⁷ From this definition, regulation of development will likely catch those made under land and would likely have caught most oil and gas and oil sands infrastructure if not expressly exempted. The novelty in Part 17 is that it does not in and of itself deal with and prescribe when, where and how a particular development may be achieved; rather it creates the public authorities and delegates to them and others which exist through other legislation, including other parts of the MGA, the task deemed necessary for effective planning and regulation.⁶⁸ As Laux puts it, Part 17 “provides the carpenters, gives them the tools and sets the general parameters for what they may build. The end product depends upon the imagination, skill and energies of the carpenters, the planning agencies.”⁶⁹ The subdivision authority exercises powers and performs duties in the area of receiving, processing, and deciding on subdivision

⁶⁵ K. Wakefield, *Alberta Municipal Law & Commentary* (Canada: LexisNexis, 2006) at 382. There are other powers which are offshoots of these two main aspects.

⁶⁶ MGA, *supra* note 1, s. 616(b).

⁶⁷ But does not include a highway or road or a bridge that forms part of a highway or road. See MGA, *ibid.*, s. 616(a.1).

⁶⁸ Laux, *supra* note 48 at 2-3. MGA, *ibid.*, Division 3 of Part 17 (ss. 623 – 630.1) establishes the planning authorities.

⁶⁹ Laux, *ibid.* at 2-4.

applications in accordance with the MGA and Regulations⁷⁰ whereas the development authority is responsible for receiving, processing, and deciding on development permit applications.⁷¹ The Subdivision and Development Appeal Board (“SDAB”) hears appeals from the decision of a subdivision authority on a subdivision application, unless the land is within the Green Area or within the distance of a highway, body of water, sewage treatment or waste management facility, in which case the appeal lies to the Municipal Government Board (“MGB”).⁷² Appeals for development permits lie to the SDAB, and similar procedures as that of subdivision appeals are followed, but no appeal lies in respect of a development permit issued for a “permitted use” unless the provisions of the land use bylaw were relaxed, varied or misinterpreted.⁷³ Further appeal lies from the decision of the SDAB to the Court of Appeal but only on a question of law or jurisdiction. Appeals from the MGB lie to the Court of Appeal only if the appeal relates to section 619 of Part 17, an intermunicipal dispute under Division 11 of Part 17, or a subdivision matter referred to it.⁷⁴

The four types of statutory plans required under the MGA for municipal planning are: (a) Intermunicipal Development Plan (“IDP”), (b) Municipal Development Plan (“MDP”), (c) Area Structure Plans (“ASP”), and (d) Area Redevelopment Plans (“ARP”) which must all comply

⁷⁰ MGA, *supra* note 1, Division 7 (ss. 652 – 660) and the *Subdivision and Development Regulations* Alta. Reg. 43/2002 as amended. A subdivision authority may impose conditions on subdivision applications such as entering into an agreement with the municipality to construct or pay for the construction of: road, pedestrian walk, permitted public utilities, parking or loading and unloading facilities necessary to serve the development, pay offsite levy or redevelopment levy; as well as to give security to ensure the terms of the agreement.

⁷¹ *Legislative Framework*, *supra* note 63 at 3; MGA, *ibid.*, ss. 625 and 626.

⁷² MGA, *ibid.*, s. 678(2). The Municipal Government Board is a provincial Board with members appointed by the Lieutenant Governor in Council and hears appeals relating to mainly provincial interests. See Elder, *supra* note 56 at 47. Note that subdivision appeal is not a two tiered appeal system; subdivision appeal to the MGB is limited to situations where the above listed provincial interests are in issue. See Alberta Municipal Affairs, News Release, “Bill 32, Municipal Government Amendment Act Introduced” (11April 1995).

⁷³ MGA, *ibid.*, s.685. The right of appeal with respect to development permit is broader than that of subdivision. The right to be heard on a development permit application extends to any one claiming to be “affected” by the development permit. See Wakefield, *supra* note 65 at 390.

⁷⁴ Application for leave to appeal must be obtained from the Court of Appeal within 30 days. MGA, *ibid.*, s. 688.

with the applicable ALSA Regional Plans.⁷⁵ While it is mandatory for a municipality with a population of 3500 or more to adopt an MDP, which establishes policies for land use in the entire municipality, a municipality with less population has an option to do so.⁷⁶ Municipalities may adopt ASPs to establish the general land use, transportation, and servicing framework for specific areas undergoing substantial new development.⁷⁷

Municipalities are mandated to pass a Land Use Bylaw (“LUB”) to regulate the use and development of land, divide the municipality into districts, and prescribe “permitted” and “discretionary” uses for each district referred to as “Zoning.”⁷⁸ The LUB also establishes development and subdivision design standards within each district and provides for a system for issuing development permits.⁷⁹ The LUB, which gives legal force to policies in statutory plans, is the key planning instrument that governs a development application.⁸⁰ Under a land use bylaw, a development authority may be authorized to waive compliance with the bylaw as long as the proposed development conforms to the prescribed use and would not unduly interfere with the amenities of the neighborhood or with the use, enjoyment or value of neighboring parcels of land.⁸¹ LUBs of municipalities that have adopted MDPs, and wish to exercise particular control

⁷⁵ The adoption must comply with the procedures for public hearing set out in s. 692 MGA. MGA, *ibid.*, ss. 631 and 634; *Legislative Framework*, *supra* note 63 at 2.

⁷⁶ MGA, *ibid.*, s. 632; *Legislative Framework*, *ibid.* at 2.

⁷⁷ MGA, *ibid.*, s. 633; *Legislative Framework*, *ibid.*

⁷⁸ MGA, *ibid.*, s. 639. Division 5 (ss. 639 – 646) of Part 17 provides for land use controls. *Legislative Framework*, *ibid.* at 3.

⁷⁹ *Legislative Framework*, *ibid.* Development standards include setbacks, building heights, and permitted finishes. A permitted use which conforms to all development standards must be granted a permit as a right while an application for a discretionary use is subject to the discretion of the development authority even if all development standards are met and may be refused as long as there are *bona fide* planning concerns. See Wakefield, *supra* note 65 at 388.

⁸⁰ Although other planning instruments are also important. See Wakefield, *ibid.* at 388.

⁸¹ MGA, *supra* note 1, s. 640(6). S. 692 provides strict procedures to be followed by council in adopting LUB or bylaws amending any statutory plan or LUB. Such procedures involve public hearing and adequate notices to specific interested parties.

over the use of land within an area, may designate certain areas as “direct control districts.”⁸² In such direct control districts the municipal council decides on development permit applications or may delegate its powers to a development authority with specific directions. Council’s decision on development permit applications for direct control districts is final and there is no appeal to the SDAB. But where such decision is made by a development authority delegated by council, appeal lies to the SDAB and the appeal is limited to whether the development authority followed the directions of council.

Municipalities are also given enforcement powers where a development or use of land or building contravenes Part 17, a bylaw or regulation made thereunder, or the permit/approval issued for that development.⁸³ Municipalities have the power to charge fees with respect to matters under Part 17⁸⁴ and to impose development levies and conditions. The two types of levies municipalities can impose are the redevelopment levy and the offsite levy.⁸⁵ In addition to the levies, a municipality may require as a condition of a development permit that the applicant enter into an agreement, to construct or pay for the construction of road, pedestrian walk, public utilities other than telecommunications, parking or loading and unloading facilities necessary to serve the development, as well as to give security to ensure the terms of the agreement.⁸⁶ There is therefore no doubt that Part 17 of the MGA brought land use planning and development

⁸² MGA, *ibid.*, s. 641(1) MGA.

⁸³ MGA, *ibid.*, s. 645-646 MGA. A development authority may by written notice issue an order to stop, demolish, remove or replace the development or use, or carryout any other action required to ensure compliance. A municipality may register a caveat against the certificate of title of the land in contravention to which a stop order has been issued and discharge such caveat when the order has been complied with.

⁸⁴ MGA, *ibid.*, s. 630.1.

⁸⁵ MGA, *ibid.*, Division 6 (ss. 647 – 651.2). Redevelopment levies are used to provide lands for parks, schools or recreational facilities. Offsite levies are used to pay for the capital cost of new or expanded facilities for water; sanitary sewage; storm sewer drainage; new or expanded roads required for or impacted by a subdivision or development; and land required for such facilities or road.

⁸⁶ MGA, *ibid.*, s. 650.

regulation closer to municipalities. But do these municipal powers apply to all development projects? The next section discusses municipal planning and development powers in relation to energy, especially, oil and gas including oil sands operations.

4.4.3 Municipal Planning and Development Jurisdiction over Oil and Gas Development

Immediately following the purposes of Part 17 are three sections (618 to 620), set out below in Schedule “A” of the thesis, which significantly carve out certain areas of provincial interest, including major aspects of oil and gas development, from municipal planning and development jurisdiction. Pursuant to section 618 of the MGA, the municipal planning and development regulatory regime do not apply where a subdivision or development is sought for the purpose of: (a) a highway or road; (b) a well or battery as defined in the *Oil and Gas Conservation Act* (“OGCA”);⁸⁷ and (c) a pipeline or installation or structure incidental to the operation of a pipeline. The municipal regulatory regime also does not apply to (a) the geographic area of a *Metis* settlement; (b) crown land within a municipal district or specialized municipality designated by the Minister under the *Public Lands Act*;⁸⁸ and (c) any action, person or thing exempted by the Lieutenant Governor in Council by regulation. This section expressly excludes municipal powers in regulating the key oil and gas and oil sands infrastructure within municipal boundaries. The unspoken rationale for section 618 may, in part, be found in the reasoning of Keith J. in *Union Gas Ltd. v. Dawn (Township)*,⁸⁹ allowing an appeal of a lower court decision that approved a zoning bylaw which regulates the location of gas transmission pipelines:

I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need

⁸⁷ R.S.A. 2000, c. O-6.

⁸⁸ R.S.A. 2000, c. P-40.

⁸⁹ (1977), 15 O.R. (2d) 722, at paras. 16 and 29 (Ont. S.C. [Div. Court]) applied in *Superior Propane Inc. v. York (City)* (1995), 23 O.R. (3d) 161 (C.A.), leave to appeal to S.C.C. refused (1996), 26 O.R. (3d) xvi (S.C.C.).

for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by *The Planning Act*, each municipality were able to enact bylaws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own bylaws pending the outcome of this appeal... These are all matters that are to be considered in the light of the general public interest and not local or parochial interests.

A “well,” expressly exempted from municipal regulatory regime under section 618, is broadly defined in the OGCA and includes every hole made in the ground for the exploration for or recovery of oil and gas and crude bitumen.⁹⁰ Arguably, oil sands mines as well as those parts of an *in situ* oil sands operation not expressly mentioned, are not caught under the definition of a well and the section 618 general exemptions.⁹¹ The *Mines and Minerals Act* (“MMA”) clearly distinguishes a well from a mine,⁹² and the *Oil Sands Conservation Act* (“OSCA”)⁹³ distinguishes *in situ* operations from mining operations. “Battery,” also expressly exempted from the municipal regulatory regime, is defined in the OGCA as “a system or arrangement of tanks or other surface equipment receiving the effluents of one or more wells prior to delivery to market or other disposition, and may include equipment or devices for separating the effluents into oil, gas or water and for measurement.”⁹⁴ It appears that processing plants are not exempted as they are separately defined in the OGCA.⁹⁵ “Pipeline” exempted under section 618 is not

⁹⁰ OGCA, *supra* note 87, s. 1(1) (eee) set out in Schedule “A” below.

⁹¹ Interview with Dennis Peck, Manager Planning & Development Department Regional Municipality of Wood Buffalo (5 June 2009) [hereinafter Interview with Dennis Peck].

⁹² MMA, R.S.A. 2000, c. M-17, ss. 1(1)(gg) and (n) set out in Schedule “A” below.

⁹³ R.S.A. 2000, c. O-7, *supra* note 44, ss. 1(1) (h) and (k) set out in Schedule “A” below. In *situ* operation is a scheme or operation ordinarily involving the use of well production operations for the recovery of crude bitumen from oil sands but does not include a mining operation, whereas mining operation is a surface or underground operation for the recovery of oil sands.

⁹⁴ OGCA, *supra* note 87, s. 1(1) (g). These would likely include well head separators, treaters and dehydrators, instrument air compressor, corrosion inhibitor tank, propane tank, methanol tank, flare knockout drum, and flare stack. See *Ketch Resources Ltd. Review of Well Licence No. 0313083 and Application for Associated Battery and Pipeline Pembina Field* (December 1, 2005), EUB Decision 2005-129 (E.U.B.) at 1-2.

⁹⁵ OGCA, *ibid.*, s.1(1) (pp) set out in Schedule “A” below.

limited to oil and gas pipelines, and the MGA does not define pipeline. For oil and gas pipelines, the meaning of “pipeline and installation” under each of the *Pipeline Act*,⁹⁶ the OGCA and OSCA, is quite broad and includes pumping, monitoring or regulating stations.⁹⁷ The implication is that only a few oil and gas operations such as oil sands mines, refineries, upgrader plants, processing plants, power plants, manufacturing and other plants, and oilfield waste facilities may, in addition to provincial approvals, trigger municipal approvals issued under Part 17 of the MGA. What is the scope of municipal powers over these few not expressly exempted?

Sections 619 and 620⁹⁸ appear to create a hierarchical division of power among provincial and municipal development authorities with respect to energy projects. A reader of section 619

⁹⁶ R.S.A. 2000, c. P-15, ss. 1(1)(l), (t) and (u); OGCA, *ibid.*, ss.1(1) (t) and (nn) set out in Schedule “A” below.

⁹⁷ See Laux, *supra* note 48 at 4-38.

⁹⁸ 619(1) A licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this Part.

(2) When an application is received by a municipality for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization under this Part and the application is consistent with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, the municipality must approve the application to the extent that it complies with the licence, permit, approval or other authorization granted under subsection (1).

(3) An approval of a statutory plan amendment or land use bylaw amendment under subsection (2)

(a) must be granted within 90 days after the application or a longer time agreed on by the applicant and the municipality, and

(b) is not subject to the requirements of section 692 unless, in the opinion of the municipality, the statutory plan amendment or land use bylaw amendment relates to matters not included in the licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC.

(4) If a municipality that is considering an application under subsection (2) holds a hearing, the hearing may not address matters already decided by the NRCB, ERCB, AER, AEUB or AUC except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required.

(5) If a municipality does not approve an application under subsection (2) to amend a statutory plan or land use bylaw or the municipality does not comply with subsection (3), the applicant may appeal to the Municipal Government Board by filing with the Board

(a) a notice of appeal, and

(b) a statutory declaration stating why mediation was unsuccessful or why the applicant believes that the municipality was unwilling to attempt to use mediation.

(6) The Municipal Government Board, on receiving a notice of appeal and statutory declaration under subsection (5),

(a) must commence a hearing within 60 days after receiving the notice of appeal and statutory declaration and give a written decision within 30 days after concluding the hearing, and

would likely presume either of two things: (a) the existence of a forum where the municipal planning and development regulatory checklist would have been considered and checked-off as resolved prior to issuing the NRCB, ERCB, AER, AEUB or AUC⁹⁹ authorizations to an applicant; or (b) the municipal planning and development regulatory checklist is considered irrelevant to development projects which are the subject of NRCB, ERCB, AER, AEUB or AUC authorizations. The remainder of the analysis in this chapter and chapter 5 reveals which of these presumptions is correct. Sections 619 and 620 are worded differently and the difference has recently been noted by the Alberta Court of Queen's Bench in *Northland Material Handling Inc. v. Parkland (County)*.¹⁰⁰

Section 619 refers to the entirety of authorizations issued by the provincial bodies listed (NRCB, ERCB, AEUB or AUC) versus all municipal approvals, policies and bylaws. Section 620 on the other hand refers only to "conditions" in authorizations granted pursuant to an enactment by

(b) is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched.

(7) The Municipal Government Board, in hearing an appeal under subsection (6), may only hear matters relating to whether the proposed statutory plan or land use bylaw amendment is consistent with the licence, permit, approval or other authorization granted under subsection (1).

(8) In an appeal under this section, the Municipal Government Board may

(a) order the municipality to amend the statutory plan or land use bylaw in order to comply with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, or

(b) dismiss the appeal.

(9) Section 692 does not apply when the statutory plan or land use bylaw is amended pursuant to a decision of the Municipal Government Board under subsection (8)(a).

(10) A decision under subsection (8) is final but may be appealed by the applicant or the municipality in accordance with section 688.

(11) In this section, "NRCB, ERCB, AER, AEUB or AUC" means the Natural Resources Conservation Board, Energy Resources Conservation Board, Alberta Energy Regulator, Alberta Energy and Utilities Board or Alberta Utilities Commission.

(12) Despite any other provision of this section, every decision referred to or made and every instrument issued under this section must comply with any applicable ALSA Regional Plan.

620 A condition of a licence, permit, approval or other authorization granted pursuant to an enactment by the Lieutenant Governor in Council, a Minister, a Provincial agency or Crown-controlled organization as defined in the Financial Administration Act or a delegated person as defined in Schedule 10 to the Government Organization Act prevails over any condition of a development permit that conflicts with it.

⁹⁹ NRCB means Natural Resources Conservation Board, AEUB means the defunct Alberta Energy and Utilities Board, and the AUC means Alberta Utilities Commission.

¹⁰⁰ 2012 ABQB 407 at paras. 29 and 47.

specified provincial authorities¹⁰¹ versus “conditions” of a municipal *development permit* only (not the entire municipal planning regime) that are in conflict. While section 620 re-enacted a similar provision in the former *Planning Act*,¹⁰² section 619 was a new addition in 1995 with the consolidation of the *Planning Act* into the MGA. In *Northland*, Veit J. comparing sections 619 and 620 confirms that the NRCB, ERCB, AER etc. permits and approvals (Category A bodies) clearly prevail over municipal development decisions. However, permits and approvals of provincial agencies (Category B bodies including the ESRD in non-energy activities), only prevail over any “condition” of a municipal development permit that conflicts with them. It has been argued that frequently there is no conflict in provincial and municipal approvals, provided the applicant of a development project can comply with both municipal and provincial conditions.¹⁰³ However, this appears not to be that simple as “conflict” in provincial-municipal jurisdiction within the planning and development context generally is controversial, and has been the subject of various court interpretations adopting and applying different legal tests. On many occasions, where development projects have required approvals from one or more provincial agencies acting under their enabling legislation in addition to municipal approvals, the key issue has always been the extent to which provincial approvals pre-empt the jurisdiction of, or portend what is to be decided by, municipal planning authorities.¹⁰⁴

¹⁰¹ (a) the Lieutenant Governor-in-Council; (b) a Minister; (c) a provincial agency or Crown-controlled organization as defined in the *Financial Administration Act* R.S.A. 2000, c. F-12; or (d) a delegated person as defined in schedule 10 of the *Government Organization Act*.

¹⁰² The 1991 amendment in S.A. 1991, c.28 introduced a new section 2.1 with almost identical wording in the *Planning Act*.

¹⁰³ Wakefield, *supra* note 65 at 381.

¹⁰⁴ Laux, *supra* note 48 at 3-10.

4.4.4 Concurrent Provincial-Municipal Jurisdiction in Planning and Development Prior to Part 17 of the MGA

Concurrent provincial-municipal jurisdiction in the planning and development context is established in Alberta. Even under the current Part 17, except the projects expressly exempted, approval of a project under other pieces of provincial legislation does not completely absolve the project from municipal approvals.¹⁰⁵ For example, although the context is not oil and gas, the NRCB specifically acknowledged the concurrency of the Town of Canmore's planning jurisdiction in *Re Three Sisters Golf Resort Inc.*¹⁰⁶ The Board stated:¹⁰⁷

It is evident to the board that there is some degree of overlap between the function of the board under the *NRCB Act* and certain functions of a municipal planning authority under the *Planning Act*... Some of the matters to be considered under these statutes will be common to both jurisdictions... However, it is also clear that the considerations and duties under each statute are not identical. For example, in terms of environmental considerations, the Board must have regard to the effect of reviewable projects on the "environment" ...whereas the environmental considerations of any planning commissions or approving authorities under the *Planning Act* would relate specifically to the context of the relationship of the physical environment to patterns of human settlement... The Board considers that the legislation is directing a broad review of the public interest for reviewable projects under the *NRCB Act* in addition to more site specific reviews of such projects pursuant to the *Planning Act*. The Board believes that the public interest can best be served by coordination of these processes to the greatest degree possible.

Similarly, in *Robertson v. Edmonton (City)*,¹⁰⁸ the Alberta Court of Queen's Bench held that although the public Board of Health is charged with reviewing environmental issues as they impact on public health, the City Council must also take into account environmental issues in the context of their planning decision. A positive response from the local Board of Health with respect to environmental considerations does not necessarily mean that environmental factors are

¹⁰⁵ *Ibid.* at 3-0 to 3-11.

¹⁰⁶ *Re Application to Construct a Recreational and Tourism Project in the Town of Canmore*, (November 1992) Alberta Decision Report # 9103 (N.R.C.B) [hereinafter *Decision Report # 9103*].

¹⁰⁷ *Ibid.* at s.7 and Appendix C, Approval No. 3.

¹⁰⁸ (1990) 72 Alta. L.R. 353 at 371-375 para. 75 (ABQB).

favorable to a zoning decision.¹⁰⁹ Therefore the rationale for the concurrent jurisdiction is that the objectives of the various pieces of legislation may be different so that the approval by the provincial agency would still leave considerable room for judgment calls under the municipal planning regime.¹¹⁰

4.4.5 Conflicts and Inconsistencies in Provincial-Municipal Planning and Development Concurrent Jurisdictions

Where there are overlapping jurisdictions there may be conflict. As indicated above, “conflict” is not a simple term and has not received literal interpretation by the Courts. Approval of a project under one statute and refusal under another appears conflicting. Similarly, an approval subject to specified conditions under a special statute and an approval imposing more stringent or different conditions under another general enactment also raise questions of conflict. However earlier case law, predating the leading interpretations of federal-provincial conflict, concluded that (a) a municipality acting within its powers may pass more stringent, enhancing legislation than the provisions of a statute; (b) legislative intent to invalidate or suspend a valid municipal bylaw must be made expressly in plain words, or at least by necessary implication; and (c) conflict may only exist where both statutes cover the same ground, have the same subject matter and objectives thus giving rise to the same issues, and the decision under one operates at cross-purposes or defeats the purposes of the decision under the other.¹¹¹

¹⁰⁹ Also in *Hutterian Brethren Church of Starland v. Starland (Municipal District No. 47)* (1991), 6 M.P.L.R. (2d) 67 at para. 3 (Alta. C.A.), the Alberta Court of Appeal rejected the suggestion that the Development Appeal Board’s power to consider environmental, health and water matters is repugnant to provincial legislation giving other governmental bodies authority to make decisions on such issues. Even Part 17 of the MGA includes in its purposes in section 617 the maintenance and improvement of the quality of the physical environment.

¹¹⁰ See Laux, *supra* note 48 at 3-11.

¹¹¹ *Ibid.* at 3-12; *Township of Uxbridge v. Timber Brothers Sand and Gravel Limited* (1975), 7. O.R. (2d) 484 at para. 14; *Ontario (A.G.) v. Mississauga (City)* (1981), 33 O.R. (2d) 395 at paras. 41-42 (Ontario C.A. per Morden J.A.).

In *Ontario (A.G.) v. Mississauga (City)*, a bylaw made pursuant to the City's power to regulate nuisances, purported to prohibit the burning of fuel containing PCBs by a cement company which had the approval of the Ontario Department of the Environment. The Divisional Court upheld the bylaws. On appeal, the Ontario Court of Appeal found an operative conflict between section 8 of the *Environmental Protection Act, 1971* ("EPA") and the bylaw.¹¹² The Court held that the fact that the objective of a bylaw is compatible with that of the statute does not, of itself, prevent a conflict from arising if they cover the same ground. The Court found, on the facts and applicable legislation, that conflict existed between the policy of the Legislature and the bylaw as to the way matters covered by section 8 of the EPA should be dealt with, and that the two policies were at cross purposes. In adopting the legal test for resolving conflict, Morden J.A. supported borrowing principles from the federal-provincial areas of conflict.¹¹³

Earlier, in *Meadow Creek Farm Ltd. v. Surrey*,¹¹⁴ the British Columbia Court of Appeal upholding the zoning bylaw of the District of Surrey held that municipal corporations must be recognized as statutory instruments of local government with legislative powers delegated to them by the Legislature for the purposes of such Government. Therefore when the Court is asked to infer the legislative intention that permission granted or an order made by a provincial Commission is paramount to, invalidates or suspends a valid municipal bylaw, "*that intention should be found to be made expressly in plain words, or at least by necessary implication.*" [Emphasis added]. While a less restrictive municipal bylaw relating to use of land might be in conflict, that is not necessarily so in the case of a more restrictive bylaw.

¹¹² *Ontario (A.G.) v. Mississauga (City)*, *ibid.* at paras. 30-33, 35 and 39; paras. 42 and 44 citing *O'Grady v. Sparling*, [1960] S.C.R. 804 at p. 812.

¹¹³ *Ontario (A.G.) v. Mississauga (City)*, *ibid.* at para. 40.

¹¹⁴ [1978] 89 D.L.R. (3d) 47 paras. 29 and 31 (B.C.C.A. per McFarlane, J.A.).

Shortly after *Ontario (A.G.) v. Mississauga (City)*, two Supreme Court of Canada decisions, *Multiple Access Ltd. v. McCutcheon* and *Bank of Montreal v. Hall*, confirmed what is now referred to as the modern law on competing enactments and competing occupation of aspects of the same legislative field,¹¹⁵ as follows:

[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament... In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says “yes” and the other says “no”; “the same citizens are being told to do inconsistent things”; compliance with one is defiance of the other.¹¹⁶ [Emphasis added].

For, as we have seen, dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose... A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible.¹¹⁷ [Emphasis added].

Accordingly, impossibility of dual compliance is not the sole mark of conflict or inconsistency. Provincial legislation that displaces or frustrates Parliament's legislative purpose is also inconsistent for the purposes of the conflict doctrine.¹¹⁸ In *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)* (“*Spraytech*”),¹¹⁹ the Supreme Court of Canada adopted these two legal tests (Impossibility of Dual Compliance and Frustration of Legislative Purpose)

¹¹⁵ *British Columbia Lottery Corp. v. Vancouver (City)* (1999), 169 D.L.R. (4th) 141, 61 B.C.L.R. (3d) 207 at para. 18 (B.C.C.A.).

¹¹⁶ *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 189-191 at paras. 45 and 48 (S.C.C.).

¹¹⁷ *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 at pp 154-155, paras. 62 and 64 (S.C.C.). These legal tests were reaffirmed by the Supreme Court of Canada in *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. at paras. 69-70 (S.C.C.) and *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 250 D.L.R. (4th) 411 at Paras. 12, 13, 14, 18, and 21 (S.C.C.).

¹¹⁸ *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, *ibid.* at para. 12.

¹¹⁹ [2001] 2 S.C.R. 241, 200 D.L.R. (4th) 419 at paras. 34-36 (S.C.C.).

in the provincial-municipal arena, and repeated the legal proposition in *Meadow Creek Farm Ltd. v. Surrey*. Upholding Bylaw 270, L'Heureux-Dubé J., stated: “*Multiple Access* also applies to the inquiry into whether there is a conflict between the bylaw and provincial legislation, except for cases (unlike this one) in which the relevant provincial legislation specifies a different test.” [Emphasis added].¹²⁰ The issue in *Spraytech* was whether the Town of Hudson’s Bylaw 270 made pursuant to the omnibus general welfare clause in the *Cities and Towns Act*, which limited the use of pesticides within the territory of the municipality, was in conflict with the federal *Pest Control Products Act* and Regulation, and the provincial *Pesticides Act*. On the facts of that case and applicable legislation, the Court found no conflict holding that there was no barrier to dual compliance, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. Further, there was no concern that application of Bylaw 270 displaces or frustrates the provincial and federal legislative purposes which, along with Bylaw 270, establish a tri-level regulatory regime.

Similarly, in *Croplife Canada v. Toronto (City)*,¹²¹ one of the issues was whether the City of Toronto’s Bylaw 456-2003 made under section 130 of the *Municipal Act*, 2001, which limited the application of pesticides within the City, was in conflict with the federal *Pest Control Products Act* and Ontario’s *Pesticides Act*. Feldman J.A. for the Ontario Court of Appeal, upholding Bylaw 456-2003, applied the two tests for conflict and repeated the legal proposition in *Meadow Creek Farm Ltd. v. Surrey* as follows:

...the conflicts test... must be interpreted in accordance with the two-pronged test prescribed in *Rothmans, Benson & Hedges Inc.*: (1) Is it impossible to comply

¹²⁰ *Spraytech*, *ibid.* at para. 36. The underlined legal principle was also echoed by the Supreme Court of Canada, per Major J., in the federal-provincial context in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, *supra* note 117 at para. 21.

¹²¹ (2005), 254 D.L.R. (4th) 40, 75 O.R. (3d) 357 (Ont. C.A.).

simultaneously with the pesticide bylaw and with the federal PCPA or the Ontario Pesticides Act?; (2) Does the bylaw frustrate the purpose of Parliament or the Ontario legislature in enacting those laws? If the answer to both questions is “no,” then the bylaw is effective. Using Major J.'s analysis, had either Parliament or the Ontario legislature intended to occupy the field of pesticide regulation with the federal PCPA or the provincial *Pesticides Act*, they would have used very clear language to say so.¹²² [Emphasis added].

The third legal proposition repeatedly adopted by Courts was fully pronounced upon by the Ontario Court of Appeal, per Rouleau J.A. for the majority, in *Peacock et al. v. The Corporation of Norfolk County* (“*Peacock*”).¹²³ The issue was Bylaw 64-Z-2003 prohibiting siting intensive livestock operations and associated nutrient facilities within Sensitivity Areas 1 and 2. The Peacocks’ proposed expansion of their intensive hog operation, located within Sensitivity Area 2, had received approval of their Nutrient Management Plan, as required under the provincial *Nutrient Management Act* and Regulation. The chambers judge held that the Regulation addressed the same subject matter as the bylaw, and as such, superseded the bylaw. On appeal, two main issues were (a) whether section 61 of the Act specifies a test different from the impossibility of dual compliance set out in *Spraytech*, and (b) whether the Regulation and the bylaw “address the same subject matter.”¹²⁴ Applying the principle in *Spraytech*, that the impossibility of dual compliance test cannot be used when the relevant provincial legislation specifies a different test, Rouleau J.A. held that section 61 of the *Nutrient Management Act* specifies a conflict test to be applied and therefore clearly displaced the impossibility of dual

¹²² *Ibid.* at paras. 63-64.

¹²³ [2006] 81 O.R. (3d) 530, 269 D.L.R. (4th) 45; leave to appeal to the S.C.C. refused in [2006] S.C.C.A. No. 371, 367 N.R. 395 (note) (S.C.C.) [hereinafter *Peacock et al.*].

¹²⁴ The *Nutrient Management Act*, s.61 provided: “A regulation supersedes a bylaw of a municipality or a provision in that bylaw if the bylaw or provision addresses the same subject matter as the regulation. (2) A bylaw or a provision of a bylaw that is superseded under subsection (1) is inoperative while the regulation is in force.”

compliance test. The Court noted that this logically flows, in part, from the fact that the province can dictate how overlap in provincial and municipal regulation is to be resolved.¹²⁵

The *Peacock* decision is in line with what Professor Hogg terms “express extension of paramountcy” or “express covering-the-field clause”¹²⁶ by which it is still possible for a higher legislature to occupy a field but only through clear expression of intent.¹²⁷ Case law confirms that where the legislature intends to occupy a particular field or an aspect of it, or to make a state of affair subject only to its own regulations, there must be clear statutory language to that effect. Where such legislative intent is found, any stricter subordinate enactment would amount to a conflict rendering the lower enactment inoperative. The absence of true conflict between the exhaustive provision and subordinate enactment is irrelevant; what matters is the intention of the legislature.¹²⁸

It therefore follows, from case law and academic opinions,¹²⁹ that there is now a three-part test for resolving federal-provincial and provincial-municipal jurisdictional conflicts and inconsistencies namely: (a) the *Specifically Legislated Test*,¹³⁰ (b) the *Impossibility of Dual*

¹²⁵ *Peacock et al.*, *supra* note 123 at paras. 26-28, 32 and 36.

¹²⁶ P. W. Hogg, *Constitutional law of Canada* 5th ed. supplemented, loose leaf (Toronto: Thomson Carswell, 2007) at 16-14 to 16-15 citing *A.G B.C. v. Smith*, [1967] S.C.R. 702 at 714; *R. v. Francis*, [1988] 1 S.C.R. 1025 at 1031.

¹²⁷ See *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, *supra* note 117 at para. 21; J.E. Magnet, *Constitutional Law of Canada Cases, Notes and Materials* 8th ed. (Edmonton: Juriliber, 2001) vol. 1 309; R. Sullivan, *Statutory Interpretation* 2nd ed. (Toronto: Irwin Law Inc., 2007) at 47 and 303.

¹²⁸ Sullivan, *ibid.* at 307.

¹²⁹ See also I.M. Rogers, *The Law of Canadian Municipal Corporations* 2nd Ed. (Toronto: Thomson Canada Ltd, 2003) vol. 1 at 345-347 [63.13 to 63.16] citing *Re Minto Const. Ltd. and Gloucester* (1979) 23 O.R. (2d) 364, 8 M.P.L.R. 172 (Div. Ct.); *R. v. Nendick* (1958) 14 D.L.R. (2d) 39, 121 C.C.C. 64 (B.C.); *Meadow Creek Farm Ltd. v. Surrey*, *supra* note 114; and *Re AG. Ont. and Mississauga*, *supra* note 111.

¹³⁰ Applying this test in the federal-provincial context is subject to the exclusive provincial powers under the constitutional division of powers. The test is applicable only in cases of concurrent federal-provincial heads of power. See examples of Aboriginal cases cited in Hogg, *supra* note 126 at 16-14 to 16-15.

Compliance; and (c) the *Frustration of Legislative Purpose*.¹³¹ The three-part test is required to be applied in the order in which they appear whenever the need arises to determine the existence of conflict or inconsistency. Applying the specifically legislated test first eliminates the possibility of an interpretation contrary to the particular legislature's intent.¹³² It inquires whether there is evidence in the provision that the legislature does not intend dual compliance or co-existence in a particular case. The questions to be asked in the application of the three-part test are: (a) does the provision or legislation contain its own specific test for conflict? If the answer is yes the specifically legislated test is applied to determine whether the subordinate enactment will remain operative. If the answer is no, then (b) is there an impossibility of dual compliance with the two enactments? If the answer is yes conflict exists and the paramountcy doctrine applies, but if the answer is no, then (c) will the co-existence of both enactments frustrate the legislative purpose of the higher legislature? If the answer is yes conflict exists, although co-existence is practically or theoretically possible, and the paramountcy doctrine applies. If the answer is no, there is no conflict and both enactments remain operative concurrently. In other words where there is "no" higher enactment on a concurrent subject matter, as in *Spraytech*, the lower legislature can regulate with abandon. Where there is express provision in a higher enactment reserving that field or an aspect of it to the higher legislature, as in *Peacock*, lower legislatures cannot regulate the subject matters reserved. Where there is evidence in a higher enactment pointing towards contribution in regulation by lower legislatures, such as in *Spraytech* and *Meadow Creek Farm*, or where the higher enactment is simply silent, passive or permissive,

¹³¹ See *Spraytech* *supra* note 119 at para. 35 for *Frustration of Legislative Purpose*, para. 36 for *Specifically Legislated Test*, and para. 38 for *Impossibility of Dual Compliance*.

¹³² "Legislative intent" or "Legislative intention" refers to the meaning or purpose that is taken to have been present in the "mind of the legislature" at the time a provision was enacted; it is the meaning the legislature wished to embody in the legislative text or the purpose it sought to accomplish by enacting the legislation or provision. See Sullivan, *supra* note 127 at 32.

lower legislatures can regulate provided they do not frustrate the purpose of the provincial legislation.

Applying these tests may not be simple in all cases. Legislative language does not always convey legislative intent clearly. The goal in all cases is to determine the legislative intent. Considering evidence of legislative intent in a legislative provision, case law seems to suggest a difference between “authorization” and “permission.” In *ATCO Ltd. v. Calgary Power Ltd.*,¹³³ Clement J.A., in describing the meaning of ‘authorize,’ stated: “... a legal power to do an act given by one man to another, and ... to empower: to give a right or authority to act: to endow with authority or effective legal power, warrant, or right.” Black’s Law Dictionary defines “authorization” as license or certificate.¹³⁴ It further defines license to include “an instrument issued conferring upon the holder the privilege of doing the things set forth in it subject to the conditions, limitations and restrictions contained in it.” On the other hand, Mcpherson C.J.M. in *R. v. Millar*,¹³⁵ quoting Words and Phrases Judicially Defined vol. 6, p. 5316, stated:

“‘Permit’ is defined as ‘not to hinder.’ Webster defines the word as more negative than ‘allow;’ that it imports only acquiescence or an abstinence from prevention ... It would seem, therefore, that to permit or suffer implies no affirmative act. It involves no intent. It is mere passivity, indifference, abstaining from preventive action.”

In *British Columbia Hydro and Power Authority v. British Columbia (Ministry of Environment)*¹³⁶ the Environmental Appeal Board described the difference between permits and approvals as being entirely different statutory instruments. In that context, a permit exempts its

¹³³ [1980] 14 Alta. L.R. (2d) 106, 24 A.R. 300 at para. 29 (Alta. C.A.).

¹³⁴ It defines “authorize” as to empower; and “authorized” as properly empowered to perform any specified duty or to do any specified act. See *Black’s Law Dictionary*, 8th ed. s.v. “authorization”.

¹³⁵ [1954] 1 D.L.R. 148, 10 W.W.R. 145 at 304 para. 62 (Man. C.A.).

¹³⁶ (2007), 30 C.E.L.R. (3d) 1 at paras. 51-52 (B.C. Env. App. Bd.).

holder from the broad prohibition in the *Act* against introducing waste into the environment - it allows someone to, in simplistic terms, “pollute.” An approval addresses the opposite: the clean-up of pollution. An approval in principle is essentially a director’s endorsement, subject to any conditions specified by the director, of a remediation plan that has been proposed by a remediating party.¹³⁷

In *Rothmans, Benson & Hedges Inc. v. Saskatchewan*,¹³⁸ the Supreme Court of Canada held that section 30 of the federal *Tobacco Act* serves to exclude, from the wide net of the section 19 prohibition, certain types of tobacco product promotion that might otherwise have been captured. The Supreme Court stated that Parliament however did not, by section 30, grant retailers a positive entitlement to display tobacco products. Further, the federal *Tobacco Act* falls within the scope of Parliament’s criminal law power. As the criminal law power is essentially prohibitory in character, provisions enacted pursuant to it, such as section 30 of the *Tobacco Act*, do not ordinarily create “*freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament.*” [Emphasis added].

It is therefore reasonable to argue that provisions in a higher enactment, such as section 30 of the federal *Tobacco Act* in *Rothmans* and the federal *Pest Control Products Act* in *Spraytech* and *Croplife* which are essentially prohibitory in character or merely permissive, do not ordinarily create “positive entitlement” that would limit the ability of lower legislatures to legislate on a subject matter more strictly than a higher legislature. Conversely, provisions which grant “positive authorizations or entitlement” would likely convey such positive legislative intention

¹³⁷ See also *Meadow Creek Farm Ltd. v. Surrey*, *supra* note 114 at paras. 24-25.

¹³⁸ *Supra* note 117 at paras. 17-19.

and therefore are more likely to limit the ability of lower legislatures to legislate on a subject matter more strictly than a higher legislature. Arguably, the provincial authorizations specifically listed in section 619, issued to energy operators pursuant to specialized statutes, are “positive entitlements” to give effect to the *profit à prendre*¹³⁹ granted to these energy companies under the MMA. In fact, the MGB confirmed that the enactment of section 619 provided a remedy not otherwise available, thus without it, the NRCB approval would have granted rights and authority to Three Sisters which it could not effectively enforce.¹⁴⁰

Another observation, in the provincial-municipal context, is that judicial treatment of municipal regulation of oil and gas matters is quite different from the judicial treatment of municipal regulation of the environment. In *Spraytech*, the Supreme Court was willing to find a tri-level cooperative regulatory regime on the environment.¹⁴¹ In fact, municipal authorities have been referred to as “trustee of the environment.”¹⁴² On the other hand, energy legislation has been given specialized status supposedly covering most, if not all, aspects of the oil and gas field as shown in *Superior Propane Inc. v. York (City)*,¹⁴³ and *Blach v. Sturgeon (Municipal District No. 90)*.¹⁴⁴ In *Union Gas Ltd.*, Keith J. held that:

The second of the additional submissions to which reference should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim *generalia specialibus non derogant*...In the case before this Court, it is

¹³⁹ It was held in *Berkheiser v. Berkheiser* [1957] S.C.J. No. 22; [1957] S.C.R. 387; 7 D.L.R. (2d) 721 that a lessee’s right to a mineral is an exclusive *profit à prendre* under common law and statute which carries with it the implied right and license to do whatever is necessary to search for, work and win the substances named. See also *Alberta Energy Co. v. Goodwell Petroleum Corp. Ltd.*, 2003 ABCA 277, 233 D.L.R. (4th) 341 at paras. 54, 60, 62, 63 and 64.

¹⁴⁰ *Three Sisters Golf Resort Inc. (Re)*, [1997] A.M.G.B.O. No. 30, Order MGB35/97 at para. 62, online: QL.

¹⁴¹ *Spraytech*, *supra* note 119 at paras. 39, 1 and 33. The Supreme Court expressly stated at para. 4 that its legal inquiry was informed by the environmental policy context, not the reverse.

¹⁴² *Spraytech*, *ibid.* at para. 27 quoting *Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, at 257.

¹⁴³ *Supra* note 89.

¹⁴⁴ (1991), Doc. Edmonton No. 9003-22604 (Alta. Q.B.) [unreported]. In *Alberta Energy Co. v. Goodwell Petroleum Corp. Ltd.*, *supra* note 139 at para. 38, Fruman J.A. stated that oil and gas law is a specialized area.

clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario “in the public interest” and hence must be classified as special legislation. *The Planning Act*, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as contained, for example, in the *Ontario Energy Board Act*, the *Energy Act* and the *Petroleum Resources Act*, 1971.¹⁴⁵ [Emphasis added].

With these observations and the three-part test in mind, the thesis turns to the specific provisions in sections 619 and 620¹⁴⁶ of the Alberta MGA. Section 620 is taken first since it is older.

4.4.6 Section 620 of the MGA

On June 25, 1991 an amendment to the *Planning Act* was assented to, which introduced a new section 2.1¹⁴⁷ with a marginal note titled, “conflict with development permit conditions.” Section 2.1 did not expressly deal with whether municipal approvals can be denied regardless of provincial approval of a project. The first interpretation of this provision, relevant to our purpose, appears to be in *Re Three Sisters Golf Resort Inc.*¹⁴⁸ The position of the NRCB was that its approval was paramount to a municipal development permit in the event of inconsistency; however, because both the NRCB approval and the municipal approval are required by legislation, the NRCB approval was not finally determinative as to whether the project may proceed. Therefore the applicant could not develop the project approved by the NRCB if municipal approvals for the development were denied. The NRCB stated:

¹⁴⁵ *Supra* note 89 at paras. 41-43.

¹⁴⁶ *Supra* note 98.

¹⁴⁷ (1) A condition of a licence, permit, approval or other authorization granted by the Lieutenant Governor in Council, a Minister of the Crown or a government agency pursuant to an enactment prevails over any condition of a development permit that conflicts with it. (2) In this section, “government agency” means a corporation that is an agent of the Crown in right of Alberta, a government official or any corporation, commission, board or other body empowered to exercise quasi-judicial or governmental functions and whose members are appointed by one or more of the following: (a) an Act of the Legislature; (b) the Lieutenant Governor in Council; (c) a Minister of the Crown.

¹⁴⁸ *Decision Report # 9103*, *supra* note 106.

In considering the potential for coordination of the processes the Board has had regard for s. 2.1 of the *Planning Act*... The Board is a “government agency” for the purposes of this section. Based on this section the Board considers that a development permit which is the final site specific approval required under the *Planning Act* prior to development, must be consistent with a mandatory order of the Board or a condition of any Board approval in order to be effective...the Board believes it may be appropriate to integrate its approval process with the more general level of statutory plans as prescribed in the *Planning Act* ... Because both the approval of the NRCB and the approval of the Town of Canmore as a municipal planning authority, or the Alberta Planning Board on appeal from the Town, are required by legislation and because neither approval is sufficient alone to enable the applicant to construct facilities on the project lands, it follows that an order of the Board in respect of the project is not finally determinative of the issue as to whether the project may proceed. The Board recognizes that it could approve all or part of the project but that the applicant may not be successful in developing the parts of the project approved by the board owing to failure by the applicant to receive approval from the town (or the appeal board) for more detailed plan for development in such areas. It also follows that if the Board fails to approve all or parts of the project, the refused project or part could not proceed whether or not the town as a local planning authority (or the appeal board) approved the development...[Emphasis added].

Section 2.1 was re-enacted as section 620 in 1995 under Part 17 of the MGA with minor changes.¹⁴⁹ Section 620 was recently considered in *Northland Material Handling Inc. v. Parkland (County)*,¹⁵⁰ a judicial review of a municipal decision denying extension of Northland’s sand extraction and dry landfill operations which had Alberta Environment approval. Veit J., also denying the judicial review application, held that as compared with section 619 of the MGA, section 620 does not give any kind of precedence or paramountcy to Alberta Environment permits over municipal zoning or other decisions. The judge noted key differences between section 619(1), which deals with certain types of permits and approvals, and section 620, which deals with Alberta Environment permits and approvals. The judge stated that the Legislature

¹⁴⁹ “Government agency” was given the definition in the *Financial Administration Act*. Crown-controlled organization as defined in the *Financial Administration Act* and a delegated person as defined in Schedule 10 to the *Government Organization Act* were added as provincial bodies whose authorization conditions prevail over development permit conditions.

¹⁵⁰ *Supra* note 100 at para. 47.

clearly intended to make a distinction between environmental legislation on the one hand, and certain other types of regulation on the other; further there was no barrier to dual compliance nor was there operational conflict.¹⁵¹ While the decisions of the municipal council and Alberta Environment can be harmonized, neither Alberta Environment nor the council had the right or the responsibility to micro-manage Northland's operation to ensure that the permits in fact harmonized.¹⁵²

The purpose of section 620 is clear; it does little more than codify common law.¹⁵³ Environmental and other provincial approvals (Category B regulatory bodies), not listed in section 619, are not paramount to municipal approvals. Only the "conditions" contained therein are paramount to "less stringent conditions" in a municipal "development permit." No other municipal approval is affected. It is noteworthy that the NRCB, ERCB, AER and AUC are "provincial agencies" within the meaning of the *Financial Administration Act*¹⁵⁴ and would likely be caught under section 620. However, the maxim *generalalia specialibus non derogant* will likely apply. Section 620 is a general provision and must yield to the specific provision in section 619.¹⁵⁵

¹⁵¹ However, the judge noted that there was potential conflict in the difference in standards with respect to storm water management. Veit J. concluded that if any conflict were to arise between the actual landfill elevation and the storm water plan that could not be resolved by negotiation, council should defer to Alberta Environment with respect to the storm water plan. *Ibid.* at paras. 58 and 59.

¹⁵² *Ibid.* at para. 57.

¹⁵³ Laux, *supra* note 48 at 3-15.

¹⁵⁴ Although exempted, pursuant to the *Funds and Agencies Exemption Regulation* Alta. Reg. 128/2002, s.2(2) and Schedule B, from ss. 37 and 38 of this Act with respect to designation of expenditure officers and accounting officers.

¹⁵⁵ General provisions, whether enacted previously or subsequently, do not, if couched in general terms, operate to control special rights granted by special provisions which, while conferring such special rights, have also imposed special obligations. Rights given by a special provision are not taken away because they cause difficulties in the permissive working of general provisions not directed to the special point. *Halsbury's Laws of Canada, Discrimination and Human Rights*, 1st ed. (Markham, Ont.: LexisNexis, 2008) at para. HDH-24 (Paramountcy doctrine); *Ottawa (City of) v. Eastview (Town of) et al.*, [1941] S.C.R. 448 at p. 461.

4.4.7 Section 619 of the MGA

Section 619 was enacted for the first time in 1995 under Part 17 of the MGA. Apparently, the fact that an applicant could not develop a provincially-approved project if a municipality refused municipal approvals created problems for those energy projects not expressly exempted under section 618. A paradigmatic example of the events leading up to the enactment of section 619 is *Blach v. Sturgeon (Municipal District No. 90)*,¹⁵⁶ featuring a series of attempts by residents of the Municipal District of Sturgeon No. 90 to prevent Norcen Energy Resources Ltd. from constructing and operating a natural gas processing plant on a parcel of land within the MD. After Norcen obtained ERCB approval, the MD amended its Land Use Bylaw in 1989 permitting a “heavy industrial” district to enable Norcen to build the approved gas processing plant on the approved parcel of land. An attempt by a number of residents to have Bylaw 620/88 quashed was refused by the Court. The residents submitted their first petition to the MD seeking to cause a bylaw to be prepared and voted upon by them, pursuant to the municipal power to regulate nuisance under section 250 of the MGA.¹⁵⁷ The petition was found to deal with matters outside the jurisdiction of the municipality by the Alberta Court of Queen’s Bench and the Court of Appeal in *Sillito v. Sturgeon No. 90 (Municipal District)*.¹⁵⁸

Norcen proceeded to obtain a development permit from the MD and some of the residents unsuccessfully appealed the development permit to the Development Appeal Board. The residents circulated a second petition arguing that the operation of the gas plant would impact

¹⁵⁶ *Supra* note 144.

¹⁵⁷ R.S.A. 1980 c. M-26. S. 250 was the power of Council to regulate businesses constituting nuisance. It provided that council may pass bylaws for regulating, restricting, or prohibiting the carrying on in any particular district of a business that is undesirable or unsuitable to the district. In such bylaw council may declare any business so carried on to be a nuisance and direct the business to be removed from the district. This power is in addition to and not in substitution for the other powers given a municipality by this Act or any other Act.

¹⁵⁸ (5 July 1989), No. 8903 11786, (Q.B.) aff’d (5 March 1990), No. 8903-0640-AC, 1990 CarswellAlta 737 (Alta. C.A.), online: WL.

adversely on the public health and quality of life of the residents.¹⁵⁹ Upon council's refusal of the petition, Blach¹⁶⁰ sought an order for mandamus to compel council to pass the bylaw in the petition prohibiting the erection or continuance of the natural gas processing plant. Murray J. held that council's general health power is subject to the *Public Health Act* and any other Act affecting public health, and are therefore "circumscribed to the extent provincial legislation or regulations have occupied the field."¹⁶¹ Murray J. agreed with the argument that if the MD could override specific legislation (including the OGCA, *Energy Resources Conservation Act*, and *Clean Air Act*) regarding safety, operation and construction of gas processing plants, it would be possible for municipalities to totally preclude the development of any oil or gas processing operations, contrary to the intent and provision of the statutes. The judge found that the provincial statutes ensure that the public is protected from pollution and emissions from natural gas processing plants, that the bylaw which the petitioners were seeking covered the same ground, and would conflict with legislation. Murray J. further held that contrary to legislative intent the proposed petition would require council to exercise jurisdiction under the *Planning Act*. Thus the petition was an attempt to interfere with zoning in the guise of a bylaw to regulate or control business or nuisance.¹⁶²

It is no surprise that section 619¹⁶³ was enacted in 1995, likely to prevent the scenario created by the residents of MD of Sturgeon, or indeed any uncooperative municipality, in blocking the construction and operation of energy and other projects of provincial interest. Section 619 has

¹⁵⁹ Pursuant to MGA, *supra* note 157, ss. 204(a),(j),(k), 222 and 224.

¹⁶⁰ Also was one of the witnesses at Norcen's ERCB hearing.

¹⁶¹ *Blach v. Sturgeon*, *supra* note 144 at 7-14.

¹⁶² *Ibid.* at page 11. Note that the residents of a municipality have no right to petition for vote on advertised bylaws and resolutions or to petition requesting a new bylaw or an amendment thereof in respect of matters under Parts 8, 9, 10 or 17 and s. 22 of the MGA *supra* note 1. See MGA, *ibid.*, ss. 231(1) and 232(2); *Whitecourt (Town) v Eglinski*, 2006 ABQB 559 at para. 29; *Clareholm (Town) v. Green*, 2003 ABQB 873 at paras. 11-14.

¹⁶³ *Supra* note 98.

not been considered in detail by the Courts.¹⁶⁴ Section 619(1) provides that the listed provincial authorizations *prevail in accordance with this section* over municipal authorizations. The underlined appears to be the first evidence of the specifically legislated test. Sections 619(2) to (12) provide the scheme for when provincial authorizations *prevail over* municipal authorizations.¹⁶⁵ Section 619(2) recognizes that a proposed energy project may not comply with existing municipal planning and development regime, and the only way to bring the books to balance is to amend the municipal planning instruments to comply with the provincial approval of the proposed project. It appears a municipality has no discretion in such case. Provided the application for municipal approval is *consistent with* the provincial approval, the municipality must grant the application, to the extent necessary to bring the municipality in compliance with the provincial authorization. The word “consistent” has been held to mean “compatible with and not contradictory of”¹⁶⁶ and portrays a sense of generality. It has been argued that consistency does not mean strict compliance; it is an elastic term intended to reflect a harmonious or compatible relationship between two parts of a thing or action.¹⁶⁷ Further, the municipality must grant municipal approval in order to *comply* with the provincial authorization. “Comply” has been held to mean “to fulfill, to accord with and to conform to.”¹⁶⁸ It seems that the mandate of the municipality here is to implement or execute the provincial authorization.¹⁶⁹ In other words,

¹⁶⁴ The section however has been considered by quasi-judicial boards such as the NRCB, Municipal Government Board, and AEUB in interpreting their mandate. It was also briefly compared with section 620 in *Northland Material Handling Inc. v. Parkland (County)*, *supra* note 100.

¹⁶⁵ “Prevail” means to dominate, have authority over, have dominion over, have superiority over. See W.C. Burton, *Legal Thesaurus* Regular ed. (New York: McMillan Publishing Co., 1981).

¹⁶⁶ *Browning v. Masson Ltd.* (1915), 52 S.C.R. 379, 27 D.L.R. 360 (S.C.C.) at para. 4.

¹⁶⁷ *Three Sisters Golf Resort Inc. (Re)*, *supra* note 140 at para. 36 (Oral argument, Laux for the Applicant).

¹⁶⁸ *Bourk v. Temple* (1990), 105 A.R. 61, 73 Alta. L.R. (2d) 302 (Alta. Q.B.) at para. 29.

¹⁶⁹ Laux, *supra* note 48 at 3-17.

municipal permits are more likely a routine process for ensuring compliance of developers with the terms of provincial approvals.¹⁷⁰

There appears to be only two instances where the municipality will have some wiggle room to apply its regulatory checklist in energy applications for municipal approvals: (a) application for municipal approvals that is *inconsistent* with a provincial authorization;¹⁷¹ and (b) municipal matters *not considered* in the provincial authorization.¹⁷² To confirm this intention, section 619(3) shields some of the energy applications for municipal approvals from the public process at this implementation level.¹⁷³ For example, in applications to amend the municipal statutory plans and land use bylaws, the municipality cannot hold a public hearing unless the reason for the amendment relates to matters not included in the provincial authorization.¹⁷⁴ For as long as the amendment application relates to matters in the provincial authorization, the municipality must approve the amendment on a routine basis. For all other applications not shielded from the public process, if the municipality holds a hearing, the hearing cannot address matters already

¹⁷⁰ This statement was acknowledged by the MGB in its decision in *Three Sisters Golf Resort Inc. (Re)*, *supra* note 140.

¹⁷¹ MGA, s. 619(2), *supra* note 98, for instance if the applicant changes the proposed land uses to something different from what was approved in the provincial authorization.

¹⁷² MGA, s. 619(3)(b), *ibid.*

¹⁷³ In fact, the Alberta Court of Appeal confirmed on three occasions that where a statute other than the MGA grants authority to a municipality to legislate in a certain area, and where that statute contains procedures for public hearings and/or public input, the democratic provisions of the MGA may not be used to override the decisions of a municipality or provincial agency made pursuant to the other statute. The *Planning Act* created its own procedure with respect to land use bylaws including the requirements for public hearings which took it out of the more general provisions relating to plebiscites. Since Part 17 of the 1995 amendment to the MGA dealt with land use planning which had been formerly contained in the *Planning Act*, it is clear that prior to the 1st of January, 1995, there was no right to a plebiscite on matters relating to land use bylaws and became equally clear that after September 1, 1995, no such right to a plebiscite exists: See *Sillito v. Sturgeon No. 90 (Municipal District)*, *supra* note 158; *Maitson v. Edmonton (City)* (1995), 174 A.R. 25, 32 Alta. L.R. (3d) 354 at para. 28; and *Burnco Rock Products Ltd. v. Rocky View No. 44 (Municipal District)* (1995), 34 Alta. L.R. (3d) 350, 30 M.P.L.R. (2d) 71 at paras. 7-8 and 11-12. See also current MGA, *supra* note 1, ss. 231(1) and 232(2) that there is no petition for a bylaw or resolution under Part 17.

¹⁷⁴ MGA, s. 619(3)(b), *supra* note 98.

decided by the provincial authority except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required.¹⁷⁵

With respect to applications to amend the municipal statutory plans and land use bylaws, where the municipality does not approve such an application contrary to section 619(2), or does not grant the application within 90 days or a time agreed to by the applicant, or unnecessarily holds a public hearing contrary to section 619(3), the applicant is required to first mediate with the municipality. If the mediation is unsuccessful or there is reason to believe the municipality is unwilling to attempt mediation, the applicant may appeal to the MGB.¹⁷⁶ The MGB appeal process is also very limited in scope: (a) public notice is not required and only the applicant and the municipality have standing to be heard;¹⁷⁷ (b) only matters relating to whether the proposed amendment is *consistent with* the provincial authorization may be heard,¹⁷⁸ because there is no appeal on the merit from a discretionary decision of council concerning amendment of a statutory plan or land use bylaw;¹⁷⁹ (c) the outcome could either be an order to the municipality to amend the statutory plan/land use bylaw to comply with the provincial authorization or a dismissal of the appeal; (d) decision of the MGB is final but may be appealed by the applicant or the municipality to the Court of Appeal only on a question of law or jurisdiction with leave in accordance with section 688.¹⁸⁰ There is no public hearing for amendment of a statutory plan or land use bylaw ordered by the MGB.¹⁸¹ It is noteworthy that the appeal to the MGB is limited to applications for amendment of statutory plan or land use bylaw. Therefore, where a provincially

¹⁷⁵ MGA, s. 619(4), *ibid.*

¹⁷⁶ MGA, s. 619(5), *ibid.*

¹⁷⁷ MGA, s. 619(6)(b), *ibid.*

¹⁷⁸ *Re AES Calgary ULC*, [2002] A.M.G.B.O. No. 110, MGB 091/02, online: QL.

¹⁷⁹ Laux, *supra* note 48 at 3-19.

¹⁸⁰ MGA, s. 619(7-10), *supra* note 98.

¹⁸¹ MGA, s. 619(8) and (9), *ibid.*

approved project requires a subdivision approval or a development permit or other municipal authorization, and such is denied by the municipality in contravention of section 619(2), the applicant's right of appeal is in the ordinary course to the SDAB or, if it relates to a subdivision within areas of provincial interests such as a green area, highway, body of water, sewage treatment or waste management facility, then to the MGB.¹⁸² Any further appeal would also lie to the Court of Appeal under section 688.¹⁸³

The entirety of section 619 therefore appears to contain its own specified test for conflict, a limited "express extension of paramountcy" or a limited "express covering-the-field clause" as Hogg terms it.¹⁸⁴ Apart from the phrase "*prevail in accordance with this section over,*" other evidence of the legislative intent appears in the provisions prohibiting both public hearing and reconsideration of matters already decided by the provincial agencies within the provincial approval process. It seems that the legislative intent of section 619 is that the provincial authorizations have covered the field on the matters included therein and precludes municipal regulation of those matters already addressed in provincial authorizations. Therefore municipal approvals cannot supplement or add to those matters included in provincial authorizations. Other evidence of the legislative intent is the fact that section 619 declaration of paramountcy does not contain the usual qualification of "conflict or inconsistency" found in a typical paramountcy

¹⁸² Laux, *supra* note 48 at 3-19.

¹⁸³ *Ibid.* at 3-19.

¹⁸⁴ Hogg, *supra* note 126 at 16-14 to 16-15. Other examples of provincial legislation containing their own conflict test are found in *Croplife supra* note 121 at paras. 63-64 citing s. 20 of the *Milk Act*, R.S.O. 1990, c. M.12, which states: "Despite this or any other Act, no council of a local municipality shall by bylaw require that fluid milk products sold in the municipality be produced or processed in the municipality or in any other designated area;" and *Peacock supra* note 123 at para. 28 citing s. 61(1) of the *Nutrient Management Act* 2002, S.O. 2002, c. 4, which provides: "A regulation supersedes a bylaw of a municipality or a provision in that bylaw if the bylaw or provision addresses the same subject matter as the regulation." (2) A bylaw or a provision of a bylaw that is superseded under subsection (1) is inoperative while the regulation is in force."

clause such as section 620.¹⁸⁵ It appears that the application of the other conflict tests of impossibility of dual compliance, and the frustration of legislative purpose, may not be necessary under section 619. Support for this view is found in principles of statutory interpretation and other extrinsic interpretive aids.

4.4.8 Principles of Statutory Interpretation

To determine whether a municipality is authorized to exercise a certain power, the provisions of the Act, in this case section 619, must be construed in a broad and purposive manner consistent with Driedger's modern principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature."¹⁸⁶ According to the modern principle, statutory interpretation cannot be founded on the wording of the legislation alone; the words of the text must be read and analyzed in light of a purposive analysis, a scheme analysis, the larger context in which the legislation was written and operates, and the intention of the legislature which includes implied intention and the presumptions of legislative intent.¹⁸⁷ "Legislative Purpose" refers to a number of things including: (a) the primary aim or object of an enactment i.e. the effect the legislature hopes to produce which could be a social or economic goal or the promotion of specific values;¹⁸⁸ (b) in its broadest sense, the reasons underlying each

¹⁸⁵ Similarly, the Ontario Divisional Court noted that the Ontario *Energy Board Act*, which was held to supersede the Ontario *Planning Act* relating to gas transmission lines, did not provide for any adjustment of conflicts: *Ontario (Minister of Environment) v. Tilbury West (Township)* (1984), 28 M.P.L.R. 97, 49 O.R. (2d) 506 at para. 4.

¹⁸⁶ *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at paras. 7-8; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at para. 26.

¹⁸⁷ Sullivan, *supra* note 127 at 42. See also E. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 106; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 1-3; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; See P. Cote, *The Interpretation of Legislation in Canada* 3rd ed. (Scarborough, Ont.: Carswell, 2000) at 376-77.

¹⁸⁸ Sullivan, *supra* note 127 at 195.

feature of the implementing scheme and thus asks the question why?;¹⁸⁹ (c) principles and policies that the legislature wishes to consider in pursuing its primary goals;¹⁹⁰ and (d) the function performed by a provision or a series of provisions in a legislative scheme or the contribution a provision makes to an existing body of law.¹⁹¹ It is presumed that every word and feature of a legislative text, from the overall conception to the smallest linguistic detail, is there for a reason to address a concern or anticipate a difficulty and takes the form it does because it contributes in some particular way to the body of existing law, the legislation's primary goals, secondary policies/principles, or to the coherent operation of the legislative scheme, and this contribution is its purpose.¹⁹²

Also worthy of note is that many statutes have several purposes which either complement or conflict with one another. It has been stated that the legislature never pursues a goal single-mindedly, without qualification, at all cost.¹⁹³ There are always additional or competing factors to be taken into account and these show up in legislation in a variety of ways: (a) in words of restriction, qualification, or exception that limit the reach or effectiveness of the main goals; (b) in provisions that confer or restrict discretion in officials permitting or limiting them from responding to a range of factors; and (c) in the choice of program design and enforcement mechanism. Therefore Courts in analyzing such multi-purpose legislation may have to rank or

¹⁸⁹ *Sullivan and Driedger*, *supra* note 187 at 204.

¹⁹⁰ *Sullivan*, *supra* note 127 at 195. Principles are values or norms that the legislature wishes to promote or take into account in devising a program or a rule while Policies are preferences for particular interests or a particular balance of competing interests that the legislature wishes to promote or take into account in devising a program or rule. Principles belong to law while policies belong to the political arena since it is the result of expedient compromise. See *Sullivan and Driedger*, *supra* note 187. at 206.

¹⁹¹ *Ibid.* at 204.

¹⁹² *Sullivan*, *supra* note 127 at 196.

¹⁹³ *Ibid.* at 195.

strike a balance between competing goals.¹⁹⁴ It is very likely that the exemptions in section 618 and the restrictions in sections 619 are evidence of legislative ranking of its competing goals. While the general purposes of the MGA and the purposes of Part 17, show that the legislature intends to grant municipalities more autonomy in municipal and planning affairs, sections 618 and 619 show that the legislature is not willing to achieve this purpose at all costs. There are competing provincial interests, especially energy projects, which needed to be protected from individual subjective municipal interference.

Other principles of interpretation and external interpretive aids only receive application where there is ambiguity as to the meaning of a provision.¹⁹⁵ Ambiguity in law occurs when, after considering the entire context of a provision, the words of the provision are reasonably capable of more than one plausible meaning each equally in accordance with the intentions of the statute. Ambiguity does not reside in the mere fact that several courts or several doctrinal writers have come to differing conclusions on the interpretation of a given provision.¹⁹⁶ Based on the modern principle of statutory interpretation, applying the three tests identified above, there appears to be no ambiguity in section 619. The intention to protect, from municipal regulatory regime, energy development projects that have received provincial approval seems obvious. On the other hand, because section 619 has not been interpreted by a court, the thesis explores extrinsic interpretive aids such as legislative history, academic opinion, and Hansard debates, as well as tribunal

¹⁹⁴ *Ibid.*

¹⁹⁵ Other principles of interpretation referred to include the strict construction of penal statutes and the Charter values presumption. See *Bell ExpressVu Ltd. Partnership v. Rex*, *supra* note 186 at para. 28.

¹⁹⁶ *Ibid.* at paras. 29-30.

decisions,¹⁹⁷ to show that the interpretation adopted herein is supported with or without a finding of ambiguity in section 619.

4.4.9 Legislative History

It was noted that during the public consultations leading to the enactment of Part 17 of the MGA, suggestions were made that environmentally significant development projects should be the subject of the “one window” approach. In other words, instead of a project being subject to multiple conflicting approval stages under health, environmental, and planning legislation, one super approving agency should be created to hold one public hearing on all matters arising and issue one combined approval. The decision of such super agency would preempt the jurisdiction of the other public authorities, including planning. To ensure that the interests of all the public authorities concerned are reflected in the decision it was proposed that the super agency would have as members, appointed on an *ad hoc* basis, representatives from these public agencies such as health, environmental, and planning.¹⁹⁸ This proposal was not adopted for various reasons, among which was an unwillingness to relinquish power on the part of the existing agencies.¹⁹⁹ What resulted, instead of the “one window” approach, was the inclusion of section 619 in the MGA.

¹⁹⁷ The legislative history of an enactment may be referred to in order to ascertain the mischief at which the enactment was aimed. Thus the historical facts and context existing at the time in respect of which the legislature was legislating may be relevant to interpretation, and to this end, parliamentary records and contemporary or other authentic works and writing may be consulted. See *British Columbia (Attorney General) v. Canada (Attorney General)* (1889), L.R. 14 App. Cas. 295, 1889 CarswellNat 13 (Canada P.C.), online: WL; *Reference re Provincial Fisheries* (1895), 26 S.C.R. 444 (S.C.C.); *Canadian Pacific Railway v. James Bay Railway* (1905), 36 S.C.R. 42 (S.C.C.) at 89; *R. v. Giftcraft Ltd.* (1984), 13 C.C.C. (3d) 192, 1984 CarswellOnt 1191 (Ont. H.C.), online: WL; *R. v. Gisby*, 2000 ABCA 261 (Alta. C.A.). Statements made by the minister in introducing a bill in the legislature and Hansard evidence are admissible in aid of the interpretation of the resulting Act. See *Neill v. Alberta (Director, Calgary Remand Centre)* (1990), 78 Alta. L.R. (2d) 1 (Alta. C.A.); *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.); *T. (F.) v. Alberta Children's Guardian* (1989), [1989] 4 W.W.R. 175 (Alta. C.A.); *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3 (S.C.C.); *R. v. Morgentaler* (1993), 25 C.R. (4th) 179 (S.C.C.).

¹⁹⁸ See Laux, *supra* note 48 at 3-14.

¹⁹⁹ *Ibid.* at 3-15.

4.4.10 Academic and Other Opinions

It was argued that while section 619 did not achieve the goal of eliminating multiple approval stages, it ensured that development projects already approved by any of the select provincial tribunals are not blocked at the municipal planning level based on issues already decided by the provincial tribunals.²⁰⁰ It sought to cure the inherent problem in the system at the time whereby secondary approvals could block significant development with conflicting decisions or require so much time and money that it is no longer practical to proceed.²⁰¹ In its wisdom the Provincial Government decided to implement section 619 to avoid the duplicative process and allow developments of regional or provincial significance to proceed with reasonable input from the local municipality.²⁰² It is therefore likely that section 619 ensures a form of *res judicata* on municipal issues decided in provincial authorizations.

Arguably, section 619 changed the common law position that allowed planning decisions to co-exist if made on legitimate planning objectives or if dual compliance is possible. Put another way, once a provincial Board has sanctioned a project, the project may not be vetoed or altered in any way by planning authorities in respect of matters that have been *addressed* by the provincial Boards; but the powers of the planning authorities remain unfettered in respect of legitimate planning issues that have not been *addressed* by the provincial Board.²⁰³ Thus, it was concluded that the impact of section 619 depends on the extent to which the provincial Boards deal with planning matters in deciding project applications under their own mandates since their respective enabling legislation confer far-ranging powers to consider issues concerning the

²⁰⁰ *Ibid.* at 3-16.

²⁰¹ *Three Sisters Golf Resort Inc. (Re)*, *supra* note 140 at para. 36 (Oral argument, Laux for the Applicant).

²⁰² *Ibid.*

²⁰³ Laux, *supra* note 48 at 3-17.

social, economic and environmental impacts of a proposed project.²⁰⁴ If the provincial Boards exercise their powers in full, they would oust much of the planning powers of municipal authorities.²⁰⁵ In that regard, developers will seek to raise as many planning issues as possible at the provincial Board stage and if approved would preempt municipal planning discretionary powers.²⁰⁶ This means that the major battle for such projects occurs at the provincial level and all parties involved including the municipal planning authorities must be well prepared to establish their points at that level.²⁰⁷

Given the above, there is great potential for disagreement between developers and municipalities as to whether a particular matter has been *addressed* by the provincial Boards.²⁰⁸ A question therefore arises as to when an issue will be considered as having been “addressed” by the provincial Board. Is it when the provincial Board actually rules on an issue in its decision report or includes the issue in its approval order; or is it enough that the developer included the issues in its application of which the provincial Board overall approved without enumeration? There are differing opinions on this point. Academic opinion concludes that it is when the provincial Board has “ruled” on the point in question or when it is included in the approval order. Thus, words like “decided” and “resolved” are used to describe the extent of consideration of an issue by a provincial Board that will oust the jurisdiction of the planning authorities on that issue.²⁰⁹ On the other hand, the MGB held that the fact that the issues in question were before the provincial Board in the form of an addendum to the application or in the form of a response to information

²⁰⁴ *Ibid.* at 3-19.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.* at 3-20.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.* at 3-19. Elder states that the municipality’s role in this regime would depend on the “wording of the applicable board’s approval.” Elder, *supra* note 56 at 37.

request of the Board or the interveners in the provincial Board process, and the fact that all these issues were before the provincial Board and referred to throughout its decision report were enough.²¹⁰

Illustrating the effect of section 619, it was argued that where the applicable provincial Board has considered emissions of noise and odour in a project prior to giving its approval, without imposing any conditions on these issues, the municipal planning authorities cannot later refuse an application for municipal approvals because of its concerns about noise and odour emissions and neither can they impose any conditions in their permit that relates to noise or odour emissions.²¹¹ Section 619 operates to remove those as legitimate planning issues.²¹² Conversely, where the provincial Board does not address a legitimate planning concern, such as whether the municipal road is adequate to accommodate the project, the local planning authorities would be entitled to impose conditions in their approvals pertaining to road,²¹³ such as an agreement to construct road or payment of money for the construction of road.

A major question arising from the above situation is whether planning authorities would be able to “veto” or “refuse” the project on the grounds of inadequate road infrastructure, especially where imposing conditions in the planning permits would not effectively resolve the road concerns.²¹⁴ The answer to this question is more likely to be no, as shown in tribunal decisions discussed below.²¹⁵ In an interview, the Mayor of the Regional Municipality of Wood Buffalo

²¹⁰ *Re AES Calgary ULC*, *supra* note 178 at para. 95.

²¹¹ Laux, *supra* note 48 at 3-18.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Laux in one instance opined that planning authorities would likely be able to veto the project on the grounds of inadequate infrastructure. See *ibid.* However, Laux’s view is not consistent with the MGB decision in *Three Sisters*

(“RMWB”) was not aware of any step in the regulatory process where the municipality could ever say no to a provincially approved project; that was why the RMWB appeared before the EUB to make recommendations.²¹⁶ The test is specifically legislated in section 619 itself. Pursuant to section 619(2) the municipality must approve all applications that are “consistent with” the provincial authorization. The only requirement, it appears, for applications under section 619(2) is “consistency with the provincial authorization.”²¹⁷ One example of inconsistency that would allow municipal veto may be where the proposed land uses in the application is different from that in the ERCB Approval.

Responding to the question of how section 619 is applied in practice, the Manager of the RMWB Planning and Development Department explained that when a project is approved by the ERCB and the LUB does not match the ERCB approval, the municipality has to change the LUB. If the LUB is in line, those projects are “permitted uses” and the Planning Department issues the permits as appropriate. The Planning Department cannot deny a provincially approved project, as municipal approvals cannot undercut a higher level of government but has to be in support. According to the Manager, while some provincial approvals cover everything some are quite general in which case the Planning Department will deal with very specific details. For instance, a traffic impact assessment may need to be done before issuing a municipal permit as there may

Golf Resort Inc. (Re), *supra* note 140. Laux concedes elsewhere at page at 4-41 that, “[t]he prospect of a decision of that [provincial] board to permit construction of a plant being frustrated by the refusal of the requisite subdivision and development permit applications at the local level has largely been eliminated by s. 619 of the Act.”

²¹⁶ Interview with Melissa Blake, Mayor Regional Municipality of Wood Buffalo (27 May 2009) [hereinafter Interview with Melisa Blake].

²¹⁷ Elder agrees with this view noting the implication that, although the municipal level process may continue, municipal jurisdiction certainly changed with considerable effects on the growth management efforts of municipalities. Elder, *supra* note 56 at 34.

be need to upgrade an offsite road. The Planning Department would require proof if it is alleged that the ERCB has decided an issue.²¹⁸

Another question raised was whether the provincial Board approvals are cast in stone, and what would happen if new information arises at the municipal approval stage which casts doubt on the acceptability of a project. For instance, new information about potential subsidence due to abandoned mining operations which raised questions about the developability of a significant portion of a site approved by the ERCB.²¹⁹ It was suggested that the section 619 regime, on the face of it, would not permit the municipality to interfere in any manner inconsistent with the provincial Board approval, not even for the avoidance of a significant risk of harm.²²⁰ Jurisdiction lies with the applicable provincial Board and it will be up to it to intervene, to the extent authorized by its enabling legislation, in order to prevent the harm.²²¹ Ultimately, what municipalities may regulate in respect of the few unexempted oil and gas operations vary from

²¹⁸ Interview with Dennis Peck, *supra* note 91.

²¹⁹ Elder, *supra* note 56 at 38.

²²⁰ *Ibid.*

²²¹ *Ibid.* The NRCB has severally held that it is not a regulatory Board; rather its mandate is a one time review of reviewable projects, and then delegates regulatory duties to other government bodies. In contrast, the ERCB had the authority to review or take a second look at any of its decisions through its review and variance powers. Two types of review process existed for decisions of the Board. The first process related to decisions of the Board that are made without the participation of a directly affected party and occurred when the Board made a decision without holding a hearing or if a hearing was held and a directly affected person was not provided notice of the hearing. In these situations, the directly affected person must apply to the Board in writing within 30 days of the issuance of the decision. See the repealed *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 40 (1) and (2). The second process related to any decision of the Board and may be on the Board's own initiative or on application by a person. There was no time limit for requesting such a review. In making a decision on whether to grant or dismiss the review request, the Board considered whether there were new facts or evidence that could lead the Board to materially vary the decision, order, license, or approval; or a legal or factual error in the decision or order that raised a substantial doubt as to the correctness of the Board's decision. See generally *Energy Resources Conservation Board Rules of Practice*, Alta. Reg. 98/2011, s. 48 ("ERCB Rules of Practice") and Energy Resources Conservation Board, Directive 029: *Energy and Utility Development Applications and the Hearing Process* (January 2003) at 19 [hereinafter Directive 029]. See also *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2, s. 24(2). Under the new REDA regime, the Regulator may, in its sole discretion, "reconsider" a decision made by it and may confirm, vary, suspend or revoke the decision. The Regulator may make rules respecting the nature and scope of a reconsideration. See REDA, *supra* note 11, ss. 42-44 and 61(n). It is not clear whether the old test still applies as the ERCB Rules of Practice and Directive 029 have not been repealed at this time. The AER Rules of practice is silent on this issue: *Alberta Energy Regulator Rules of Practice*, Alta. Reg. 99/2013, ss. 34 and 35.

case to case. Municipalities may have a good deal of discretion in one case and not have at all in another; and even where available such discretion is very likely limited to imposing extra conditions and may not be used to veto the project in its entirety.

In terms of setback requirements and emergency response for oil and gas facilities, it has been argued that the ERCB setback requirements are minimums only which may be increased by municipalities.²²² It has also been argued that municipal emergency response power is a wildcard available in some instances to municipalities to at least ensure that their concerns with respect to public safety and emergency response are adequately addressed.²²³ With respect to setbacks, it is pertinent to point out that the ERCB (and recently the AER) jurisdiction and municipal jurisdiction over setbacks relate to two different subject matters. Municipalities have jurisdiction under the *Subdivision and Development Regulation* (“SADR”)²²⁴ to regulate setbacks for new residential and other surface developments, away from existing oil and gas operations, roads/highway, and water bodies. Municipal setback requirements are typically found in land use bylaws, and may vary based on the type of development and type of existing oil and gas facility in close proximity to the new surface development.²²⁵

²²² Vlavianos & Thompson, *supra* note 3 at 76-77 and 89-90.

²²³ *Ibid.* citing *Re Dynege Canada Energy Inc. Application for Pipeline Licence Amendments - Okotoks Field* (31 March 2000), Decision 2000-20 (E.U.B) 29-30. In *Dynege*, the Board was addressing the *Subdivision and Development Regulation* requirements for residential development setback.

²²⁴ Alta. Reg. 43/2002, s. 5(5)(g) and s. 10.

²²⁵ See Stantec Consulting Ltd., *Regional Pipeline Corridor and Setback Study in Alberta's Industrial Heartland* (November, 2004) at 10. Strathcona County Land Use Bylaw imposes a minimum 15 meter setback from a pipeline right of way boundary for the construction of any permanent buildings or residences. See Strathcona County, Bylaw No. 8-2001, *Land Use Bylaw*, s. 6.7 “Setbacks from Pipelines.”

The AER, on the other hand, has jurisdiction under the *Oil and Gas Conservation Regulation* (“OGCR”)²²⁶ and through Directives,²²⁷ Interim Directives and information Letters,²²⁸ to regulate setbacks for new energy facilities away from existing residential and other surface development or land uses. However, the AER and municipalities have a well coordinated procedure for establishing municipal setback requirements for new residential and other surface developments pursuant to SADR. The SADR requires that municipal subdivision or development authorities refer subdivision and development applications to the AER if any of the land that is the subject of the municipal application is located within 1.5 kilometres of a sour gas facility. The AER must provide the subdivision authority or development authority with its recommendations, based on AER’s classification of the sour gas facility and the minimum development setbacks necessary to be applied to such new surface development, which the municipality must not decrease but may increase. Thus, the SADR allows AER’s input in municipal establishment of modest setbacks for new residential and other surface developments in circumstances where oil and gas operations already exist and pose a significant risk of danger to the surrounding land.²²⁹ In its minimum

²²⁶ Alta. Reg. 151/71, s. 2.110(1).

²²⁷ Energy Resources Conservation Board, Directive 056: *Energy Development Applications and Schedules* (01 September 2011) [hereinafter Directive 056] has detailed setback requirements for categories C, D, and E oil and gas facilities from permanent dwellings, unrestricted country developments, urban centers, or public facilities. See also the new Energy Resources Conservation Board, Directive 079: *Surface Development in Proximity to Abandoned Wells* [hereinafter Directive 079].

²²⁸ See for instance, Energy Resources Conservation Board, Interim Directive, ID 81-03 – *Minimum Distance Requirements Separating New Sour Gas Facilities from Residential and Other Developments*; Energy Resources Conservation Board, Information Letter, IL 97-02 – *Well Spacing/Lease Boundary Setbacks Oil Sands Area Development*.

²²⁹ Established in 1976, new sour gas setback distances were immediately used by the energy industry. In 1979, Provincial Planning Authorities formally adopted the same setback distances, so both the energy industry and all Alberta municipalities use these same guidelines when proposing and approving developments of any kind. See “EnerFAQs 05 Explaining ERCB Setbacks,” at 2-3 [hereinafter *Explaining ERCB Setbacks*] in *Frequently Asked Questions on the Development of Alberta’s Energy Resources* (September 2011), online: ERCB Homepage <<http://ercb.ca/learn-about-energy/enerfaqs>> [hereinafter EnerFAQs]. In response to the SADR requirements the Energy Resources Conservation Board, Information Letter, IL 95-07 – *Subdivision and Development Regulation Requirements for Referrals to the Alberta Energy and Utilities Board* (20 September 1995), outlined some basic guidelines which subdivision and development approving authorities should use to reduce the number of referrals required to be sent to the ERCB. See also T. Brown, *An Overview of Initiatives Taken in the Calgary Area to Coordinate the Recovery of Sour Gas Reserves with Surface Development* (Calgary, 26 June 2003) at 13-14,

setback recommendations²³⁰ the EUB [ERCB/AER] stated clearly that it does not regulate land development²³¹ and that specific questions in this area should be directed to the local municipal authority which may require larger setback distances, for residential and other non-board regulated land uses in addition to many other municipal setback requirements such as road allowance.

In the case of abandoned wells in proximity to new surface development, an amendment to SADR effective November 1, 2012 and a new Directive 079 in support of it requires all future surface developments to be a minimum of 5m away from abandoned oil and gas wells and the municipality may require a larger setback than the minimum 5m requirement.²³² Accordingly, a municipality may not have the authority to vary a setback requirement for a new oil and gas facility approved by the AER unless the issue was not addressed by the Board in its decision report as required by section 619. This is most unlikely as setback should be contained in the application before the Board to show that the AER setback requirements have been met or exceeded.

With respect to oil and gas emergency response, the AER has extensive requirements that oil and gas companies must follow to protect the public and the environment during all stages of energy

Background Report Prepared for the Provincial Task Force Investigating Improved Coordination between Subsurface and Surface Development.

²³⁰ See “EUB Minimum Setback Recommendations An Overview” in EUB General Bulletin, GB 99-4 - *Land Development Information Package - Introducing A New Service* (12 March 1999).

²³¹ In response to a question, “May I develop my land if it falls within an ERCB setback?” the ERCB answered, “Municipal authorities oversee land development and do not permit development where people will be living within the setback.” See “Explaining ERCB Setbacks,” *supra* note 229 at 4.

²³² Directive 079, *supra* note 227 at 4. See also Municipal Affairs Information Bulletin, *Government ensures new developments will not be built on abandoned oil and gas well sites* (20 September 2012); and Energy Resources Conservation Board, Bulletin 2012-20 - *Directive 079: Surface Development in Proximity to Abandoned Wells in Support of the Subdivision and Development Regulation Amendment*. The SADR amendment and Directive 079 replace the previous Municipal Affairs Information Bulletin 06/10: *Advisory Land Use Planning Notes on Abandoned Well Sites*, which contained recommended guidelines for development near abandoned wells.

development which must be reviewed carefully and approved by the AER before issuing any license.²³³ Directive 071 mandates energy operators to “*notify*” and “*consult*” with the local authorities and the public while preparing their Emergency Response Plans (“ERP”) and in different other situations in order to confirm and coordinate each party’s roles and responsibilities.²³⁴ Additionally, recent draft revisions to Directive 071 indicate that the Directive will soon apply to all AER-regulated operations, including oil sands and coal, and will address all hazards.²³⁵ However, while emphasis has been added to reflect that duty holders must involve local and aboriginal authorities in emergency planning process, duty holders are only required to “strive to reach an agreement” with these authorities. In the event that an agreement is not reached, the duty holder is only required to provide the AER with a record of its efforts and evidence to show that an effective emergency response could be implemented in the absence of support from the local and aboriginal authorities.²³⁶

²³³ See Energy Resources Conservation Board, Directive 071: *Emergency Preparedness and Response Requirements for the Petroleum Industry* (18 November 2008 republished 24 November 2009) [hereinafter Directive 071]; *Frequently Asked Questions Emergency Response Preparedness in the Oil and Gas Industry Questions + Answers*, (April 2008 updated July 2008) at 5; and *EnerFAQs 13: Emergency Response Preparedness in the Energy Industry* (October 2009).

²³⁴ Section 4: Public and Local Authority Involvement in Emergency Preparedness and Response which provides that the licensee must attempt to reach a mutual understanding with local authorities on the specific needs and roles and responsibilities of each party during an emergency and include a summary of the roles and responsibilities in its ERP reflecting the mutual understandings. This is to ensure that there is no confusion or misunderstanding of the roles and responsibilities in the event of an incident requiring activation of the ERP. If the licensee and the local authority fail to reach a mutual understanding on roles and responsibilities, the ERCB encourages the use of third-party dispute resolution services through either local synergy groups or independent practitioners to assist in resolving the parties’ concerns. If appropriate, and with agreement from both parties, the ERCB may provide facilitation through its Appropriate Dispute Resolution Program. See also s. 13.1 and table 8 of Directive 071, *ibid.* for notification and consultation requirements for different situations.

²³⁵ Energy Resources Conservation Board, Bulletin 2012-21: *Invitation for Feedback - Revisions to Draft Directive 071: Emergency Preparedness and Response Requirements* (16 October 2012).

²³⁶ Draft Directive 071, *ibid.* at 6-7 s. 3.3.

Therefore despite their substantial emergency powers,²³⁷ municipalities may not have power to vary AER ERP requirements or conditions unless the ERP was not specifically addressed in the decision report. Again, this is most unlikely as it should be contained in the application before the Board to show that the AER requirements have been met or exceeded. If the draft revisions come into force municipalities may, in some circumstances, be completely excluded in emergency response. Thus, arguably, a municipality's power to affect the course of an oil and gas project through ERP is insignificant. Such powers may be available only in cases where the operator does not meet the AER requirements or seeks changes to the AER's mandated ERP conditions.²³⁸ Where AER requirements are met, it is unlikely that deliberate frustration of ERP agreement will be a viable option for municipalities given the current dispute resolution mechanism and the fact that the requirement to reach a mutual understanding with a municipality is only an "attempt." The draft Directive 071 is also a relevant consideration.

4.4.11 Non-legislative Statements and Hansard Debates

Alberta Municipal Affairs' Proposal document²³⁹ acknowledges that "[t]his change [in section 619] effectively removes certain types of decisions from the normal Planning Act Process." The

²³⁷ Pursuant to MGA, *supra* note 1, s. 551 and *Emergency Management Act*, R.S.A. 2000, c. E-6.8, s. 11 requiring every municipality to develop a Municipal Emergency Plan (MEP) to address emergencies of *all types* that could happen within their boundaries to ensure public safety. See also See Energy Resources Conservation Board, "Public Health and Safety: Roles and Responsibilities of Agencies that Regulate Upstream Oil and Gas" EnerFAQs (10 January 2008) at 3-4.

²³⁸ See for example *Re Compton Petroleum Corporation Applications for Licences to Drill Six Critical Sour Natural Gas Wells, Reduced Emergency Planning Zone, Special Well Spacing, and Production Facilities, Okotoks Field (Southeast Calgary Area)* (22 June 2005), Decision 2005-060 (E.U.B) where Compton sought to reduce the emergency planning zone (EPZ) and the emergency awareness zone (EAZ). The City of Calgary, the Calgary Health Region (CHR), the Municipal District of Rocky View (MD) intervened arguing that Compton's ERP was not in compliance with the EUB's regulations and no well approvals should be granted. EUB denied Compton's proposed reduced EPZ and EAZ and subsequently closed Compton's application due to failure to file its ERP by the required deadline. See EUB, News Release "EUB Closes Compton Critical Sour Gas Well Applications" (4 January 2006).

²³⁹ Alberta Municipal Affairs, *Alberta Planning Act Review '94 Proposals* (October 1994) at 5 cited in Elder, *supra* note 56 at 34.

Municipal Government Amendment Act,²⁴⁰ which consolidated the *Planning Act* into the MGA as Part 17, was introduced as Bill 32 in the Alberta Legislative Assembly by Richard Magnus (then MLA Calgary-North Hill) on behalf of Hon. Tom Thurber, then Minister of Municipal Affairs. Magnus stated:

...In some areas, however, balancing of interests was required... Some municipalities have asked for a clarification of the relationship between NRCB, ERCB, and Alberta Energy and Utilities Board approvals and municipal approvals. The amendments in Bill 32 do just that. Municipalities will be able to deal with legitimate municipal concerns in the normal approval process while respecting NRCB and ERCB approvals. Dispute resolution may be referred to the municipal government board should municipal decisions not be consistent with NRCB and ERCB approvals. It is expected that only a few municipalities will be affected by these provisions.²⁴¹

A news release issued by Municipal Affairs following the introduction of the Bill explained the main purposes Bill 32 sought to achieve, including integrating “the *Planning Act* into the MGA to reflect a municipally based system of planning which would be developed within a provincial policy and regulatory framework.”²⁴² The news release stated at page 5 that:

[d]uplication between the Natural Resources Conservation Board (NRCB), the Energy Resources Conservation Board (ERCB), and municipal approvals will be eliminated. Municipal decisions may not contradict NRCB or ERCB approvals or conditions. An applicant may appeal a municipal decision to the Municipal Government Board on these grounds.

4.4.12 Tribunal Decisions

As section 619 has not been considered by the courts in detail, it is worthwhile to see how the judicial tribunals specified in section 619 have variously interpreted their mandates relative to

²⁴⁰ *Supra* note 55.

²⁴¹ Alberta, Legislative Assembly, *Hansard Debates* (2 May 1995) at 1483-4.

²⁴² Alberta Municipal Affairs, News Release, “Bill 32, Municipal Government Amendment Act Introduced” (11 April 1995) at 2.

municipal approvals. In *Re Three Sisters Golf Resort Inc.*,²⁴³ Three Sisters Golf Resort Inc. (“Three Sisters”) appealed to the MGB in 1996 regarding the refusal of the Town of Canmore to amend its land use bylaw in accordance with section 619 to enable it to develop a recreation and tourism project approved by the NRCB. The Town argued that it had made planning decisions on the project consistent with an orderly, economical and efficient growth strategy for the Town, and that there were inconsistencies between Three Sisters’ application and the NRCB approval.²⁴⁴ Three Sisters submitted that the only time the Town could interfere with provincially approved matters is when a change is sought by the applicant, and that the Town must take responsibility for the construction of the midpoint interchange which will relieve the Town’s concerns regarding the stress placed on the Rundle Drive Bridge.

The MGB held that the enactment of section 619 provided a remedy not otherwise available, thus without it, the NRCB approval would have granted rights and authority to Three Sisters which it could not effectively enforce.²⁴⁵ The MGB found that the Town retains authority to decide on Three Sisters’ changes to the land uses approved by the NRCB as well as other planning matters not dealt with by the NRCB in its approval.²⁴⁶ Further, the Town also retains substantial power over subdivision and development which are means of implementing the overall land use approval given by the NRCB, but the Town does not have the authority to refuse applications

²⁴³ *Supra* note 140.

²⁴⁴ *Ibid.* at paras. 28 and 37. The Town argued that the projected increase in the volume of traffic raised questions about the capacity of Rundle Drive Bridge being the only available river crossing for existing and proposed development. It was noted that the construction of the proposed future midpoint interchange east of the proposed lands will alleviate the major traffic concerns had not begun and in that regard, the full rezoning of Pods 7 and 8 was premature. The town decided that development of Pod 7 should be delayed to allow resolution of the traffic impact concerns and to resolve the financing and other problems faced with the construction of the midpoint interchange.

²⁴⁵ *Ibid.* at para. 62.

²⁴⁶ *Ibid.* at para. 63. In fact, the then Mayor of Canmore, Bert Dyck, lamented that section 619 is an erosion of local authority. See J. Harasemchuk, “Canmore Fears Local Control of Land Use in Jeopardy” *Calgary Herald* (27 December 1996) B6.

which are consistent with the land use approval or other specific matters approved by the NRCB. The Board concluded that the contemplated changes in Three Sisters' application were not of a material nature, did not constitute changes within the meaning of the NRCB approval, would not result in inconsistency within the meaning of section 619 and therefore would not entitle the Town to refuse to amend its Land Use Bylaw in accordance with the application.²⁴⁷

Similarly in *AES Calgary ULC 525 – MW Natural Gas-Fired Power Plant*,²⁴⁸ an application to construct a natural gas-fired, combined-cycle power plant in the Municipal District of Rocky View ("MD"), the Board held that it is not constrained by the municipal land use planning documentation but must decide whether the application is in the public interest based on the purposes of its own enabling legislation. The Board concluded that municipal land use planning regimes are only relevant to the Board's consideration because they indicate from the municipality's perspective, the nature of the past, present, and future uses of a proposed site or lands in close proximity, and the Board is better able to determine whether the relative impacts created by energy facilities on the use of lands are acceptable. Following the EUB approval, AES applied to the MD under section 619(2) of the MGA for a bylaw amendment redesignating 44 acres of land to accommodate the new plant. The MD refused the application and AES appealed to the MGB.²⁴⁹ Alberta Energy intervened, in support of the appeal, expressing particular

²⁴⁷ *Three Sisters Golf Resort Inc. (Re)*, *ibid.* at para. 68. The Town of Canmore sought leave to appeal from the MBG's decision and Cote J.A. granted leave on a number of grounds. See *Canmore (Town) v. Municipal Government Board and Three Sisters Golf Resorts Inc.* (10 April 1997), Appeal No. 9703-0154 A.C. The parties settled before the appeal could be heard.

²⁴⁸ (11 December 2001), Decision 2001-101 (E.U.B) at paras 12 and 198.

²⁴⁹ *Re AES Calgary ULC*, *supra* note 178. Elections had somewhat changed the membership of the MD's previous Council which approved of the project and the public hearings attracted considerable public attention, of which many opposed to the construction of such a power plant at the proposed location. A letter outlining why mediation would be unlikely to succeed showed that the MD's decision was not solely based on perceived conflicts between the proposed bylaw and the EUB decision, but on broader concerns about using the land in question for a power plant at all. See para. 10.

concern over the integrity and efficiency of Alberta's regulating approval process.²⁵⁰ Alberta Energy argued that: (i) the refusal by the municipality to approve the application of AES affects not only AES but also the policies of the Government of Alberta, whose interests the Department of Energy represented; and (ii) the interpretation of section 619(2) of the Act is a matter of interest to the department which has an obligation to ensure that applicants who have EUB approvals can proceed without facing any unauthorized and unnecessary regulatory burdens.²⁵¹

Among the issues at the MGB were whether AES' application for municipal approval was consistent with the EUB approval, if so, whether there is any "*residual*" authority in the Act allowing the MD to refuse the application, and if there is no authority for the MD to refuse the application, whether the MGB has discretion to reject AES' appeal.²⁵² The MGB interpreted the key words in the section 619, "*consistent*," to normally mean accordant, agreeable, compatible, conforming, consonant, constant, equable, harmonious, regular, undeviating and uniform; while "*comply*" would normally mean to agree, coincide, concur, and conform.²⁵³ The MGB found that since AES' application is consistent with the EUB approval, the MD must adopt the draft land use bylaw amendment proposed by AES. In the MGB's opinion, the EUB had authority to approve the power plant at that location given the EUB's prevailing authority over any municipal statutory plan or land use bylaw, and since the EUB heard extensive evidence about land use in the area.²⁵⁴

²⁵⁰ *Ibid.* at para. 31.

²⁵¹ *Ibid.*

²⁵² *Ibid.* at para. 12.

²⁵³ *Ibid.* at para. 86.

²⁵⁴ *Ibid.* at para. 89.

The MGB disagreed that the MD has final authority over bylaw amendments for EUB approved projects since section 619(2) does not provide the MD discretion on municipal approvals. The MGB held that the legislature intended section 619 to provide an environment free of additional regulatory burdens for projects approved by the EUB, and that the legislature did not intend that an applicant with EUB approval be denied the right to proceed by a different level of government.²⁵⁵ The MGB found that the MD has authority or involvement in the *implementation* of the EUB approval, as section 619 was written to allow a municipality some control over how such projects are developed.²⁵⁶ Regarding its own mandate, the MGB held that while it cannot review or alter the EUB approval, it has the authority to review the merits of the MD's decision respecting planning matters not resolved by the EUB approval to determine the question of consistency.²⁵⁷ On the issue of what has been "addressed" by the EUB, the MGB held that each of the eight matters in contention was before the EUB in the form of an addendum to the AES application or as a response to the information requests of the EUB and the interveners in the EUB process, and the EUB referred to all pertinent land use planning matters throughout its Decision Report.²⁵⁸ With respect to duplication in the proposed land use bylaw amendment provisions dealing with noise, the MGB refused to allow the deletion of the provisions holding that the provisions of the bylaw are "consistent" with condition 4 of the EUB approval, and served to underline the EUB's decision as well as provide convenience to the MD when evaluating development permit applications.²⁵⁹

²⁵⁵ *Ibid.* at para. 90.

²⁵⁶ *Ibid.* at para. 89.

²⁵⁷ *Ibid.* at para. 92.

²⁵⁸ *Ibid.* at para. 95.

²⁵⁹ *Ibid.* at para. 97.

In *Shell Canada Limited Cogeneration Plant and Hydrogen Pipeline Fort Saskatchewan Area*,²⁶⁰ another application to construct and operate a natural-gas-fired cogeneration plant on its previously approved Scotford Upgrader site in the County of Strathcona, and a pipeline to transport hydrogen gas to the proposed cogeneration plant, all part of Shell's Fort McMurray oil sands project, the EUB considered impacts on the community, particularly noise, safety, air quality, and excessive lighting (nuisance), and whether municipal land uses should be considered in approving a project. The EUB held that the effect of section 619 of the MGA is to give Board approvals precedence over land-use bylaws, planning instruments and decisions of local development appeal boards or planning agencies; although the provision does not empower it to assume authority for land-use planning responsibilities. However, in reaching decisions on energy projects, the public interest as expressed in the energy statutes obliges the Board to consider the impacts of energy-related activities on neighboring lands. The Board held that the impact of energy-related activities on nearby lands is a land-use issue, in that, it may limit or impair the use and enjoyment to which owners may legitimately wish to put their lands.

Also, in a similar application, *Epcor Power Development Corporation and Epcor Generation Inc. Atco Pipelines*,²⁶¹ the EUB had to consider at the pre-hearing meeting the inclusion of land-use planning in the EUB process. Some interveners, including Concerned Citizens for Edmonton's River Valley ("ConCerv"), argued that section 619 would effectively circumvent the local planning process if EPCOR applied to the City for development permit on the same terms and conditions as approved by the EUB. Thus, the result would be the elimination of the public from meaningful participation in the City's consideration of EPCOR's application for

²⁶⁰ (25 July 2000), Addendum to Decision 2000-30 (A.E.U.B).

²⁶¹ (30 May 2000), Prehearing Meeting Memorandum of Decision 2000-05-30 (E.U.B), online: WL.

development permit or other related municipal approvals. The interveners submitted that the local issues were so significant that they must be aired either at the EUB or the City forum, and requested that if land-use planning issues would not be heard by the EUB, the EUB should adjourn the hearing to allow EPCOR to obtain its development permit from the City first.

The EUB held that the City's processes in relation to the project are not relevant considerations in the EUB hearing process, as section 619 of the MGA neither requires the Board to consider municipal land-use planning issues nor to defer its consideration of EPCOR's application pending the outcome of the municipal development permit process.²⁶² In its full hearing of the application²⁶³ the Board reiterated²⁶⁴ that while it is not bound to give expression to the City's land-use regime in its public interest determination, land use in the river valley is relevant to the Board's consideration of the application in the context of the impacts of the project on adjacent lands, as the Board better appreciates the actual effects of the project, if any, on such usage. In ConCerv's leave application to appeal EUB's decision,²⁶⁵ the Alberta Court of Appeal held that the Board properly drew a distinction between land use effects which it said were relevant, and land use plans and policies which the Board referenced but held as properly within the jurisdiction of municipalities.

²⁶² *Ibid.* at paras. 32-35 and 59.

²⁶³ *EPCOR Power Development Corporation and EPCOR Generation Inc. Rosedale Power Plant Unit 11 (RD 11)* (8 May 2001), Decision 2001-33 (E.U.B) at paras. 50-53.

²⁶⁴ As held in previous decision such as *Dow Chemical Canada Inc. Polyethylene Plant Expansion, Fort Saskatchewan Decisions 97-4 and 97-8*; *CE Alberta Bioclean Ltd., New MTBE/ETBE Plant, Fort Saskatchewan Area Decision 98-1*; *Canadian 88 Energy Corp., Application to Drill a Level 4 Critical Sour Gas Well in the Lochend Field* (7 July, 1999), *Decision 99-16 (E.U.B)*; and *Shell Canada Limited, Application to Construct and Operate an Oil Sands Bitumen Upgrader in the Fort Saskatchewan Area Decision 99-8*.

²⁶⁵ *ConCerv v. Alberta (Energy & Utilities Board)*, 2001 ABCA 217 at para. 34 (Alta. C.A.).

*Dow Chemical Canada Inc. Application for a Well Licence Fort Saskatchewan Area*²⁶⁶ was an application for a license to drill solution-mine brine from a well to be used as raw material in Dow's ChlorAlkali production facility at its Fort Saskatchewan plant site. The relevant issues were potential impacts on groundwater, noise, lights, and odours. Some of the interveners requested that the EUB hold an inquiry to review the Strathcona County's Alberta Industrial Heartland Area Structure Plan and land-use policies. The EUB held that while it takes local planning instruments into consideration when deciding whether to approve industrial projects, based on section 619 of the MGA, it was not bound to review local planning instruments as those are not appropriate or relevant to its statutory responsibilities.

Although wells, batteries and pipelines are exempted from municipal planning, the EUB heard evidence from the West Central Planning Agency and the County of Wetaskiwin in *Ketch Resources Ltd. Review of Well Licence No. 0313083 and Application for Associated Battery and Pipeline Pembina Field*²⁶⁷ that certain bylaws of the County of Wetaskiwin have designated some of the lands as part of a watershed protection district for the Battle Lake/River Watershed. The EUB held that counties and municipalities share in the responsibility to assess any potential impacts of a proposed energy development on their community and to engage the EUB processes as appropriate to present municipal assessment to the Board. The Board held that while EUB licenses prevail over any land-use bylaw, pursuant to section 619 of the MGA, energy project applicants should be aware of municipal planning processes and bylaws and should incorporate

²⁶⁶ (11 December 2001), Decision 2001-99 (E.U.B).

²⁶⁷ (1 December 2005), Decision 2005-129 (E.U.B), *supra* note 94. See also *ENMAX Shepard Inc., Re* (21 October 2010), Decision 2010-493 (A.U.C), Appendix 6 — Preliminary Motion Ruling where the Commission ruled, having regard to its broad mandate to consider the social, economic, and environmental impacts of the project, that it does not preclude or limit interveners from pursuing issues relating to siting, planning, and water use as the Commission and the predecessor Boards has routinely looked at planning documents as properly within its mandate to consider.

them into development planning to the greatest extent possible, especially where special circumstances exist, such as the establishment of the watershed protection district.

In sum, the following principles emerge from statutory interpretation, and review of academic opinion and tribunal interpretations, of the legislative intent of section 619:

- The specified provincial Board approvals are paramount to all municipal planning instruments and development regime, including decisions of Appeal Boards or other planning agencies; however section 619 does not empower provincial Boards to assume authority for land use planning responsibilities.
- Section 619 provided a remedy not otherwise available. Thus without it, provincial approvals would have granted rights and authority to energy project applicants which they could not effectively enforce. Applicants who have EUB approvals can proceed without facing any unauthorized and unnecessary regulatory burdens. Duplication between provincial Boards and municipal planning authorities are eliminated. Municipalities will be able to deal with legitimate municipal concerns in the normal approval process while respecting NRCB and ERCB approvals.
- Municipalities retain authority to decide on changes to the land uses originally approved by a provincial Board as well as other planning matters not dealt with by the provincial Board in its approval. Municipalities also retain substantial power over subdivision and development which are means of implementing the overall land use approval given by the provincial Boards.
- Municipalities do not have the authority to refuse applications which are consistent with the provincial approvals or other specific matters approved by a provincial Board. There

is no residual, discretionary or veto power in a municipality to refuse an application for municipal approvals for a provincially approved project.

- Changes by the applicant that are not of a material nature do not constitute changes within the meaning of the provincial Board approval, would not result in inconsistency within the meaning of section 619, and therefore would not entitle a municipality to refuse municipal approvals for the application.
- Lack of municipal infrastructure is not a relevant consideration under section 619(2) when considering whether an application for municipal approval is *consistent with* a provincial Board approval.
- Matters considered as “addressed” by provincial Boards are those documented in the decision report of the provincial Boards regardless of their origin. It does not matter that the provincial Board do not specifically refer to or list the issues in their approval orders.
- Duplication of provincial Board conditions or requirements by municipalities in their planning instruments are allowed under section 619 as that will be “consistent” with the provincial approvals.
- Although provincial Boards are not bound or constrained by the municipal planning regime in making their decisions and therefore do not consider municipal planning processes and instruments relevant to their statutory mandate, the public interest as expressed in their enabling statutes obliges a provincial Board to consider the impacts of the proposed project on neighboring lands. For this purpose, municipal land use planning instruments are relevant considerations as being indicative of, from the municipality’s perspective, the nature of the past, present, and future uses of lands in close proximity to

the project and would aid the Boards to better determine whether the relative impacts created by the project on the use of neighboring lands are acceptable.

- A distinction is clearly drawn between land use effects that are regarded by provincial Boards as relevant, and land use plans and policies that are regarded by provincial Boards as properly within the jurisdiction of municipalities.
- Counties and municipalities also share a responsibility to assess any potential impacts of a proposed energy development on their community and to engage the provincial Board processes as appropriate to present their assessment to the Boards. Applicants should be aware of municipal planning processes and bylaws and should incorporate them into development planning to the greatest extent possible, especially where special circumstances exist, such as the protection of a natural resource or environmentally sensitive areas.

4.4.13 Effect of Part 2 of the MGA on Municipal Jurisdiction over Oil and Gas Matters

As discussed in chapter 3 above,²⁶⁸ Part 2 of the reformed Alberta MGA endowed municipalities with enhanced bylaw-making powers in broad spheres of jurisdiction by which municipalities have wide discretion to make general local laws within their own boundaries. It has been argued that municipalities can use their Part 2 of the MGA general bylaw-making powers to regulate oil and gas activities since oil and gas wells and pipelines are not exempted from Part 2, neither are there any provisions giving precedence to ERCB approvals in Part 2.²⁶⁹ Particularly relied upon for this view are the bylaw-making power in section 7(a) “respecting the safety, health and welfare of people and the protection of people and property;” and section 7(c) “respecting

²⁶⁸ Section 3.2.

²⁶⁹ N. Vlavianos, “The Role of Municipalities and Regional Health Authorities in Oil and Gas Development in Alberta” (2006) 94 Resources 2 [hereinafter “The Role of Municipalities and Regional Health Authorities”].

nuisances, including unsightly property.” Further, the Supreme Court of Canada decision in *Spraytech* and the “impossibility of dual compliance” conflict test emphasized therein were relied upon for the conclusion that, at least as a starting point, municipalities have the Part 2 powers to regulate in the context of oil and gas smoke, flaring, emissions, odours, setbacks and noise for genuine health and safety purposes and for nuisances.²⁷⁰ For the reasons set out below, it is unlikely that Part 2 of the MGA grants municipalities powers to regulate oil and gas activities and their effects.

4.4.14 The Rule Against Circumvention

It is a cardinal principle of municipal law that municipal general welfare powers may not, as a rule, be invoked to enlarge municipal powers or circumvent restrictions on powers in respect of a particular subject-matter specifically dealt with by the legislature.²⁷¹ This rule goes at least as far back as the 1937 case of *Morrison v Kingston*²⁷² cited with approval by the Supreme Court of Canada in *R v Greenbaum*.²⁷³ Therefore when a matter is dealt with by specific grant of authority in one section of the MGA or another Act, which might also be dealt with under the general authority granted in the sphere of jurisdiction section of the MGA, the specific power including any restrictions therein takes precedence over the general power.²⁷⁴ To illustrate the rule, where a specific provision elsewhere in the MGA or any other Act provides that a municipality could pass bylaw relating to pool safety, but not height limits for diving boards, a municipality could

²⁷⁰ Vlavianos & Thompson, *supra* note 3 at 86-87.

²⁷¹ *Croplife*, *supra* note 121 at paras. 40 and 48-49.

²⁷² (1937), 69 C.C.C. 251 at 255 (Ont. C.A.).

²⁷³ [1993] 1 S.C.R. 674, 100 D.L.R. (4th) 183 at para. 34 (S.C.C). Metropolitan Toronto could not use its general welfare power to enact a bylaw prohibiting the sale of goods on Metro sidewalks except to licensed owners or occupiers of abutting proper ties. There were other specific provisions in the Act that authorized bylaws for controlling sidewalk obstructions, street vending, and public nuisances. If those specific powers did not give Metro the authority to enact the impugned bylaw, the municipality could not find that authority in the general welfare section.

²⁷⁴ Rogers, *supra* note 129 at 396.

not pass a bylaw purporting to limit the height of diving boards under the general bylaw power²⁷⁵ although it is a safety issue for municipal purposes.

In *Spraytech*,²⁷⁶ the Supreme Court of Canada applied the rule against circumvention, an exercise mandated in *Greenbaum*, by first examining whether there was a specific bylaw making power in the Quebec *Cities and Towns Act* that the Town could have used. L’Heureux-Dube J. concluded that there was none in that case, but cautioned:

While enabling provisions that allow municipalities to regulate for the “general welfare” within their territory authorize the enactment of bylaws genuinely aimed at furthering goals such as public health and safety, it is important to keep in mind that such open-ended provisions do not confer an unlimited power. Rather, courts faced with an impugned bylaw enacted under an “omnibus” provision such as s. 410 C.T.A. must be vigilant in scrutinizing the true purpose of the bylaw. In this way, a municipality will not be permitted to invoke the implicit power granted under a “general welfare” provision as a basis for enacting bylaws that are in fact related to ulterior objectives, whether mischievous or not... There is no doubt that a bylaw passed pursuant to the provisions of s. 242 must be approached with caution. If such were not the case, the municipality could be deemed to be empowered to legislate in a most sweeping manner. [Emphasis added].

LeBel J. also warned that “[i]n the case of a specific grant of power, its limits must be found in the provision itself. Non-included powers may not be supplemented through the use of the general residuary clauses often found in municipal laws.”²⁷⁷ In *Balch v Sturgeon*,²⁷⁸ Murray J. found such ulterior objective cautioned against by L’Heureux-Dube J. in *Spraytech* and stated:

²⁷⁵ *Croplife*, *supra* note 121 at para. 40. The City of Toronto was authorized to enact bylaw which limits the application of pesticides within the City for health, safety, or well-being pursuant to section 130 of the *Municipal Act* which was deliberately left as a specific power and not a sphere of jurisdiction when the new Act was passed. The new Act contains no named specific power to make bylaws regarding the use of pesticides within a municipality, nor is there a sphere of jurisdiction that might encompass such a power.

²⁷⁶ *Spraytech*, *supra* note 119 at paras. 21-22. Distinguishing *Greenbaum*, *supra* note 273 L’Heureux-Dube J. noted that the appellant in *Greenbaum* was trying to expand the ambit of the specific authorizations by recourse to the “omnibus” provision in the *Municipal Act*.

²⁷⁷ *Spraytech*, *ibid.* at para. 52.

To my mind, the substance and intent of this bylaw is to regulate the use of land notwithstanding that the bylaw attempts to fit itself within certain sections of the *Municipal Government Act*. The *Municipal Government Act* provides the general powers necessary for the governing of the municipality. The *Planning Act* deals with the specific limited area of the use and development of land and constitutes a complete legislative scheme for controlling such use and development. The specific obligatory provisions of the *Planning Act* take precedence over the *Municipal Government Act*...

The rule against circumvention is now codified in section 10 of the MGA²⁷⁹ and has the effect of taking back some of the broad powers granted to municipalities in sections 7 – 9. Accordingly, section 10 restricts the application of Part 2, to land use and development subject matter and its various impacts in Part 17. Although acknowledging the limiting effect of section 10, it was argued that the validity of a Part 2 bylaw regulating oil and gas activities would depend on the nature of the particular bylaw. To illustrate, it was suggested that while it would be an inappropriate use of the Part 2 powers to pass a bylaw requiring all oil and gas wells, for health and safety reasons, to obtain development permit or restricted in certain areas, it might be more difficult to argue that section 10 applies to a general noise bylaw or a bylaw dealing with the release of toxic substances into the atmosphere, as Part 17 does not empower municipalities to pass generally applicable noise bylaws or bylaws in relation to releases of toxic substances.²⁸⁰ It was therefore concluded, on this basis, that it may be possible for municipalities to regulate some aspects of oil and gas development including wells, pipelines, and batteries that are expressly

²⁷⁸ *Supra* note 144 at 12 citing *Texaco Canada v. Vanier* (1981) 15 M.P.L.R. 199, [1981] 1 S.C.R. 254 (S.C.C.); *Re Gulf Canada Ltd. and Vancouver* (1980) 118 D.L.R. (3d) 552 (B.C.C.A.); and *Cox Construction v. Duslinch* (1982) 36 O.R. (2d) 618 (H.C.).

²⁷⁹ Bylaw passing powers in other enactments - 10(1) in this section, “specific bylaw passing power” means a municipality’s power or duty to pass a bylaw that is set out in an enactment other than this Division, but does not include a municipality’s natural person powers. (2) If a bylaw could be passed under this Division and under a specific bylaw passing power, the bylaw passed under this Division is subject to any conditions contained in the specific bylaw passing power. (3) If there is an inconsistency between a bylaw passed under this Division and one passed under a specific bylaw passing power, the bylaw passed under this Division is of no effect to the extent that it is inconsistent with the specific bylaw passing power.

²⁸⁰ Vlavianos & Thompson, *supra* note 3 at 90-91.

exempted from municipal planning regime; for if the legislature meant to exclude entirely oil and gas facilities from the application of Part 2 it could have said so expressly.²⁸¹

First, it should not be forgotten that the purpose of Part 17 is to regulate “land use” and “development” and their “effects” on the environment, amenities and neighboring properties; this is the core essence of land use planning. For this reason a land use bylaw and development permit may include conditions to minimize unacceptable “effects” of such uses or development such as smoke, flaring, emissions, odours, setbacks and noise.²⁸² Arguably, to the extent a general noise or emissions bylaw passed under Part 2 purports to regulate the impacts of a proposed land use or development, or a change in use thereof, the rule against circumvention in section 10 would apply and the general bylaw will yield to Part 17 bylaw restrictions. This was the case noted by Murray J. in *Blach* and cautioned by L’Heureux-Dube J. in *Spraytech*, above. For clarity, the issue here is not that municipalities cannot pass valid general bylaws regulating noise or emissions under Part 2. The question is, to what activities or subject matters can such Part 2 noise bylaw apply, and whether such bylaws can apply to provincially approved energy projects, the scheme of which the legislature has arranged in Part 17. For instance a Part 2 general nuisance bylaw may be able to catch excessive noise coming from an operating pub in a strip mall but may not be applicable in evaluating a proposed recycling plant seeking municipal

²⁸¹ *Ibid.*

²⁸² The ERCB/AER has been granted power to make rules respecting various aspects of energy projects under the *Pipeline Act*, R.S.A. 2000, c. P-15 section 3(1); *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7 section 20(1); *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 section 10(1). For instance see Directive 038 – Noise Control; Directive 060 – Upstream Petroleum Industry Flaring, Incinerating, and Venting; Directive 071 – Emergency Preparedness and Response Requirements for the Upstream Petroleum Industry; Directive 026 – Setback Requirements for Oil Effluent Pipelines; Directive 055 – Storage Requirements for the Upstream Petroleum Industry; Directive 057 – Fencing and Site Access Requirements for Oil and Gas Facilities; ID 2001-05 – Public Safety and Sour Gas Policy Implementation Recommendations 54, 60, and 61: Site-Specific Emergency Response Plans for Sour Operations, Emergency Planning Zones, and Reduced Planning Zones; ID 96-03 – Oilfield Waste Management Requirements for the Upstream Petroleum Industry; IL 98-02 – Suspension, Abandonment, Decontamination, and Surface Land Reclamation of Upstream Oil and Gas Facilities.

development approvals under Part 17. The Part 2 nuisance bylaw remains valid generally but inoperative in respect of the proposed recycling plant to which a land use bylaw made under Part 17 is applicable.²⁸³

Second, it would likely be impracticable to enforce the suggested Part 2 blanket noise bylaw that applies an equal level of noise to everything within a municipality. Arguably, as illustrated with the Town of Canmore Noise Control Bylaw below,²⁸⁴ for such a general bylaw to be reasonable, it will have to describe the activities or facilities targeted and perhaps the level of noise that will be deemed excessive. To the extent oil and gas activities or facilities (exempted under section 618 or approved by the ERCB under section 619) are listed in a Part 2 noise bylaw, the rule against circumvention in section 10 will apply, as Part 17 bylaw powers specifically deal with oil and gas and other energy matters and the restrictions in Part 17 will apply.

A follow up question, however, is whether such a Part 2 bylaw will apply to already operating oil and gas activities or facilities. It is arguable that at the operation stage (post-municipal approvals) the more specific land use bylaw as amended by the municipality to comply with ERCB approval,²⁸⁵ will likely take precedence over any general bylaw regulating noise or emission in accordance with section 10(3) of the MGA.²⁸⁶ An illustration is the Town of Canmore Noise Control Bylaw which exempts, among others, (i) works for which all necessary federal, provincial and municipal permits, license and approvals have been obtained and the work is not contrary to any federal, provincial or municipal laws or regulations; and (ii) work by any person

²⁸³ Hogg, *supra* note 126 at 16-19 and 16-20; Rogers, *supra* note 129 at 417 citing *French v. North Saanich* (1911), 16 B.C.R. 106; *Re Can. Occidental Petroleum Ltd. and North Vancouver* (1983) 46 B.C.L.R. 179.

²⁸⁴ Town of Canmore, Bylaw NO. 1997-11, *Noise Control Bylaw* online: Town of Canmore homepage <<http://www.canmore.ca/Municipal-Services/Bylaws/>>

²⁸⁵ And development permit issued accordingly, which likely authorizes noise or emission to the level approved by the ERCB or imposed by the municipality as the case may be.

²⁸⁶ Pursuant to MGA, *supra* note 1, s. 10(3) an inconsistency may be found between the amended land use bylaw and the general Part 2 noise bylaw. It is likely that the latter may be found to frustrate the purpose of the former.

on lands zoned as Heavy Industrial District (M-3) or General Industrial District (M-2) pursuant to the Town of Canmore Land Use Bylaw as amended if the noise is generated pursuant to work done in the normal manner to that end, and the work is authorized pursuant to the Land Use Bylaw as amended and does not contravene any federal, provincial or municipal laws or regulations.²⁸⁷

Third, the presumption of knowledge and competence is a settled principle of statutory interpretation that credits the Legislature with a vast body of knowledge including legislative facts, adjudicative facts of which judicial notice may be taken, common law, statute law, case law interpreting statutes and practical affairs.²⁸⁸ The Legislature is presumed to know all that is necessary to produce rational and effective legislation. Therefore, contrary to the argument that the legislature could have expressly excluded oil and gas matters from Part 2, the legislature is presumed to know the rule against circumvention and indeed expressly included it in section 10 of the MGA.²⁸⁹ The legislature appears to have spoken regarding oil and gas activities and their impacts, and appears to have ordered the state of affairs regarding their approval and operation in Part 17.

4.4.15 Section 13 of the MGA and the Three-part Conflict Test

The academic opinion also suggested that there are no specifically legislated tests, such as sections 618 and 619, in respect of bylaws passed under Part 2 of the MGA since the only conflict test provided in Part 2 is section 13 which points to the impossibility of dual compliance

²⁸⁷ *Supra* note 284 at part 4, sections 4.3 and 4.4.

²⁸⁸ R. Sullivan, *Sullivan on Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at 205 [hereinafter *Sullivan on Statutes*] citing *Willick v. Willick*, [1994] 3 S.C.R. 670 at 699; *Quebec Inc. v. Quebec*, [1996] 3 S.C.R. 919 at para. 237-238.

²⁸⁹ *Croplife*, *supra* note 121 at paras. 10 and 48.

and frustration of legislative purpose.²⁹⁰ Section 13 provides that “[i]f there is an inconsistency between a bylaw and this [the MGA] or another enactment, the bylaw is of no effect to the extent of the inconsistency.” [Emphasis added]. As noted by the Supreme Court of Canada in *Bank of Montreal v. Hall*,²⁹¹ dual compliance will be impossible when application of the bylaw can fairly be said to frustrate provincial legislative purpose. It was conceded that the purposive approach is applicable to interpret Part 2 and this means that in deciding whether a municipality is authorized to exercise a Part 2 power, “the specific words ... must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”²⁹² Applying section 13 in resolving a conflict between a Part 2 bylaw purporting to regulate impacts from oil and gas activities, it is likely that the three-part test will apply. Since section 13 considers “inconsistency” between a bylaw and the MGA, and the MGA includes Part 17, it is more likely that the specifically legislated test in sections 618 and 619 will end that conflict analysis and the paramountcy clause in those sections will apply. Even if the analysis gets to the third test, frustration of legislative purpose, it is likely that the Part 2 bylaw would be found to frustrate the legislative purpose of sections 618 and 619.

4.4.16 Case Study of Municipal Attempts to Regulate Oil and Gas Impacts Under Part 2

In support of the above view are municipal attempts to regulate oil and gas matters pursuant to section 7(a) general health and welfare powers which all ended up as mere unenforceable policy and draft or rescinded bylaws. One case was the 2003 Strathcona County Protocol, and the

²⁹⁰ Vlavianos & Thompson, *supra* note 3 at 90.

²⁹¹ *Supra* note 117 at para. 62.

²⁹² Vlavianos & Thompson, *supra* note 3 at 85.

Strathcona County Bylaws (Draft).²⁹³ In 2003, when the socio-economic impacts of oil and gas development in municipalities started becoming too much for municipal authorities to handle, first, the chief commissioner for Strathcona County, Bill Sutherland, invited the EUB to join with municipal governments in a land-use planning partnership to meet everyone's needs.²⁹⁴ Then, in response to residents' concerns, the Strathcona County Council in October 2003 passed Bylaw 96-2003 and established an Oil and Gas Exploration *Ad Hoc* Committee to advise Council on new policies and guidelines to minimize the impact of oil and gas exploration, extraction and transportation on residents and lands in Strathcona.

The committee produced a summary report used to draft the *Strathcona County Protocol* and *Strathcona County Bylaws (draft)*. The main purpose of the protocol and the draft bylaw was for oil and gas exploration and production to occur with the least possible impact on the environment, health, safety and quality of life for the residents of the community. It prohibited carrying out oil and gas exploration, drilling, recovering or transmitting by pipeline or vehicle unless the person complies with the County's standards for emergency preparedness, land reclamation, environmental and habitat protection, no flaring policy, and restrictions on noise and light levels.²⁹⁵ It also prohibited flaring for air quality and resource conservation. On November 27, 2003 (before the bylaw was passed) Strathocona's oil and gas regulatory

²⁹³ *The Strathcona County Protocol for Seismic Surveying, Drilling, Construction and Operation of Oil and Gas Facilities in Strathcona County*; and the *Strathcona County Bylaws and Information for the Seismic Surveying, Drilling, Construction and Operation of Oil and Gas Facilities in Strathcona County (Draft)* (17 June, 2004).

²⁹⁴ S. Kennett & M. Wenig, "Alberta's Oil and Gas Boom Fuels Land-Use Conflicts — But Should the EUB Be Taking the Heat?" (2005) 91 Resources 2; Humberto Bonizzoni, "Strathcona to meet with EUB officials" This Week [Sherwood Park] (14 February 2003) 13) cited in S. Fluker, "The Jurisdiction of Alberta's Energy and Utilities Board to Consider Broad Socio-Ecological Concerns Associated with Energy Projects" (2005) 42 Alta. L. Rev. 1085 at 1088.

²⁹⁵ Clause 3(d) of Protocol and Preamble of draft bylaw. See Clause 4 for Water Quality and testing of water wells, Clauses 6 and 7 – requiring submission of Wildlife and Habitat Protection Plan and environmental protection and reclamation plan to Strathcona County.

initiatives came up for discussion in the Alberta Legislative Assembly.²⁹⁶ It is no surprise that Strathcona's Energy Exploration draft bylaw did not see the light of the day. Strathcona was reported to have backed away from introducing the draft oil and gas bylaw, saying it believed the ERCB was ready to change its existing regulations.²⁹⁷

Another case was the 2008 Parkland County, Bylaw No.60-2008²⁹⁸ which required the County's review and approval of industrial activity emergency response plans. It was noted that provincial agencies immediately raised questions about overlapping regulation and duplication. As discussed in the analysis above and the Minister's legislative and non-legislative comments, the aim of section 619 is to remove regulatory duplication by ensuring that municipalities do not consider in their approval process any subject matter that has been addressed by the listed provincial Boards. On the recommendation that it rescind Bylaw 60-2008, Parkland County did

²⁹⁶ One of the MLAs, Mr. Bonner, stated: "residents of rural Alberta have given up on this government ever fixing its energy deregulation mess. At a meeting last night residents and councillors [sic] from the county of Strathcona started planning how to regulate the energy industry at the municipal level because this government has failed to do it at the provincial level. To the Minister of Municipal Affairs: will the government support the efforts of the residents of Strathcona county to regulate the energy industry at the municipal level... given that municipalities feel that the Energy and Utilities Board ignores their interests, when will the government start to defend municipalities' interests and recommend a review of the EUB's mandate?... To the Minister of Energy: why is the government's record on regulating oil and gas development so bad that the municipalities feel that they have to do it themselves?" Mr. Boutilier replied: "To the hon. member, municipalities are important stakeholders in the EUB decision-making process. They often participate in the process along with the residents and ratepayers... Now, oil and gas development is seen to be beneficial to all Albertans. The importance of the provincial interest is reflected in the fact that oil and gas wells, batteries, and pipelines are specifically exempted from local municipal planning authority under the Municipal Government Act... section 619 of the MGA does state that the decisions of the EUB take precedence over any municipal statutory plan, land use bylaw, and planning decision. That is what's taking place, but clearly it is not pre-emptive of citizens and municipal leaders participating in the EUB process in terms of the concerns that the hon. member has raised." See Alberta, Legislative Assembly, *Hansard Debates* (27 November 2003) at 1934-5.

²⁹⁷ However the ERCB was reported as having no plans to change the rules governing energy development, despite complaints from the County. The Board only committed to finding ways to make the existing rules work better in Strathcona County. See "County, EUB At Odds over Regulation Change," online: The Land Advocate <<http://web.archive.org/web/20050208030518/www.landadvocate.org>> cited in Vlavianos and Thompson, *supra* note 3 at 87.

²⁹⁸ Parkland County, Bylaw No.60-2008, *Industrial Activity Emergency Response Plan Review and Approval Bylaw* (9 December, 2008) cited in Vlavianos & Thompson, *supra* note 3 at 58.

so on June 6, 2009 as a measure of “good faith and commitment by all parties to go forward and improve existing processes to address the County's concerns.”²⁹⁹

A slightly different approach was adopted by the City of Edmonton Oil and Gas Facilities Policy Review Implementation Plan.³⁰⁰ Concerned over land use conflicts caused by the rapid expansion of Edmonton's urban development into areas with significant existing oil and gas activity and an influx of new oil and gas operations in and around Edmonton, the City commissioned a study of the policy framework that governs the interaction between oil and gas activity and urban development in and around the City. The goal of the Plan was to achieve an improved understanding among regulatory bodies of each others' roles and responsibilities as well as clearly defined mechanisms and processes for communicating, coordinating and consulting on the complex aspects of co-existence. The City's Plan, which acknowledged the prevalence of ERCB jurisdiction over oil and gas projects, suggested working collaboratively with the provincial Board and other stakeholders. It included a set of actions to be implemented by the City of Edmonton in cooperation with the ERCB, the oil and gas industry, the development industry and other stakeholders for the purpose of strengthening the City's ability to manage land use impacts from current and future oil and gas development.³⁰¹ The City of Edmonton is typically an “*Implementation Plan*” (as opposed to regulatory), acknowledging its limited jurisdiction over oil and gas issues, and adopting a cooperative approach with the provincial Board in stark contrast with Strathcona's and Parkland's bylaw approach.

²⁹⁹ See Parkland County, News Release, “Parkland County rescinds bylaw, works with ERCB and other government agencies to resolve concerns” (8 July 2009) at 4; and Parkland County, Bylaw No. 27-2009, *A Bylaw to rescind the Industrial Activity Emergency Response Plan Review and Approval Bylaw 60-2008* (6 June 2009) cited in Vlavianos & Thompson, *Ibid.*

³⁰⁰ City of Edmonton (30 January 2008).

³⁰¹ The Plan is structured into headings such as clarifying Roles, Responsibilities and processes; enhancing Public Safety; updating planning Process and Tools; and Building Internal Capacity.

While energy companies are encouraged by provincial Boards, and indeed endeavour, to work cooperatively with municipalities in order to get practical business results, they are most likely to oppose additional unauthorized, unenforceable and expensive (in terms of time and money) regulatory burdens contained in municipal protocols and policies. Arguably, the phrase “or any other authorization under this Part” in section 619 of the MGA catches municipal policies as part of the municipal planning and development regime which must comply with the listed provincial approvals. It is reasonable to say that when municipal and industry interests align³⁰² or when the municipal regulatory burden is insignificant, industry will cooperate with informal municipal protocols for business reasons. Otherwise, duplicative informal municipal regulatory policies are unenforceable.

From the foregoing, it is reasonable to conclude that the ability of host municipal authorities to regulate socio-economic challenges of oil and gas activities within municipal boundaries is highly circumscribed. Municipal governance becomes very difficult as the challenges get larger and both the community and the investing industry become affected. The next part and chapter 5 try to locate the forum at the provincial level where socio-economic impacts of oil and gas activities are aired, addressed and resolved or at least a commitment to resolution made.

4.5 The Oil and Gas Development Regulatory Process

This part discusses the provincial regulatory stages of an energy project with a view to identifying the stage or forum where socio-economic challenges of oil and gas activities are aired, addressed and resolved. The purpose is to answer the question whether there is a gap in the regulatory framework which the federal principle of non-centralization may resolve. The focus

³⁰² Chapter 5 below illustrates industry and municipalities working together for mutual benefits.

here is on oil sands development. Some stages of the regulatory process, such as reclamation, are beyond the scope of the thesis and are not discussed. The construction and operation of an upstream oil sands project require approvals for the following key stages in the development process: (a) exploration; (b) mineral rights; (c) preliminary disclosure, scheme approval and development licenses; and (d) surface rights and environmental approvals.³⁰³

Some of the responsible bodies for the various stages will be affected by the coming into force of the *Responsible Energy Development Act* (“REDA”)³⁰⁴ and the AER after this thesis had been written.³⁰⁵ While the AER became operational on June 17, 2013, the provincial government has employed a phased approach in the Regulator’s assumption of functions.³⁰⁶ On November 5, 2013, new regulations authorize the AER to administer and perform the duties under the *Public Lands Act* (“PLA”)³⁰⁷ for energy projects including: (a) issuing geophysical approvals for exploration; (b) issuing public lands dispositions related to energy resource activities for oil, natural gas, oil sands and coal; and (c) enabling the registration of private surface agreements by landowners that the Regulator can enforce.³⁰⁸ The next phase before complete implementation of the single energy regulator involves the AER assuming the powers, duties and functions, including issuing water licences and environmental approvals, under the *Environmental*

³⁰³ *The Guide*, *supra* note 38 at 5. The Guide covers conventional and unconventional oil and gas development activities, including in situ oil sands, but not does not include mineable oil sands projects and other aspects of the regulatory framework such as information reporting, inspections and monitoring which are also not within the scope of this thesis.

³⁰⁴ S.A. 2012, c. R-17.3, *supra* note 11.

³⁰⁵ A one-stop shop that will assume the regulatory powers, duties and functions of the ERCB and ESRD in respect of energy resource activities (oil, gas, oil sands and coal) under the existing energy, public lands, water and environmental statutes.

³⁰⁶ Regulatory Enhancement Project General Questions and Answers, online: Alberta Energy Homepage <<http://www.energy.alberta.ca/Initiatives/RegulatoryEnhancement.asp>>

³⁰⁷ R.S.A. 2000, c. P-40.

³⁰⁸ *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013 as amended. The Regulations also align enforcement (administrative penalties) under the AER with those under ESRD. See Regulatory Enhancement Project General Questions and Answers, online: Alberta Energy Homepage <<http://www.energy.alberta.ca/Initiatives/RegulatoryEnhancement.asp>>

Protection and Enhancement Act (“EPEA”)³⁰⁹ and the *Water Act*³¹⁰ in relation to energy resource activities (upstream oil, gas, oil sands and coal). The AER is expected to be fully established in spring 2014. As discussed in chapter 6 below, it does not appear that the assumption of these duties by a single energy regulator, without more, resolves the identified gap in the framework. The following parts discuss the relevant stages of energy development approval and the regulatory requirements as they existed prior to their assumption by the AER.

4.5.1 Exploration

This stage is crucial because if oil sands deposits are found, the proponent applies for the appropriate mineral and surface disposition to develop the resource.³¹¹ All exploration program approvals were administered by ESRD.³¹² The Land Use Operations Branch of ESRD was the provincial “one-window” for processing oil sands exploration activities.³¹³ The AER will assume this function under the REDA regime. The *Code of Practice* requires only a notice to the Director of Environment, containing specified information, to be submitted at least two weeks prior to commencing exploration operations. On private lands, written consent of all current registered owners of the land must be obtained,³¹⁴ therefore exploration on municipal road

³⁰⁹ R.S.A. 2000, c. E-12.

³¹⁰ R.S.A. 2000, c. W-3.

³¹¹ *The Guide*, *supra* note 38 at 27.

³¹² For conventional oil and gas, pursuant to Part 8 of the MMA, *supra* note 92, the *Exploration Regulation* (Alta. Reg. 284/2006) and associated exploration directives of the MMA; for oil sands operations under the *Code of Practice for Exploration Operations* (September 2005) (“Code of Practice”) made under *Environmental Protection and Enhancement Act* (“EPEA”), R.S.A. 2000, c.E-12 and the *Conservation and Reclamation Regulation* (Alta. Reg. 115/93). Exploration activities may also require approvals from Alberta Environment under Alberta’s *Water Act*, R.S.A. 2000, c. W-3 and dispositions under the *Public Lands Act*, *supra* note 307 if on Crown land.

³¹³ Online: Environment and Sustainable Resources Development Homepage

<<http://www.srd.alberta.ca/LandsForests/IndustrialActivity/IndustrialDevelopmentReclamation/IndustrialProjects.aspx>>

³¹⁴ *Code of Practice*, *supra* note 312 at s. 3 and Schedule 1.

allowances or land maybe the only trigger to the notice and consent of the municipality.³¹⁵

Surface access approval is required on public lands under the PLA.³¹⁶

Operational requirements include the preparation and maintenance of an activities plan covering the expected life of the operation and containing certain prescribed information about the proposed area and land. These include ownership, current land use, and a summary of any land use planning policies and regulations, plans in effect in the area such as municipal plans and land use bylaws, Eastern Slopes Zoning, Integrated Resource Plans, and Wildlife Management.³¹⁷

There is no indication of permit or approval issued for this activity, apart from surface dispositions for public lands or water approvals where applicable. For activities requiring only notice under EPEA, stakeholder notification is not required although proponents are encouraged to work with stakeholders to alleviate any concerns. While information about current land uses and municipal planning policies are contained in the activities plan, the activities plan is only required to be prepared and maintained. As test holes are “wells” expressly exempted from municipal approval pursuant to section 618 of the MGA there is no evidence that municipalities are required to be informed, except as noted here, neither is there evidence that municipal infrastructure or indeed socio-economic factors are considered at the exploration stage.

³¹⁵ With respect to conventional petroleum and natural gas, industry became concerned about the fees some municipalities were charging for seismic operation on road allowances and the use of public right of way and for certain uses on public land. Municipalities are concerned about public safety, liability and impact of increased industrial activity on developed roads. The Ministers of ESRD, Municipal Affairs and Infrastructure met with affected municipalities, the Alberta Association of Municipal Districts and Counties (“AAMD&C”), and industry representatives to resolve the issue. The Ministers asked a stakeholder group to look for non-regulatory means to resolve the issue and develop specific recommendations that would eliminate the need for municipalities to charge fees for seismic activity by the summer of 1999. The group recommended a process of notification and inspection for seismic activity and set out how the costs incurred by municipalities are to be dealt with. See Alberta Environment, *Geophysical Information Letter 001/01 Relating to: Conducting Exploration Programs in Municipalities* (1 January, 2001) online ESRD Homepage <https://www.cagc.ca/_files/pdf/ab_md_4.pdf>

³¹⁶ See also *Public Lands Operational Handbook* (December 2004); and Exploration Backgrounder, online: *ibid.* <<http://www.srd.alberta.ca/FormsOnlineServices/documents/Bill16ExplorationBackgrounder.pdf>>

³¹⁷ *Code of Practice*, *supra* note 312 at s. 4 and schedule 2.

4.5.2 Mineral Rights

This is the beginning of the tenure process. It has been argued that this is a critical stage which demands a full public interest analysis, especially socio-economic considerations such as timing, intensity, and adequacy of support infrastructure and services for development.³¹⁸ It has also been argued that the rate at which oil sands rights are sold inevitably drives the pace at which exploration and development will take place.³¹⁹ Crown-owned oil sands³²⁰ are disposed by means of agreements pursuant to the MMA and the *Oil Sands Tenure Regulation*, 2010 (“OSTR”).³²¹ Alberta Energy is responsible for mineral right dispositions in the form of permits or leases³²² after a public offering and bidding process.³²³ As the result of exploration and surrounding development, industry submits requests to the department for parcels of land to be

³¹⁸ *Oilsands 101*, online: Alberta Energy Homepage < <http://www.energy.gov.ab.ca/OilSands/1717.asp>>. See N. Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis* Canadian Institute of Resources Law Occasional Paper #21, August 2007, at 11 [hereinafter *Regulatory Framework for Oil Sands*] and the literature cited therein. Authors argue that the granting of the rights “kick-starts” the exploration and development activities of the company holding the rights, creates legal and political pressures to allow the company to exercise its property rights, and creates a snowballing effect that leaves regulators like the EUB [ERCB] hard pressed to adopt any kind of limitations that would effectively preclude the exercise of those rights. Further, it was argued that the fact that the rights disposition process creates legally-enforceable property rights is highlighted every time the EUB, at the project approval stage, relies on their existence to justify the need for the proposed project. Thus, in the Board’s view, a company’s ability to exercise oil and gas rights it has purchased from the government is a “compelling component” in the Board’s determination of need. *Re Canadian 88 Energy Corp. Application to Drill a Level 4 Critical Sour Gas Well Lochend Field* (7 July 1999), Decision 99-16 (E.U.B.) was cited.

³¹⁹ *Regulatory Framework for Oil Sands*, *ibid.* at 11.

³²⁰ Alberta owns approximately 97 percent of Alberta’s oil sands while the remaining 3 percent are held privately or by the federal Crown. See Alberta Energy, Alberta’s *Oil Sands 2005* (December 2006) at 3, online: Alberta Energy Homepage <<http://www.energy.gov.ab.ca/docs/oilsands/pdfs/osgenbrf.pdf>> cited in *Regulatory Framework for Oil Sands*, *ibid.* at 7.

³²¹ Alta. Reg. 196/2010 and the *Mines and Minerals Administration Regulation*, Alta. Reg. 262/1997. See also MMA, *supra* note 92, s. 16 and the *Oil Sands Tenure Guidelines*, *supra* note 25. For the Life Cycle of Oil Sands Rights see Figure 3 in *The Guide*, *supra* note 38 at 46-48.

³²² Permits are issued to the highest bidder for a 5 year term and are considered exploratory. Upon expiry, the permittee may apply for a lease selection on all or part of the oil sands permit if it meets the minimum level of evaluation (“MLE”) required for each section. If the lease selection is granted, then one or more 15 year term oil sands lease is issued. Leases are also issued to the highest bidder for a 15 year term. Upon expiry, the lessee may continue the oil sands lease if they meet the MLE required for each section within the lease and continued leases have an indefinite term. If the lease is producing at the minimum requirements then continuation with a producing status is granted. If continuation with a non-producing status is granted, the lease is subject to escalating rent which serves to promote the development of oil sands resources. See *The Guide*, *ibid.* at 46-47. Oil sands agreements may also be purchased by way of a registered transfer (that is, buying an existing agreement).

³²³ If very specific requirements are met, operators may also apply for a direct purchase, also known as a private sale, of oil sands rights. *Ibid.* at 47.

included in the public offering process held every two weeks. Alberta Energy posts available rights in a public offering notice eight weeks in advance of the sale. Prior to offering mineral rights, Alberta Energy refers all requests for Crown mineral rights to the Crown Mineral Disposition Review Committee (“CMDRC”), an interdepartmental committee created in 1971³²⁴ comprising representatives from ESRD, Culture, ERCB, and Special Areas Board.

The CMDRC provides an “interdepartmental” review of all proposed mineral dispositions to identify their possible impacts on the environment. The CMDRC review is a general assessment that identifies major surface or environmental concerns that can affect surface access for exploration and development of minerals. There is no evidence that municipal infrastructure or socio-economic factors are considered. The CMDRC may recommend that lands be withdrawn from disposition, or that the proposed disposition be granted with or without special terms or conditions. Based on recommendations received from the CMDRC, Alberta Energy determines whether they warrant preventing a sale, or if the minerals can be posted for sale.³²⁵ Alberta Energy may attach an addendum to the Public Offering Notice indicating a major surface or environmental concern that may result in Crown-imposed surface access restrictions capable of affecting mineral exploration and development activities. The identified concerns usually arise from broad provincial government policies, programs, projects, initiatives or similar interests pursuant to provincial legislation or regulations.³²⁶ It does not reflect on-the-ground operational

³²⁴ Pursuant to the *Land Conservation Regulations* (Alta. Reg. 125/74, *Land Surface Conservation and Reclamation Act*) and continued via s. 10(2) of the EPEA (1993) online: ESRD Homepage <<http://www.srd.alberta.ca/LandsForests/LandManagement/CrownMineralDisposition.aspx>>.

³²⁵ Privately-owned lands are not within the scope of CMDRC’s assessment. See online: ESRD Homepage <<http://www.srd.alberta.ca/LandsForests/LandManagement/CrownMineralDisposition.aspx>>

³²⁶ See ESRD Information Letter, IL 2007-21: *Crown Mineral Rights; Identification of Major Surface Concerns in Public Offering Notices* at 1.

conditions³²⁷ neither does it caution about required infrastructure. Any term or condition attached appears in Appendix 3 of the Public Offering Notice for Crown minerals. Industry can then decide whether they want to bid on the parcel based on the restriction, or adjust their bid accordingly. Prior to formulating a bid, applicants are encouraged to ensure they perform their due diligence by researching surface access conditions to ensure they have an accurate understanding of the operational challenges of a given site.³²⁸ Alberta Energy strongly recommends consultation with the relevant municipal government, provincial department, reclamation officer, and landowner or occupant, as its addendum is not intended to be an exhaustive list of all possible concerns.³²⁹

The CMDRC is the only evidence of coordination among regulatory bodies at the mineral rights disposition stage. Unfortunately the CMDRC, a viable forum that could be maximized, does not conduct a comprehensive review of the proposed development prior to making recommendations to Alberta Energy. Despite the importance of this stage in directing the regulatory process, the review is limited to surface access restrictions and ignores socio-economic on-the-ground or place-based impact considerations. Academic opinion has argued that mineral rights are issued through procedures that fail to apply the basic ‘look before you leap’ principle, largely or entirely ignoring the full implications of mineral development.³³⁰ There is no indication that the CMDRC consults municipalities that have the best local knowledge and socio-economic information of

³²⁷ *The Guide*, *supra* note 38 at 47.

³²⁸ See IL 2007-21 *supra* note 326; *The Guide*, *ibid.* at 13.

³²⁹ IL 2007-21, *ibid.* at 2. Other surface access restrictions, such as those that may be imposed by municipal governments, public interest groups or private landowners (e.g., urban areas, country residential developments, airports, private nature reserves), are not identified on the Public Offering Notice.

³³⁰ Kennett & Wenig, *supra* note 294 at 5. In fact, some critics noted that “government and industry insiders dismiss this closed-door process as a “joke” and a “farce.”” See *ibid.* citing Confidential interviews, cited in: D. Farr, et al., *Al-Pac Case Study Report – Part 2: Regulatory Barriers and Options*, Prepared for the National Round Table on the Environment and the Economy, July 2004 at 15 (available at www.nrtee-trnee.ca).

the proposed area for suggestions on what may be required to support energy development. Rather the onus is shifted to industry to conduct due diligence to locate operational challenges. In addition to this heavy onus and whatever operational challenges there might be, the permits and leases issued to industry have strict penalties, including escalating rent, if certain minimum levels of exploration and production are not met.³³¹

4.5.3 Preliminary Disclosure, Scheme Approval and Development Licenses

Following the purchase of mineral rights, the regulatory process for major commercial oil sands projects has four key stages although only the first three are discussed: (a) Preliminary Disclosure to Government; (b) Scheme Approval with Environmental Impact Assessment; (c) Operating permits, licenses and approvals; and (d) Abandonment Approval and Reclamation Certification.³³² Major oil sands proposals will normally require, as stage 1, the submission of a Preliminary Disclosure to the government which initiates a review of the project in principle, in terms of the form, timing, location, or any other essential feature of the proposal. If the Preliminary Disclosure is endorsed by the provincial government, the proponent can proceed to the stage 2 more detailed scheme approval process. A project scheme approval allows for phased production on smaller parcels of the total leased land rights, as commercial oil sands projects typically take years to construct, and operate for several decades. The ERCB, a quasi-judicial agency of the provincial government, was primarily responsible for the recovery scheme approval, energy development licenses for wells, facilities and pipelines,³³³ and had ongoing regulatory authority in the public interest pursuant to the OGCA, the OSCA, the *Pipeline Act*, the

³³¹ See *Oil Sands Tenure Regulation, 2010*, Alta Reg 196/2010.

³³² Directive 023, *supra* note 43 at 3-4 Figure 1.

³³³ And other authorizations such as Resource or Pool Development approvals for commingling, well spacing, enhanced recovery and disposal schemes, changes to oil well production rate administration, equity matters such as rateable take and compulsory pooling, pool delineation and gas removal; emergency response approvals; flare permits; and waste management approvals.

ERCA and all the regulations made thereunder.³³⁴ The AER has assumed these functions under the REDA regime.

The operator typically applies for a scheme approval from the AER pursuant to Directive 023 for the initial application, and Directive 078³³⁵ for modification of the existing commercial in situ oil sands project to reflect changes in technology and operational experience. The application process requires information submissions (including resource recovery plans and assessment of the social, economic and environmental effects of the project), technical review, stakeholder notification and consultation, and adjudication including a hearing if necessary where there are unresolved objections to allow citizens to express potential concerns or support.³³⁶ Where the EPEA requires an Environmental Impact Assessment (“EIA”) report,³³⁷ the EIA report must be submitted with the scheme application to the AER and factored into the scheme approval process.³³⁸

³³⁴ The Board also developed Directives which may have the force of law, Interim Directives, Information Letters and Bulletins in carrying out its duties. See *Kelly v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, 60 Alta. L.R. (5th) 391 at paras. 15-21 (A.B.C.A.). Also an Act or regulation may incorporate Directives by reference.

³³⁵ Energy Resources Conservation Board, Directive 078 - *Regulatory Application Process for Modifications to Commercial In Situ Oil Sands Projects*, (03 December 2010) [hereinafter Directive 078].

³³⁶ *The Guide*, *supra* note 38 at 79.

³³⁷ An EIA is the first step in a regulatory process to determine what the environmental, social, economic and health implications of a project may be, and to gather information and determine specific conditions under which the project can operate. See *The Guide*, *ibid.* at 66. An EIA is mandatory for commercial oil sands, heavy oil extraction, upgrading or processing plant producing more than 2000 m³ of crude bitumen or its derivatives per day: *Environmental Assessment (Mandatory and Exempted Activities) Regulation* Alta. Reg. 111/1993, Schedule 1(j). Projects lower than the 2000 m³/day bitumen production fall under the discretionary category where the Director will decide if an environmental impact assessment is warranted. *The Guide*, *ibid.* at 30; EPEA, *supra* note 309, ss. 41 to 44.

³³⁸ *The Guide*, *ibid.* at 83. The Board stated that for projects which require input from other government departments, the ERCB passed such applications to ESRD which handled distribution to other departments in “one-window” approach. The general rule was that each government department checked that a specific proposal met its own regulations and standards and then forwarded any deficiencies or concerns to the ERCB via ESRD. See EnerFAQs 01, “What is the Energy Resources Conservation Board?” in EnerFAQs, *supra* note 237.

There is sparse information on the stage 1 Preliminary Disclosure process. It allows the proponent to (a) introduce and outline a project to the regulatory agencies thereby identifying the most serious concerns that will have to be addressed subsequently, (b) gain Cabinet “decision in principle,” and (c) help minimize costs for the proponent in cases where the proposal is rejected.³³⁹ However, according to the ERCB, Preliminary Disclosure is a process that puts the government on notice about a project, but there is little information available at that stage to even begin considering a regulatory review.³⁴⁰ The Preliminary Disclosure stage is another critical stage, after sale of mineral right, where the form, timing, location, or any other essential features of the project are decided in principle. Ideally, this is the key forum for intergovernmental cooperation or federalism in action. This is where the province and affected municipal authorities ought to put heads together to tackle infrastructure, socio-economic and other operational challenges to industry and surrounding communities that may arise from the proposed development. There is no indication that this forum is utilized for this purpose.

For the stage 2 scheme approval, apart from the regular public notification and consultation requirements, there is no evidence of input early in the process from affected municipal authorities, especially for small-scale commercial or pilot oil sands projects not requiring EIA reports, apart from them intervening at the regulatory hearing.³⁴¹ Indeed some of the *in situ* oil

³³⁹ Alberta, *Alberta Tourism Recreational Leasing (ATRL) Process*, (January 1999) at 5, online: Alberta Tourism Homepage <<http://www.tpr.alberta.ca/tourism/tourismdevelopment/landdevelopment/docs/atrl.pdf>>

³⁴⁰ *Re Syncrude Canada Ltd. Approval for the Aurora Oil Sands Mine, Application No. 960552* (15 April 1997) Pre-Hearing Meeting Memorandum of Decision at 3 (A.E.U.B.).

³⁴¹ See *The Guide*, *supra* note 38 at 38, Table 7. There was a protocol, *Protocol for Coordination between the Alberta Energy and Utilities Board (EUB), Alberta Association of Municipal Districts and Counties (AMDC), Alberta Urban Municipalities Association (AUMA), and Alberta Municipal Affairs (MA)*, October 25, 2004, which ran a two-year test period but did not continue as some of the parties changed such as the Health Regions that merged into a single Alberta Health Services. An ERCB representative stated the protocol was very helpful in outlining consultation needs, processes and audiences. However, since then the ERCB has moved to very much of a stakeholder based regulatory change model whereby it consults with stakeholders - something admittedly was not

sands projects start off small-scale without a full Socio-Economic Impact Assessment (SEIA).³⁴² Also notable is that, while information requirements from applicants at this stage include resource recovery plans and assessment of social, economic and environmental impacts of the project,³⁴³ this stage is unlikely the proper forum for infrastructure considerations as discussed in chapters 5 and 6 below.³⁴⁴ The scope of the issues considered by the ERCB in oil sands scheme approval hearings, including those with full EIA reports, are discussed in chapter 5 below.

A significant change in the oil sands approval process has been proposed in a draft Directive 023 released on May 28, 2013.³⁴⁵ This draft, if approved and adopted by the AER, will rescind and replace the current 1991 edition of Directive 023 as well as Directive 078. One major proposed change is that the stage 1 Preliminary Disclosure to the government will be discontinued. Figure 1 of the 1991 edition of Directive 023 which outlines the overall approval process for major oil

done very well in the late 1990s. While the Board still worked with the AUMA and AAMD&C on issues with provincial scope, it has witnessed a far more proactive approach to energy development emerge within individual local governments. Thus the concept of regional groups dealing with regional issues has been replaced by individual local governments dealing with local industry players and locally located ERCB staff via the ERCB Community and Aboriginal Relations (“CAR”) team on local issues. E-mail correspondence from Greg Gilbertson, Operations Leader, Community and Aboriginal Relations Public Safety/Field Surveillance Branch Energy Resources Conservation Board (12 May 2009).

³⁴² SEIA is defined as a systematic analysis which seeks to understand the economic impacts and the social consequences on communities that result from project employment, and from project-related expenditures and sales. The SEIA is intended to communicate the potential effects (including cumulative effects) of a project on the economy and population base and, in turn, the implications for local public services and infrastructure. It should also address other quality of life issues that are of interest to the communities affected. In sum, it is an assessment of the effects that a project will have on the social and economic factors in the region. See Government of Alberta, Alberta Environment, *Glossary of Environmental Assessment Terms and Acronyms Used in Alberta*, (Edmonton: Environmental Assessment Team, February 2010), online: ESRD Homepage <<http://environment.gov.ab.ca/info/library/8003.pdf>>

³⁴³ Directive 023, *supra* note 43, s. 6.0 at 38-43 requires assessment of population, services and infrastructure, land use, housing, quality of life, and mitigative measures.

³⁴⁴ Where a regulatory hearing is conducted, historically municipalities were not granted standing before the Board, and they were not granted intervener costs for their participation where standing is granted. For a review of municipal standing and recovery of cost at ERCB public hearings see *Regulatory Framework for Oil Sands*, *supra* note 318 at 36 and decisions cited therein.

³⁴⁵ Draft Directive 023: *Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project*, May 28, 2013 released with Bulletin 2013-20: Invitation for Feedback – Draft Directive 023: Oil Sands Project Applications, May 28, 2013. Online: AER Homepage <http://www.aer.ca/documents/directives/DraftDirective023_20130528.pdf>

sands scheme will be replaced with a figure 2.1, a simplified review process for oil sands project approvals. Another notable proposed change is the level and type of information under the “Socio-economic Requirements” to be included in oil sands applications. For example, the 1991 Directive 023 requires applicants to identify the need for new services or improvement to existing services, and how the applicant will “facilitate planning *by municipal and provincial agencies to provide the services or improvements required.*” [Emphasis added]. It also required a general discussion of the impact of the project on the quality of life in the study area, and the “*institutional changes that may be necessary to accommodate the development.*” [Emphasis added]. These do not appear in the draft Directive. On the other hand, the draft Directive requires the applicant to provide a table showing the taxes, royalties, gross domestic product, and labour income (i.e., direct, indirect, and induced) to be generated by the oil sands project, and a table showing the capital costs and annual operating expenditures in percentage amounts in relation to the local region, Alberta, Canada, and outside of Canada. For employment and training, the applicant is required to describe potential employable population as well as policies and programs to enhance skill development of the community to participate in the project.³⁴⁶ If the draft Directive 023 is approved, the AER will be responsible for all stages of the oil sands development approval.

Once a project scheme is approved, the operator applies for facility, pipeline, and well licenses pursuant to Directive 056.³⁴⁷ Since objections and technical matters are generally addressed in the Directive 023 scheme application process, the Directive 056 application process is typically

³⁴⁶ *Ibid.* at 19-20. Contrast with the “Social Impact Assessment” in the 1991 edition of Directive 023, at 38-43.

³⁴⁷ *Supra* note 227.

routine.³⁴⁸ The process was directed and managed by the ERCB with limited formal involvement from ESRD and Alberta Energy.³⁴⁹ The AER has assumed this function under the REDA Regime. Key aspects of this process include any outstanding notification and consultation with stakeholders,³⁵⁰ confirmation that technical requirements have been met, and a primary permanent record of the specifics of the energy project that can be expanded upon over time. Where stakeholder objections are unable to be resolved by the proponent, the ERCB provides access to an Appropriate Dispute Resolution or may call a hearing if warranted.³⁵¹ Municipalities are not included in the agencies with formal input at the development application process. Routine applications, which typically do not include oral hearings, unlikely provide a forum to tackle and resolve socio-economic and infrastructure issues.³⁵²

4.5.4 Environmental Approvals and Surface Rights

EPEA and *Water Act* authorizations as well as ESRD's *Public Lands Act* dispositions followed ERCB project scheme approval.³⁵³ While an EIA is the first step in a regulatory process to determine what the environmental, social, economic and health implications of a project may be, and to gather information and determine specific conditions under which the project can operate,³⁵⁴ small scale commercial oil sands projects do not attract mandatory EIA under

³⁴⁸ *The Guide*, *supra* note 38 at 80. Stakeholder notification and consultation that has been completed as part of the Directive 023 scheme approval satisfies the participant involvement requirements for any related Directive 056 licenses for wells, pipelines, and facilities within the ERCB-approved oil sands project area. See Directive 078, *supra* note 335 at 7.

³⁴⁹ *The Guide*, *ibid.* at 82.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*; Energy Resources Conservation Board Information Letter, IL 2001-01: *Appropriate Dispute Resolution (ADR) Program and Guidelines for Energy Industry Disputes*.

³⁵² ERCB approval for a facility or project is considered to be routine if an application is complete, there are no landowner objections, and the company applying has met all technical, safety, public consultation, and environmental requirements. The turnaround time for a complete and well-prepared routine application can be as short as a few days. See EnerFAQs 01, *supra* note 338.

³⁵³ *The Guide*, *supra* note 38 at 79.

³⁵⁴ *Ibid.* at 66.

Environmental Assessment (Mandatory and Exempted Activities) Regulation.³⁵⁵ The ESRD at this time is responsible for the EIA process and may involve other provincial agencies as required.³⁵⁶ The AER will assume this responsibility for energy projects under the REDA regime. The EIA process may be triggered by a proponent, or anybody including a municipal authority, informing ESRD about a proposed project. The proponent is required to first prepare a Proposed Terms of Reference (“TOR”) to set the scope of the EIA and must provide notice of it to the public and ESRD for review.

Interested persons, including municipal authorities³⁵⁷ have the ability to provide input on the proposed Terms of Reference.³⁵⁸ The Environmental Assessment Director considers input received and issues the Final Terms of Reference that sets the scope for the EIA report, also notify the public.³⁵⁹ While ESRD requires the proponent to evaluate cumulative effects based on three development scenarios – the Baseline Case, the Application Case and the Planned Development Case,³⁶⁰ the only requirement for SEIA, as a component of the EIA report, is that

³⁵⁵ *Supra* note 337. Activities not covered under this regulation are discretionary.

³⁵⁶ *The Guide*, *supra* note 38 at 14; Government of Alberta, Alberta Environment, *Guide to Reviewing Environmental Impact Assessment Reports* (Edmonton: Environmental Assessment Team, 2010), EA Guide 2008-3 [hereinafter *Guide to Reviewing EIA Reports*].

³⁵⁷ See for example, the Regional Municipality of Wood Buffalo (“RMWB”) Comments on proposed Terms of Reference North American Oil Sands Corporation - Kai Kos Dehseh SAGD Project File # 00231131-001, March 15, 2007 at 24-26 online: ESRD Homepage <<http://www.environment.alberta.ca/documents/StatoilHydro-Canada-Kai-Kos-Dehseh-Public-Comments-3.pdf>>

³⁵⁸ EPEA, *supra* note 309, s. 48(2); *Environmental Assessment Regulation*, Alta. Reg. 112/1993, s. 6; Government of Alberta, Alberta Environment, *Guide to Providing Comments on Proposed Terms of Reference* (Edmonton: Environmental Assessment Team, 2010), EA Guide 2009-3 at 1-2. online: *ibid.* <<http://environment.gov.ab.ca/info/library/8128.pdf>> [hereinafter *Guide to Providing Comments on TOR*]

³⁵⁹ Government of Alberta, Alberta Environment and Sustainable Resource Development, *Alberta’s Environmental Assessment Process* (Edmonton: Environmental Assessment Program, 2013), EA Guide 2008-1 at 2-3, online: *ibid.* <<http://environment.gov.ab.ca/info/library/6964.pdf>> [hereinafter *Alberta’s Environmental Assessment Process*]; *Environmental Assessment Regulation*, *ibid.*, s. 7; EPEA, *supra* note 309, s. 48(3).

³⁶⁰ Additional scenarios will be dictated by special circumstances specific to individual projects. The Baseline Case establishes the conditions that exist or would exist prior to development of the project or the conditions that would exist if the project were not developed. However, in more developed areas, such as the Regional Municipality of Wood Buffalo or Strathcona County, it describes environmental conditions that include the effects resulting from existing and approved projects or activities. The Application Case describes the Baseline Case with the effects of the

“[p]roponents are encouraged to identify training, employment and business benefits specifically accruing to aboriginal communities in the Study Area where possible.”³⁶¹ Once the EIA is submitted, a technical review of it is conducted by ESRD and other provincial agencies through a multi-disciplinary integrated team from various government departments and agencies based on the nature and location of the project.³⁶² Once the review team is satisfied that the EIA effectively presents the potential effects and mitigation, the report is formally referred to ESRD and other relevant government agencies and jurisdictions for public interest decision and regulatory approvals including the ERCB.³⁶³ Municipal input, it appears, is limited to the preparation of the proposed TOR to set the scope of the EIA. Further, the scope of the SEIA component of an EIA is narrower than the Directive 023 social impact assessment that requires a description of the effects of the scheme on the population base and its consequence on infrastructure and the quality-of-life in the study area.³⁶⁴

project added. The Application Case provides information that is valuable to regulators in determining how project operations would need to be controlled to meet provincial environmental management requirements. In areas where local or regional environmental limits have been set (e.g., air emissions or water use) the Application Case shows if the project can operate within the limits. The Planned Development Case describes the environmental conditions that would exist as a result of the interaction of the proposed project, other existing projects and other planned projects that can be reasonably expected to occur (any project or activity that has been publicly disclosed up to six months prior to the submission of the Proponent’s Application and EIA report.) See Government of Alberta, Alberta Environment and Sustainable Resource Development, *Guide to Preparing Environmental Impact Assessment Reports in Alberta* (Edmonton: Environmental Assessment Program, 2013), EA Guide 2008-1 online: *ibid.* <<http://environment.gov.ab.ca/info/library/8127.pdf> > at 2 [hereinafter *Guide to Preparing EIA Reports*]. See also Information Letter: *Cumulative Effects Assessment in Environmental Impact Assessment Reports under the Alberta Environmental Protection and Enhancement Act* online: <http://environment.alberta.ca/documents/CEA-in-EIA-Reports-Required-under-EPEA.pdf>

³⁶¹ *Guide to Preparing EIA Reports*, *ibid.* at 15. EPEA, *supra* note 309, s. 49 lists the content of an EIA report unless the Director provides otherwise.

³⁶² The Review Team, Coordination Group, and Specialist Review Team. See *ibid.*, at 4.

³⁶³ *The Guide*, *supra* note 38 at 73-74.

³⁶⁴ Directive 023, *supra* note 43 at 38.

Oil sands activities, such as processing plants, require environmental approval under the *Activities Designation Regulation* of the EPEA³⁶⁵ and water approval or license under the *Water Act* and its Regulations.³⁶⁶ ESRD at this time has primary responsibility but other agencies, mainly the former ERCB for environmental approvals, provide specific technical advice.³⁶⁷ The AER will assume these functions for energy projects under the REDA regime. Applicants must provide notice of applications to interested persons who then may file Statements of Concern to the Director.³⁶⁸ The Director can waive notice requirements when the activity is considered routine within the meaning of the regulations.³⁶⁹ The Director's decision may be appealed to the Environmental Appeals Board.³⁷⁰ The Guide notes that where more than one approval is required under EPEA, the *Water Act*, or other legislation administered by other provincial government agencies, the ESRD may utilize a streamlined "single window" approach in reviewing the application for approval. Joint notices are sometime issued.³⁷¹ The single window approach is limited to provincial regulatory agencies. There is no indication that municipal authorities are consulted in review of environmental and water approval processes, especially for projects exempted from municipal development approvals. There is no indication that social impact factors are considered at all for these approvals.

³⁶⁵ Alta. Reg. 276/2003, Schedule 1. The authorization process follows requirements of the *Approvals and Registrations Procedure Regulation* (Alta. Reg. 113/93); *Applications for Sour Gas Processing Plants and Heavy Oil Processing Plants - A Guide to Content*; and *A Guide to Content for Industrial Approval Applications*.

³⁶⁶ R.S.A. 2000, c. W-3, *supra* note 310; *Water Ministerial Regulation* Alta. Reg. 205/1998. See also *Administrative Guide for Approvals to Protect Surface Water Bodies under the Water Act*.

³⁶⁷ On issues relating to technologies, standards, aquatic environments, fisheries, vegetation and wildlife. See *The Guide*, *supra* note 38 at 67.

³⁶⁸ EPEA, *supra* note 309 s. 73.

³⁶⁹ EPEA, *ibid.*, s. 72(3) and (4).

³⁷⁰ EPEA, *ibid.* at Part 4, s. 91.

³⁷¹ *The Guide*, *supra* note 38 at 68. See also EUB Informational Letter, IL 96-7: *EUB/AEP Memorandum of Understanding on the Regulation of Oil Sands Developments (MOU)* (18 April 1996) for ERCB-Alberta Environment coordination of their oil sands regulatory processes.

Permission to use land for a proposed activity is required regardless of whether activity is planned on public or private lands.³⁷² Proponents are required to have a Pipeline Agreement application number or a Mineral Surface Lease (“MSL”) from ESRD before applying to ERCB for development licenses and approvals on public lands.³⁷³ Surface dispositions for oil sand projects on public lands are mostly in form of MSL pursuant to the *Public Lands Act* and Regulations³⁷⁴ and are subject to a provincial review through the EIA process coordinated by ESRD and the ERCB.³⁷⁵ Access to occupied public land requires consent from occupants which must be attached to the application to ESRD.³⁷⁶ The surface disposition function for energy projects will also be assumed by the AER under the REDA regime. Operators are also required to identify other land users and landscape values of the project area, describe how these impacts will be minimized (e.g., use of common corridors), identify any reservations or notations on the land, and ensure proposed development is consistent with current government policies and guidelines (e.g., Integrated Resource Plan; Forest Land Use Zone).

Other approvals may be needed from Category B provincial bodies, depending on the public land uses, such as wild land, water management, provincial parks and recreation areas, Special Areas, highways, and historic or cultural sites.³⁷⁷ Although consent must be obtained from occupants, the Surface Rights Board (“SRB”) resolves disputes among users and administers Right of Entry

³⁷² As 97 percent of oil sands are on public lands this section focuses on public lands.

³⁷³ *The Guide*, *supra* note 38 at 16.

³⁷⁴ R.S.A. 2000, c. P-40, *supra* note 307, and *Public Lands Administration Regulation*, Alta. Reg. 187/2011. There are other types of surface dispositions such as License of Occupation (“LOC”) issued primarily for access roads, Pipeline Agreement (“PLA”) which authorizes construction of a pipeline or flowline within the right-of-way right-of-way installations incidental to the pipeline, Pipeline Installation Lease (PIL) which authorizes off the right-of-way incidentals to pipeline operation (e.g., pumping station, compressor site, metering facility).

³⁷⁵ Online: Environment and Sustainable Resource Development Homepage,

<<http://www.srd.alberta.ca/LandsForests/IndustrialActivity/IndustrialDevelopmentReclamation/IndustrialProjects.aspx>> The Enhanced Approval Process (“EAP”) was inapplicable to oil sands projects.

³⁷⁶ *Public Lands Operational Handbook* (December 2004), *supra* note 316 at 7. Occupants are land users such as forest management agreement holders or grazing lease holders. See *The Guide*, *supra* note 38 at 16.

³⁷⁷ *The Guide*, *ibid.*

Orders, pursuant to the *Surface Rights Act* and Regulations,³⁷⁸ to allow entry onto land where agreement cannot be reached among users. The Minister of ESRD can designate public land within a municipality for the purpose of exempting them from Part 17 of the MGA.³⁷⁹ While the Crown is not bound by the MGA if it initiates a subdivision or development on public land, disposition holders under the *Public Lands Act* may be subject to municipal planning and development requirements depending on the use.³⁸⁰

There appears to be some form of coordinative mechanisms between ESRD and municipalities for surface rights disposition. ESRD states that as many of its activities can affect local land use patterns and municipal services, it consults with municipalities on most disposition applications before making a decision in order to reduce “duplication and administration.”³⁸¹ First, it appears that such consultation occurs only for projects not expressly exempted from municipal planning and development regime under Part 17 of the MGA. Second, the Planning Department of the RMWB concurs that SRD provides them with a copy of an application for surface dispositions prior to SRD decisions. However, the result of the Planning Department’s detailed review and attached information never gets to the applicant. The applicant simply gets the SRD approval or

³⁷⁸ R.S.A. 2000, c. S-24; *Surface Rights Act General Regulation*, Alta. Reg. 195/2007.

³⁷⁹ See MGA, *supra* note 1, s. 618(2)(b) and (3). An example of this occurred in a portion of the Municipal District of Clearwater. See Alberta, *Co-ordinating Land Use Planning on Public Lands with Municipalities* (October 1997) at 2, online: ESRD Homepage

<<http://www.srd.alberta.ca/FormsOnlineServices/documents/CoordinatingLandUsePlanningonPublicLandsWithMunicipalitiesOCT1997.pdf>> [hereinafter *Co-ordinating Land Use Planning*]

³⁸⁰ *Ibid.* at 2. See also Alberta, *Land-Use Framework* (December 2008) at 12, online: Land-Use Secretariat Homepage <https://www.landuse.alberta.ca/Documents/LUF_Land-use_Framework_Report-2008-12.pdf>. Private companies operating oil sands mines, although they are lessees of Crown lands, are subject to the development permit process of the Regional Municipality of Wood Buffalo pursuant to Part 17 of the MGA. Interview with Semra Kalkan, Planner and Development Officer, Regional Municipality of Wood Buffalo (21 November 2008). The lessee of provincial Crown land is *prima facie* subject to Part 17 in the same way as the owner or lessee of private lands. Crown immunity can only attach to a lessee where the Crown has claimed immunity either in the lease contract or in some other express manner (such as in Section 618 (2)(b), (3) and (4) of the MGA), or where the Crown is a joint user. See Laux, *supra* note 48 at 4-17.

³⁸¹ *Co-ordinating Land Use Planning*, *ibid.*, at 2.

refusal without the results of the municipal review. The Planning Department did not see any value in continuing with detailed review at this stage, deferring such review to the development permit application stage.³⁸² Further, given that SRB can grant a mandatory Right of Entry Order to an operator who has the right to a mineral or the right to work a mineral, and which Order must be consistent with the AER approval, it is unlikely that ESRD's consultation with municipalities in such situations will have any effect.³⁸³

From the foregoing, a preliminary conclusion can be made that there is no substantial mechanism through which all views on the socio-economic challenges of oil and gas activities are fully input, substantially addressed and resolved early in the regulatory process.³⁸⁴ Responding to the question of where municipal authorities fit in the regulatory framework, the Manager of Planning & Development Department of the RMWB stated that municipalities are at the lower level and are engaged in the approval process after the fact. Their only option is to intervene in ERCB hearing, the only regulatory forum where they may be allowed to express their views.³⁸⁵ Chapter 5 below discusses the regulatory Board's mandate in respect of socio-economic assessment of an energy project.

Centralized provincial governance of oil and gas development, especially oil sands, through the regulatory framework is substantial. Alberta's oil and gas regulatory framework is centripetal and can be properly described as unitary. The Canadian federal values are lacking among the

³⁸² Interview with Dennis Peck, *supra* note 91.

³⁸³ *Surface Rights Act*, *supra* note 378, ss. 12 and 15. Since the ESRD, Environmental Appeal Board and SRB are not section 619 bodies, the standing of municipalities before these bodies are not discussed. For a review of municipal standing and recovery of cost at the ERCB public hearings see *supra* note 344.

³⁸⁴ ERCB oil sands hearings and the scope of the issues addressed are discussed in chapter 5.

³⁸⁵ Interview with Dennis Peck, *supra* note 91.

orders of government in Alberta. Given the level of interdependence in the oil and gas development regulatory process, the lack of cooperation and “planning together” results in crisis and a fire brigade approach to solve an institutional problem. Has the ALSA done anything to connect the missing links and fill gaps in governance?

4.6 Effect of Alberta Land Stewardship Act on Oil and Gas Development Regulatory Process and Municipal Jurisdiction

Responding in part to the challenges created by Alberta’s prosperity³⁸⁶ and academic or public criticisms about lack of plans and patchwork regulation of oil and gas activities, the Government of Alberta reverted to regional land-use planning which it discarded in the 1995 MGA amendment and consolidation of the former *Planning Act*.³⁸⁷ The legal authority to make Regional Plans was established in October, 2009 with the proclamation of the ALSA.³⁸⁸ The ALSA amended twenty-seven other statutes that touch upon land use and natural resources. Among other objectives,³⁸⁹ the ALSA seeks to provide the coordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment. However, the only requirement in the Act with respect to coordination is that all local government bodies and decision-makers must comply with any applicable Regional Plan.³⁹⁰

³⁸⁶ Land-Use Framework, *supra* note 380 at 2.

³⁸⁷ See *supra* note 55 and accompanying text.

³⁸⁸ ALSA, *supra* note 2, contains 5 parts as follows: Part 1: Regional Plans - Making, Amending and Reviewing and Contents of Regional Plans; Part 2: Nature and Effect of Regional Plans and Compliance Declarations; Part 3: Conservation and Stewardship Tools; Part 4: Regional Planning Process and Administration; and Part 5: Transitional Provisions.

³⁸⁹ To provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives; 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 generations of Albertans, including aboriginal peoples; and to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavor and other events. ALSA, *ibid.*, s. 1(2).

³⁹⁰ ALSA, *ibid.*, ss. 20, 21 and 22.

A Regional Plan is a legislative instrument considered to be a regulation and public policy for the region.³⁹¹ To the extent each Regional Plan provides, Regional Plans bind the Crown, local government bodies, decision-makers and, subject to the right of variance, all other persons.³⁹² A Regional Plan may manage the surface or subsurface of land, any natural resource, or any activity.³⁹³ A Regional Plan may by express reference affect, amend or rescind a statutory consent or the terms or conditions of the statutory consent. Provincial and municipal development approvals are statutory consents.³⁹⁴ The Lieutenant Governor in Council is given ultimate authority over integrated planning regions, broad regulatory-making powers respecting Regional Plans, and as an expression of the public policy of the Government, exclusive and final jurisdiction over the contents of Regional Plans.³⁹⁵

Consultation required before a Regional Plan is made or amended is public consultation. The Stewardship Minister is required to present a report of the findings of such public consultation to the Executive Council, and “lay” the proposed Regional Plan or amendment before the

³⁹¹ ALSA, *ibid.*, ss. 13. Alberta’s *Regulations Act* does not apply to a Regional Plan: ALSA, *ibid.*, s. 14(1). The Provincial Land Use Policies approved by the Lieutenant Governor in Council on November 6, 1996 (O/C 522/96) do not apply in any ALSA planning region, where an ALSA Regional Plan is in force: MGA, *supra* note 1, s. 622(4).

³⁹² ALSA, *ibid.*, s.15. Decision-makers are defined as persons who, under an enactment or regulatory instrument, have authority to grant a statutory consent, and include decision-making bodies. ALSA, *ibid.*, s. 2(1) (e); *Edmonton (City) v. Parkland (County)*, [2010] A.W.L.D. 3714 at para. 17 (Alta. Mun. Gov. Bd. Jun 15, 2010); *Sylvan Lake (Town), Re*, [2011] A.W.L.D. 2199 at para. 8 (Alta. Mun. Gov. Bd. Mar 07, 2011).

³⁹³ ALSA, *ibid.*, ss. 9(2)(g) and 8(2)(h) and (i). Activities are defined as anything that requires a statutory consent and anything that, under an enactment, must comply with a rule, code of practice, guideline, directive or instrument. ALSA, *ibid.*, s. 2(1) (a).

³⁹⁴ ALSA, *ibid.*, s. 11. “Statutory consent” means, except those listed in s. 2(2), a permit, licence, registration, approval, authorization, disposition, certificate, allocation, agreement or instrument issued under or authorized by an enactment or regulatory instrument. See ALSA, *ibid.*, s. 2(1)(aa). A Regional Plan may not affect, amend or rescind a development permit or an approval in respect of a development, or for which no development permit is required under a land use bylaw under Part 17 of the MGA, where the development has progressed to the installation of improvements on the relevant land at the time the Regional Plan comes into force: ALSA, *ibid.*, s. 11(3). This appears to preserve the principle of non-conforming use. See MGA, *supra* note 1, s. 643.

³⁹⁵ ALSA, *ibid.*, ss. 3-4 and 13.

Legislative Assembly before it is made or amended.³⁹⁶ Intergovernmental consultation with municipalities is neither required nor considered. Any views of the municipalities in respect of Regional Plans are communicated through the mass public consultation as discussed below in chapter 5.

The ALSA also contains a strong privative clause severely limiting the ability for recourse to any court in respect of claims,³⁹⁷ except for compensatory rights. Neither the ALSA, its regulations nor Regional Plans limits, reduces or restricts the compensation payable, or rights to compensation provided for, under any other enactment or in law or equity.³⁹⁸ A limited right of variance is available to title holders affected by a Regional Plan. A title holder may apply to the Stewardship Minister for a variance in respect of any restriction, limitation or requirement regarding a land area or subsisting land use, or both, under a Regional Plan as it affects the title holder.³⁹⁹ There is also a right to request a review of a Regional Plan by a person directly and adversely affected by the Regional Plan or its amendment, by application to the Stewardship Minister within 12 months of coming into force of the plan.⁴⁰⁰

³⁹⁶ ALSA, *ibid.*, s. 5.

³⁹⁷ Except for an application by the stewardship commissioner to the Court of Queen's Bench under section 18. See ALSA, *ibid.*, s. 15(3)-(5). A claim includes any right, application, proceeding or request to a court for relief of any nature whatsoever and includes, without limitation, any cause of action in law or equity, any proceeding in the nature of certiorari, prohibition or mandamus, and any application for a stay, injunctive relief or declaratory relief.

³⁹⁸ See ALSA, *ibid.*, ss. 2(3), 19 and 19.1. ALSA was amended in May, 2011 to clarify that government respect the property and other rights of individuals. ALSA does not limit any existing rights to compensation and respects all existing appeal provisions in Alberta legislation. It clarified that land titles and freehold mineral titles are not included in the definition of statutory consents. Alberta Government news releases and information bulletins capture steps in the development of ALSA from its inception as Bill 36 in April 2009, through proclamation in October 2009 to approval of Bill 10 amendments in May 2011. *Facts about ALSA* helps clarify the amendments. See online: Land-Use Secretariat Homepage <<https://www.landuse.alberta.ca/Governance/ALSA/Pages/default.aspx>>

³⁹⁹ ALSA, *ibid.*, s. 15.1.

⁴⁰⁰ ALSA, *ibid.*, s. 19.2. Apart from individual review requests, Regional Plans are also subject to general reviews and public reporting at least once every five years by an audit committee that provides a public report to the Stewardship Minister. At least once every 10 years, a comprehensive review of the Regional Plan and a report on its effectiveness will be initiated by the Land-Use Secretariat and submitted to the Stewardship Minister and may result in the plan being amended, replaced, renewed or repealed. See ALSA, *ibid.*, ss. 6 and 58.

The relationship between a municipality and an ALSA Regional Plan is established in both the ALSA and MGA. While municipal governments maintain their responsibility for local land-use planning and development on all lands within their boundaries, every decision referred to or made or every instrument issued under section 619 of the MGA, must comply with the applicable ALSA Regional Plan. Further, all municipal authorities and appeal boards must perform their functions in accordance with the applicable ALSA Regional Plan.⁴⁰¹ As discussed in this section, the three ways in which a municipality is obligated to ensure it is acting in accordance with the applicable Regional Plan are: (a) municipal planning decisions must conform to Regional Plans; (b) municipal council must review its plans and bylaws, and make amendments as necessary to comply with the Regional Plans; and (c) municipal council must submit the statutory declaration affirming that it is in compliance with the ALSA Regional Plan.⁴⁰²

In the event of a conflict or inconsistency between a municipal statutory plan or land use bylaw and a Regional Plan, the Regional Plan prevails to the extent of the conflict or inconsistency.⁴⁰³ In the event of a conflict or inconsistency between a Regional Plan and a regulation under any Act, the Regional Plan prevails. If there is a conflict between an Act and a Regional Plan, the Act prevails. Ultimately, the ALSA prevails over any other enactment including the MGA.⁴⁰⁴ Based on the above-mentioned limitations on access to court, it is unlikely that municipalities can challenge or compel any provision of, or decisions made pursuant to, a Regional Plan in a court of law. Unless land specifically owned or in which a municipality holds an interest is involved,

⁴⁰¹ MGA, *supra* note 1, ss. 619(12) and 630.2; *ENMAX Shepard Inc., Re*, 2010 CarswellAlta 2225, online: WL.

⁴⁰² See online: Land-Use Secretariat Homepage

<<https://www.landuse.alberta.ca/Governance/MunicipalLocalPlanning/Pages/default.aspx>>

⁴⁰³ MGA, *supra* note 1, s. 638.1.

⁴⁰⁴ ALSA, *ibid.*, s. 17.

or Crown land in the possession of a municipality is particularly affected, a municipality is not a titleholder and has no right of variance.⁴⁰⁵

It is not clear if municipalities would be eligible to request review of Regional Plans to the Stewardship Minister.⁴⁰⁶ According to the former stewardship commissioner, Regional Plans are protected from court review by the separation of process from decision-making in order to prevent successful process challenges. Thus, by making Regional Plans legislative instruments and including a privative clause to stop contents of plans being grounds for legal action, there is no room for the courts to second-guess Regional Plans.⁴⁰⁷ The provincial government defends its broad discretionary powers in respect of Regional Plans as a strong desire to keep the regime within the control of “Albertans.”⁴⁰⁸ Describing the ALSA, the province stated that it is a “model for *central planning*.”⁴⁰⁹ The Alberta Court of Queen’s Bench has held that the ALSA “establishes a legal framework for increased Provincial oversight of land use planning and development.”⁴¹⁰ Academic opinion has also observed that the ALSA contains Henry VIII type

⁴⁰⁵ ALSA, *ibid.*, s. 2(1) (gg) defines title holder.

⁴⁰⁶ By *Alberta Land Stewardship Regulation* (“ALSR”) Alta. Reg. 179/2011, s. 5(1)(c), “directly and adversely affected” means that there is a reasonable probability that the person’s health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the Regional Plan or its amendment. Neither ALSA nor the regulation defines “person” but the form of application in the regulation contemplates an applicant to include a corporation, society or other body corporate. ALSR, *ibid.*, s. 7(1)(a). By virtue of its incorporation or its natural person powers a municipality would likely qualify as a “person” entitled to apply for a review of a Regional Plan subject to proof of direct and adverse effect.

⁴⁰⁷ M. Seiferling, “The Alberta Land-Use Framework and The Alberta Land Stewardship Act” (*The Alberta Land Stewardship Act: A Practical & Critical Colloquium*, Faculty of Law University of Calgary, 20 May 2010) [unpublished] at 7.

⁴⁰⁸ Alberta, Legislative Assembly, *Hansard Debates*, Issue 47a (2 June 2009) at 1503 (Ted Morton) cited in A. Harvie & T. Mercier, “The Alberta Land Stewardship Act and its impact on Alberta’s oil and gas industry” (2010) 48 Alta. L. Rev. 295-330 at 304.

⁴⁰⁹ Alberta, *Alberta Land Stewardship Act Fact Fiction Brochure* (September 2011) at 2.

⁴¹⁰ *Keller v. Bighorn (Municipal District) No. 8*, 2010 ABQB 362 at para. 48.

provisions that enable the Executive or others to override the otherwise applicability of the MGA, and limit municipal powers.⁴¹¹

An example of the Henry VIII type provisions is that mandating every local government body affected by a Regional Plan or its amendment to review its regulatory instruments and, within the time set in the Regional Plan, make any necessary changes or implement new initiatives to “*comply*” with the Regional Plan. This is regardless of the cost and difficulties in the practical implementation of this mandate. The local government body must also file a statutory declaration of compliance with the Land-Use Secretariat.⁴¹² The Minister is empowered to take any necessary measures to ensure that a municipal authority “*complies*” with the Regional Plan including: (i) suspending the authority of a Council to make bylaws (with or without conditions) and exercising bylaw-making authority in respect of any matter specified in the order; (ii) withholding money otherwise payable by the Government to the municipal authority; (iii) repealing, amending and making policies and procedures with respect to the municipal authority; (iv) suspending the authority of a development authority or subdivision authority and providing for a person to act in its place; and (v) requiring or prohibiting any other action as necessary to ensure a Regional Plan is complied with.⁴¹³

⁴¹¹ A. Kwasniak, “ALSA-Related Exceptional Delegation Powers and ALSA Impacts on Municipalities” (*The Alberta Land Stewardship Act: A Practical & Critical Colloquium*), *supra* note 402 at 5 [hereinafter Exceptional Delegation Powers].

⁴¹² ALSA, *supra* note 2, ss. 20 and 22. See also Alberta Municipal Affairs, *The Legislative Framework for Regional and Municipal Planning, Subdivision and Development Control* (Edmonton: February 1997 Updated August 2012) [hereinafter *The Legislative Framework for Regional and Municipal Planning*].

⁴¹³ MGA, *supra* note 1, s. 570.01.

An author has queried what “compliance” with Regional Plan means, and has compared compliance with “conflict and inconsistency” in paramountcy clauses.⁴¹⁴ It is unlikely that “compliance” will require the tests applied to resolve “conflict and inconsistency.” It is more likely that “compliance” means something more compelling.⁴¹⁵ Support for this interpretation is found in comparing section 9(3) of the ALSA and section 570.01 of the MGA (penalties for non-compliance) on the one hand, and section 17 of the ALSA and section 638.1 the MGA (paramountcy of one enactment over another) on the other hand. The penalties for non-compliance with Regional Plans are draconian including conviction requiring payment of fine. On the other hand, paramountcy of Regional Plans over bylaws and other municipal policies merely suspends the operation of the bylaw or policy in relation to the particular matter.

There is no doubt that the ALSA has laudable objectives, as comprehensive plans would help direct orderly oil and gas development. However it does not appear that the ALSA has achieved the goal of “coordination of decisions...concerning land, species, human settlement, natural resources and the environment.” Coordination of regulatory decisions involves much more than compelling “compliance” with Regional Plans. Instead of the much needed matrix-like consultation, negotiation, communication, sharing of information and planning together, what the ALSA has done is to add another layer of authority without mandating any form of cooperation in the development regulatory framework. The new layer of authority is in the form of the

⁴¹⁴ See Exceptional Delegation Powers, *supra* note 411 at 28-29. Paramountcy clauses are contained in ALSA, *supra* note 2, s. 17 and MGA, *ibid.*, s. 638.1.

⁴¹⁵ “Comply” has been held to mean “to fulfill, to accord with and to conform to” in *Bourk v. Temple* (1990), 105 A.R. 61, 73 Alta. L.R. (2d) 302 (Alta. Q.B.) at para. 29. Compliance is defined ... as an “action in accordance with request, command”: *Northern Telecom Ltd. v. U.A.W., Local 1839* (1980), 25 L.A.C. (2d) 379 (Ont. Arb. Bd.) at para. 16, online: WL.

Lieutenant Governor in Council and the stewardship commissioner appointed under section 57(2) of the ALSA to head the Land-Use Secretariat.

The ALSA grants any person the right to submit a written complaint to the Land-Use Secretariat if the person believes a Regional Plan is not being complied with.⁴¹⁶ The stewardship commissioner has powers to apply to the Court of Queen's Bench for an order to enforce compliance with the ALSA, its regulation or a Regional Plan.⁴¹⁷ Upon such application, the Court may make any interim or final order it thinks fit, including declaring that any regulatory instrument of a local government body does or does not comply with a Regional Plan, ordering compliance, and amending or repealing a regulatory instrument of a local government body that does not comply with a Regional Plan. In *Keller v. Bighorn (Municipal District) No. 8*, the Alberta Court of Queen's Bench held that by excluding references to individuals or persons other than the Stewardship Commissioner, the Legislature intended to exclude any other person from bringing an application for judicial review on the basis of non-compliance with the ALSA. The Court stated that this interpretation is consistent with section 15(3) of the ALSA, which expressly limits the ability to bring any action concerning compliance with a Regional Plan to the Stewardship Commissioner, as well as section 62 which provides the mechanism by which individuals may make a written complaint to the Stewardship Commissioner. According to the Court:

[i]n short, ALSA taken as a whole implements a scheme whereby the Province assumes a greater role in local planning and the power to determine whether there has been compliance with the Act and with Provincial dictates as expressed in Regional Plans. Individual recourse is limited to the complaint provision at s.62.⁴¹⁸

⁴¹⁶ ALSA, *supra* note 2, s. 62.

⁴¹⁷ ALSA, *ibid.*, s. 18.

⁴¹⁸ *Keller v. Bighorn*, *supra* note 410 at paras. 52 and 62.

In sum, the provincial government has added iron-clad control mechanisms over the oil and gas and oil sands approval process. The ALSA has not provided the needed intergovernmental cooperation and coordination of the municipal and provincial regulatory processes for oil and gas development. The content of Regional Plans is discussed in chapter 5 below to determine to what extent they consider local socio-economic circumstances in planning oil and gas development in a region and the implications in deciding development approvals.

4.7 Preliminary Conclusion

The importance of oil and gas, especially oil sands, development to Alberta's economy is clear. Encouraging investment in oil and gas development is a priority for the province to achieve its goal of global energy leadership. Alberta fought hard to obtain and retain control over its natural resources from the federal government and therefore continues to be protective of its control over their development. This historical context seems to have a strong influence on the model of governance employed in Alberta's energy development regulatory framework. Centripetal or unitary, reactive and *ad hoc* arguably describe Alberta's governance approach to oil and gas development. This is buttressed by the similarities between the province's reactive responses currently and its reactive responses to the same problems in the 1940s when massive exploration efforts across the province brought about migration and settlement of droves of workers. While municipalities have been given jurisdiction over planning for, and regulation of, development of land in Alberta, the MGA as amended in 1995 significantly carve major aspects of oil and gas development out of municipal planning and development jurisdiction. Although there remains concurrent provincial-municipal jurisdiction in a few oil and gas development matters, municipal powers and discretion in these few areas are highly restricted with the result that socio-economic challenges of oil and gas development cannot be resolved at the municipal approval stage.

A look at the current oil and gas development regulatory framework reveals that there is no substantial mechanism, stage or forum for resolving potential or real socio-economic challenges of oil and gas development. Socio-economic challenges appear to fall through the cracks in the framework and go unnoticed until they accumulate to the point of system breakdown. The development regulatory framework needs remodeling. The Canadian federal values are lacking among the orders of government in Alberta and among the current regulatory bodies. The federal model of non-centralization is a useful alternative that can be employed in the framework to catch and resolve these problems before they arise. For emphasis, the federal principle of non-centralization does not canvass municipal control of oil and gas development within each municipal boundary; rather it advocates proactive intergovernmental cooperative mechanisms to anticipate and resolve problems in advance of the system's breaking point. The LUF identifies the challenges but the resulting ALSA, by kicking the unitary model up a notch, does not provide any solution.

Chapter Five

Case Study - Regional Municipality of Wood Buffalo and Oil Sands Development

This chapter studies the experience of the Regional Municipality of Wood Buffalo (“RMWB”), a few years after Alberta’s oil sands took the center stage in the world’s energy reserve outlook, and the provincial government’s response and approaches to resolution. The purpose is two-fold. The first is to depict the nature and magnitude of socio-economic challenges of large scale energy development and its impact on the RMWB. The second is to show that leaving socio-economic factors unresolved prior to or at project approvals causes those issues to get to an overwhelming magnitude that can cripple governance and affect capital investments. The lessons learnt from this case study set the stage for potential solutions with the federal principle of non-centralization recommended in chapter 6 below.

There is consensus that energy development projects also bring immense positive social and economic benefits to the host communities, however, those benefits are not discussed. The focus is on the challenges and how to proactively resolve them for the greater benefit of all concerned. The chapter begins with brief history of oil sands development in the region and the challenges occasioned by incremental unresolved impacts of development. It then discusses the struggles and efforts of the RMWB to address these challenges, including interventions at the Alberta Energy and Utilities Board (“EUB”) hearings. The chapter reviews provincial government initiatives to address the challenges since the EUB interventions. It then analyzes the effect of the provincial and municipal government efforts and concludes with the lessons learnt from the case study.

5.1 Brief History of the Regional Municipality of Wood Buffalo and Oil Sands Development

The RMWB is home to one of the world's largest oil deposits, the Athabasca oil sands, and has become the heart of Canada's energy industry and the economic epicenter of Alberta as a result of the tremendous growth of the oil sands industry in the last one and half decades.¹ Economic activity within the municipality impacts global energy production and prices, and forecasts indicate an increase in such economic activity for the foreseeable future.² The RMWB is one of Canada's largest municipalities, covering a total of 68,454 square kilometers, and the first specialized municipality³ in Alberta. It was formed by the amalgamation of Improvement District No. 143 and the City of Fort McMurray in 1995 to provide for the unique needs of a large urban centre and a large rural territory with a small population.⁴ Fort McMurray was designated "urban service area" and the rest of the municipality "rural service area."⁵

Prior to the creation of the RMWB, large-scale commercial oil sands development was occurring in the region. As far back as 1967 the Great Canadian Oil Sands, now part of Suncor Energy Ltd., initiated the world's first large-scale oil sands operation, the Athabasca oil sands mining project. In 1978 Syncrude Canada Ltd., a consortium of oil companies and the federal and

¹ Regional Municipality of Wood Buffalo, Media Release, "Municipality and industry make business case for special infrastructure funding in Fort McMurray" (29 March 2005).

² Regional Municipality of Wood Buffalo, *Economic Profile* (2011) at 6 [hereinafter *Economic Profile*].

³ Pursuant to *Municipal Government Act* ("MGA") R.S.A. 2000, c. M-26, ss. 110, 83, 89 (3) and (4). To date, four specialized municipalities have been created in Alberta. Others are Strathcona County, Municipal District of McKenzie No. 23, and the Municipality of Jasper. See K. Wakefield, *Alberta Municipal Law & Commentary* (Canada: LexisNexis, 2006) at 54.

⁴ O.C. 817/94 (*Municipal Government Act*), December 21, 1994; Regional Municipality of Wood Buffalo, *Wood Buffalo Where We Are Today - Envision Wood Buffalo: Towards 250K Regional Report* (Fort McMurray: Regional Municipality, 2008) at 1 [hereinafter *Envision Wood Buffalo*].

⁵ The communities are Anzac, Conklin, Draper, Fort Chipewyan, Fort Fitzgerald, Fort MacKay, Fort McMurray, Gregoire Lake Estates, Janvier, and Saprae Creek Estates.

provincial governments, commenced oil sands mining and upgrading project at Fort McMurray.⁶ For decades, few companies developed oil sands in the Fort McMurray area, as most of Alberta's oil production was focused on conventional crude oil. However, a number of events contributed to the revolution of the oil sands industry. The first was the declining conventional reserves⁷ and high oil prices that shifted the focus towards the oil sands, much of which are located within the RMWB. The second was the invention of SAGD technology in the late 1970s that paved the way for the scores of *in situ* projects.⁸ Finally, between 1995 and 1997, the Alberta government established the "generic" royalty regime, and the federal government launched a capital cost allowance tax arrangement that provided more certainty to oil sands investors and encouraged investment in new projects.⁹ Since 2000, the surge in oil prices made development of the oil sands much more economically feasible and has attracted significant investment in the industry.

Today about 37 companies, each with more than one project, operate in the oil sands industry in the RMWB.¹⁰ This shift in focus and growth in investment has created the need for an enormous

⁶ For earlier and complete history of oil sands development, see *Energy's History in Alberta*, online: Alberta Energy Homepage <http://www.energy.alberta.ca/About_Us/1133.asp> [hereinafter *Energy's History in Alberta*].

⁷ See Energy Resources Conservation Board, *Business Plan 2010-2013* at 7, online: ERCB Homepage <http://www.ercb.ca/projects/URF/URF_ERCBRole.pdf> See also *Re Total E&P Joslyn Ltd., Application for the Joslyn North Mine Project* (27 January 2011), Decision 2011-005 at 17(E.R.C.B.) [hereinafter ERCB Decision 2011-005] establishing the need for its Joslyn North Mine Project.

⁸ Dr. Roger M. Butler developed the concept of using horizontal pairs of wells and injected steam to develop certain deposits of bitumen considered too deep for mining. See *Energy's History in Alberta*, *supra* note 6.

⁹ See Alberta, *The Oil Sands: A New Energy Vision for Canada*, A Report prepared by the National Task Force on Oil Sands Strategies of the Alberta Chamber of Resources. The generic oil sands royalty regime and the *Oil Sands Royalty Regulation*, 1997 (Alta. Reg. 185/1997) came into effect on July 1, 1997 establishing generic royalty terms for all new oil sands projects. See *Energy's History in Alberta* *ibid.*; Center for Energy, *Oil Sands Timeline* <<http://www.centreforenergy.com/AboutEnergy/ONG/OilsandsHeavyOil/History.asp>> [hereinafter *Oil Sands Timeline*]; and Regional Municipality of Wood Buffalo et al., *Wood Buffalo Business Case 2005: A Business Case for Government Investment in the Wood Buffalo Region's Infrastructure*, (Alta.: Athabasca Regional Issues Working Group, 2005) at 40 [hereinafter *Wood Buffalo Business Case 2005*]. *Wood Buffalo Business Case 2005* was prepared by the Athabasca Regional Issues Working Group (RIWG) in conjunction with Regional Municipality of Wood Buffalo, Fort McMurray Public Schools, Fort McMurray Catholic Board of Education, Northland School Division, Keyano College, and Northern Lights Health Region.

¹⁰ For a list of current oil sands projects see *Alberta Oil sands Industry Quarterly Update* (Summer 2012).

workforce and a corresponding population in the RMWB.¹¹ As the host municipality to the oil sands industry expansion, the population of the RMWB exploded from 35,213 in 1996 to 104,338 in 2010 and 116,407 in 2012.¹² Overall, population growth in the RMWB from 2000 to 2012 was about 124.5 percent at an average annual growth rate of 7.0 percent.¹³ With persistent high oil prices, rapid growth is expected to continue, given the need for temporary construction of new sites and permanent operation and maintenance of existing projects.¹⁴ The lifespan of an oil sands project is anticipated at 80 to 100 years using current technology, with a longer life as new technologies emerge enabling higher recoveries.¹⁵

5.2 Socio-economic Challenges of Oil Sands Development and Expansion Projects

The connection between oil sands development and the growth, infrastructure and services pressures in the RMWB is clear. As mentioned above, a high level of industry activities and expenditure in the Athabasca oil sands drives new jobs and population growth. This in turn puts increased demands on public infrastructure and services at the front end of the projects and ongoing demands at the operational stage.¹⁶ In fact, one of the risks in oil sands development identified by industry was lack of regional infrastructure and skilled trade, and workforce

¹¹ *Envision Wood Buffalo*, *supra* note 4 at 1.

¹² Growth and Demographics, online: Regional Municipality of Wood Buffalo Homepage <http://www.woodbuffalo.ab.ca/living_2227/FAQ/Demographics.htm> [hereinafter Growth and Demographics]; *Executive Summary, Municipal Census 2012*, January 2013 at 1, online: Regional Municipality of Wood Buffalo Homepage < <http://www.woodbuffalo.ab.ca/Assets/Census+Executive+Summary.pdf>> [hereinafter *Municipal Census 2012*]. The connection between population growth and oil sands activity is clearly seen in that growth stagnated in the decade from 1985 to 1995, before the next major investments in the oil sands occurred. See *Wood Buffalo Business Case 2005*, *supra* note 9 at 20.

¹³ *Municipal Census 2012*, *ibid*.

¹⁴ *Envision Wood Buffalo*, *supra* note 4 at 3.

¹⁵ *Wood Buffalo Business Case 2005*, *supra* note 9 at 12.

¹⁶ *Ibid.* at 10.

challenges.¹⁷ There became an urgent need for critical public infrastructure and services to support current and expected development in the region.¹⁸

The growth pressure resulted in municipal infrastructure and public services being designed too small and built too late to meet the needs of population that continually exceeded past projections. By 2005, all existing service and infrastructure capacity in the RMWB were used, either at or over capacity, to achieve 1 million barrel per day production levels.¹⁹ The RMWB was unable to sustain adequate levels of services to residents, let alone accommodate the predicted population growth.²⁰ There was the risk that the next one million barrels a day of increased production from the oil sands would be seriously delayed, and so was the RMWB's ability to maintain reasonable quality of life standard essential to all private and public employers in the region to be able to attract and retain the required workforce.²¹

Apart from regular residents, the region has a "shadow population" residing in construction camps whose needs are also catered to by the region's infrastructure and services.²² The required infrastructure and services are broad in range and include hard infrastructure that a community cannot live without, such as water and water treatment facilities, sewage and its treatment facilities, landfill for solid waste, offsite infrastructure for new subdivisions, fire stations and

¹⁷ M. Glennon, "Oil Sands: Growth, Challenge & Opportunity" (Economics Society of Northern Alberta, 2 December 2005) at 14; Canadian Association of Petroleum Producers, "Building a Workforce for the future" in *Context: Energy Examined* (Spring 2013) at 16. CAPP homepage < www.capp.ca/context >

¹⁸ *Wood Buffalo Business Case 2005*, *supra* note 9 at 5 and 24.

¹⁹ Alberta Energy, *Investing in our Future: Responding to the Rapid Growth of Oil Sands Development Final Report* by D. Radke, (Edmonton: Department of Energy, 29 December 2006) at 137, online: Alberta Energy homepage <<http://www.energy.alberta.ca/pdf/OSSRadkeReportInvesting2006.pdf>> [hereinafter *Investing in our Future*].

²⁰ *Wood Buffalo Business Case 2005*, *supra* note 9 at 5-6.

²¹ *Ibid.* at 4.

²² *Ibid.* at 5. Between March 2007 and January 2008 there were 65 work camps in the RMWB, and industry project accommodation were approved for at least 40,000 temporary and permanent workers. See *Envision Wood Buffalo*, *supra* note 4 at 8. The 2012 total population of work camps is 39,271 and the average annual growth rate between 2000 and 2012 is 17.1 percent. See *Municipal Census 2012*, *supra* note 12 at 1.

other emergency services, police services, roads, bridges and other transportation infrastructure.²³ It also includes schools, hospitals and other health facilities, art and cultural facilities, social services such as childcare centers, recreational facilities, affordable housing, and many other quality of life amenities that citizens would normally enjoy where they live.²⁴ These are crucial to enable the RMWB to fulfill its purposes to: (a) provide good government; (b) provide services, facilities or other things necessary or desirable for the municipality; and (c) develop and maintain safe and viable communities.²⁵ As the Mayor of the RMWB put it:

But the outlandish fear that the oils sands might disappear...was replaced by a headlong rush into unrestrained development and took our eye off the things that really did deserve our attention... like the lack of affordable housing; the inability of municipal infrastructure to meet the needs of a growing population; the transportation snarls arising from too many vehicles and too little road; the lack of amenities that make any community an attractive place to raise a family; and the social dislocation that accompanies rapid growth.²⁶

Apart from the lack of hard infrastructure, a common theme that cut across all the specific needs is the challenge of attracting and retaining the necessary labor force to deliver key services.²⁷ Housing costs, suitability and availability, are commonly cited as the single biggest problem facing both public and private sector employers suffering from chronic skilled and unskilled

²³ Some of the key concerns are public safety on the region's roads and highways, congestion, and uncertainty of access to current and new oil sands development. See *Wood Buffalo Business Case 2005*, *supra* note 9 at 6, 8-9; Regional Municipality of Wood Buffalo, Media Release, "Wood Buffalo Region needs help with transportation bottlenecks" (4 March 2005). Key regional transportation issues include expansion and upgrading of Highway 63, upgrades and paving to Highway 881, and a new East Side Corridor Road for better access to new and emerging oil sands development. See also J. Irving and G. Dahl, "Only One Way to Get There: Challenges of the Oil Sands Transportation Corridor" (RIWG Transportation Committee Paper) [archived with author].

²⁴ It is notable that not all of these are solely municipal responsibilities. Municipal infrastructure include water and wastewater treatment plant, regional landfill site, new RCMP facility, new and maintenance road projects, recreational facilities, water line and infrastructure servicing. The province has a traditional role in the provision of education, health care, policing for a certain population, and provincial or primary roads. See *Investing in our Future*, *supra* note 19 at 127.

²⁵ MGA, *supra* note 3, s. 3.

²⁶ M. Blake, "State of the Region Address" (Fort McMurray Chamber of Commerce Network Luncheon, Sawridge Inn and Conference Centre, 26 November 2009) at 6 [unpublished] [hereinafter "State of the Region Address 2009"].

²⁷ *Investing in our Future*, *supra* note 19 at 47.

labour shortages and high wage costs.²⁸ For the RMWB administration, labour shortages place large pressures on departments to meet increasing public service demand, in particular, the planning and permitting function for property development and bylaw enforcement.²⁹ According to the Mayor of the RMWB:

We know that if it is difficult to attract industrial workers, then it must be impossible to attract anyone else... I am tired of the complicated answers we get as to why the situation is what it is.³⁰ In order to attract people to the region and support oil sands development, we need, at a minimum, affordable housing, safe and efficient roadways, increased sewage treatment capacity, and quality schools, health care and recreational facilities. We need some immediate solutions, and a commitment to some longer term planning, to ensure a healthy, vibrant and sustainable community that supports the people who live and work here.³¹

Other social issues plaguing residents in the RMWB include homelessness, addictions, and inadequate social facilities like childcare centers, family counseling and other intervention centers.³² Regardless of later investments and other efforts made by the provincial government discussed below, the RMWB admitted as at October 2011 that it still grappled with these challenges.³³ It has been forecast that public infrastructure and services in the RMWB will continue to remain under pressure as a result of rapid and sustained economic and population growth.³⁴ The Mayor of the RMWB predicted that “[w]hat we are experiencing now is not a

²⁸ *Wood Buffalo Business Case 2005*, *supra* note 9 at 35. Particularly in the public sector, teachers, police officers, social services workers, and health care providers. See *Investing in our Future*, *ibid.* at 6. Historically, the Province has been slow in releasing public land for development. The vast majority of land within the RMWB boundaries is crown land and falls under the jurisdiction of the Province of Alberta. See *Envision Wood Buffalo*, *supra* note 4 at 4 and 6.

²⁹ *Wood Buffalo Business Case 2005*, *supra* note 9 at 35.

³⁰ M. Blake, “State of the Region Address” (Fort McMurray Chamber of Commerce Dinner, 16 May 2005) at 8 [unpublished] [hereinafter “State of the Region Address 2005”].

³¹ Media Release, *supra* note 1 quoting Mayor Melissa Blake.

³² *Investing in our Future*, *supra* note 19 at 6.

³³ M. Blake, “State of the Region Address” (Fort McMurray Sawridge Inn & Conference Centre, 27 October 2011) at 2 [unpublished] [hereinafter “State of the Region Address 2011”].

³⁴ *Investing in our Future*, *supra* note 19 at 124.

boom. It is strong, sustained growth stretching well into the foreseeable future.”³⁵ Indeed, massive capital outlays and workforce are associated with each oil sands project in the construction and the operating phases. The capital spending, the jobs, the contracts and the expectation that go with it, create an instant and ongoing need for public infrastructure, accommodation and services which need to be in place well in advance.³⁶ Project planning is such that before one development project is finished the next one starts. With the number of oil sands projects now operating or planning to operate in the region, the demand has become constant.³⁷ The RMWB is estimated to be producing 6.9 million barrels of oil per day by 2030 and would be expecting over 100,000 new residents.³⁸ It appears that the growth pressure and its challenges are not over.

5.3 Municipal Governmental Efforts to Deal with Oil Sands Development and Expansion Challenges

Cognizant of its limited ability to regulate socio-economic impacts of oil sands development within its boundaries, the RMWB sought other means to manage current and future growth pressures. For clarity, the RMWB has always been in support of energy development as the region tremendously benefits from it. The only concern was the RMWB’s ability to carry out its functions at the same pace with the growth of the industry.³⁹ The RMWB’s position was that if

³⁵ According to the Mayor, “Once we get our infrastructure deficit fixed, we will have to quickly adjust for the next, even bigger wave, of investment and development.” See “State of the Region Address 2005,” *supra* note 30 at 16 and 18.

³⁶ *Wood Buffalo Business Case 2005*, *supra* note 9 at 5 and 10. Imperial Oil has resumed its \$8 billion Kearl Lake project. Suncor/Petro-Canada merged to create Canada’s largest oil and gas company. PetroChina paid \$1.9 billion to control two oil sands projects and many of the plants that were under construction for the past five years are now complete and are moving into production. See “State of the Region Address 2009,” *supra* note 26 at 21-22.

³⁷ *Wood Buffalo Business Case 2005*, *ibid.* at 10 and 26. At the time of the State of the Region Address 2009, 21 projects, ranging from new in situ plants in the south to mining and upgrading projects in the north, were expected to apply for ERCB approvals in the next eighteen months. See “State of the Region Address 2009,” *ibid.* at 23.

³⁸ “State of the Region Address 2011,” *supra* note 33 at 6.

³⁹ Interview with Melissa Blake, Mayor Regional Municipality of Wood Buffalo (27 May 2009) [hereinafter Interview with Melissa Blake].

growth was accelerated it needed additional support from the provincial government to enable it to match the growth rate. If the provincial government was not willing or prepared to give its support, then the RMWB needed to have the growth slowed down to enable it to prepare to accommodate new growth.⁴⁰ Besides engaging in various growth and development studies,⁴¹ long range planning,⁴² and other population policies,⁴³ the RMWB took the following radical measures with respect to the socio-economic challenges of oil sands development and expansion within the region.

5.3.1 The Resource Development Review Committee

The Resource Development Review Committee (“RDRC”) was formed in 2000 under Bylaw 2000-38 to replace the Regional Standing Committee on Oil Sands Development.⁴⁴ The committee was a municipal-industry forum for industry to present their projects and consequential impacts to a multitude of stakeholders in the region including the municipal authority, environmental associations, school boards, and health providers. It created an opportunity for municipalities to obtain and test some of the information from industry to enable them to prepare for the impacts of the development. It also brought industry notification obligations under one roof given the number of requests from industry to consult with different stakeholder groups.⁴⁵ The RDRC was instrumental in preparation for the RMWB interventions at

⁴⁰ *Ibid.*

⁴¹ See the *Commercial Industrial Land Use Study* and the *Fort McMurray Fringe Area Development Assessment* which guides discussions with the Province for all areas related to infrastructure development and land release.

⁴² Area Structure Plans (“ASP”) and Municipal Development Plans (“MDP”). Through Bylaw No. 11/027 passed in October 2011 the RMWB adopted a new MDP that outlines a 20 year strategic path forward to manage growth.

⁴³ See *Envision Wood Buffalo*, *supra* note 4 (an Integrated Community Sustainability Plan which is a long-term strategic plan for municipalities) and *Population Projection Model* (a tool that the Municipality and other regional stakeholders use to forecast growth in Wood Buffalo).

⁴⁴ E-mail correspondence with Lisa Pottle, FOIP Advisor FOIP Branch Council and Legislative Services Department, Regional Municipality of Wood Buffalo (18 October 2012).

⁴⁵ Interview with Melissa Blake, *supra* note 39.

the EUB hearings in 2006 through a series of public consultation meetings held across the region.⁴⁶ The information received gave the municipality a good understanding of the community needs and formed part of the impact statement submitted by the municipality at the EUB hearings. The RDRC ceased operation in 2007.⁴⁷

5.3.2 The Business Cases

Without help from any other source, the RMWB started collaborating with industry with respect to projections of growth and required infrastructure. It also prioritized hard infrastructure in the distribution of its capital project investment funding while sacrificing other quality of life amenities.⁴⁸ As conditions in the region deteriorated, two business cases and updates were made to the provincial government between 2002 and 2005. In March 2005, the RMWB with industry leaders made a business case to the provincial government on the need to address the critical infrastructure and service needs in the region. Representatives also appeared before the Government of Alberta's Standing Policy Committee on Energy and Sustainable Development on April 4, 2005 to present the Wood Buffalo Business Case 2005.⁴⁹

The Business Case 2005 was prepared by the Regional Issues Working Group ("RIWG"), now the Oil Sands Developers Group ("OSDG"),⁵⁰ together with the RMWB and other regional

⁴⁶ Regional Municipality of Wood Buffalo, Media Release, "Municipality's Resource Committee Seeking Public Submissions on Oilsands Expansion" (8 May 2006).

⁴⁷ E-mail correspondence with Lisa Pottle, *supra* note 44.

⁴⁸ Interview with Melissa Blake *supra* note 39.

⁴⁹ Media Release, *supra* note 1. See H. Kennedy, "Realizing the Vision" Presentation to the Standing Policy Committee on Energy & Sustainable Development June 12, 2006, RIWG [hereinafter Realizing the Vision].

⁵⁰ An industry-funded organization originally founded in 1997 as the Regional Infrastructure Working Group and incorporated in August 2003 as a non-profit organization under the legal name Athabasca Regional Issues Working Group Association to deal with four main issues in the community: Human infrastructure, Physical infrastructure, Environment and Economic development. The first task was to complete a cumulative socio-economic assessment of all the oil sands projects. Membership in the group was made up of industry representatives from 26 companies and the RMWB. In June of 2008, the RIWG Board of Directors approved the changing of the name from Athabasca

stakeholders. The Business Case 2005 was to provide the provincial government with a comprehensive overview of the urgent public infrastructure needs in the region, and the critical role of infrastructure and public services in the development of oil sands and preservation of sustainable communities. It provided data available at the beginning of 2005 on infrastructure shortfalls with costing estimates and a five-year plan for critical infrastructure funding.⁵¹ Prior to the Wood Buffalo Business Case 2005, the RIWG had presented *A Business Case for Addressing the Infrastructure Needs of the Regional Municipality of Wood Buffalo* (“Business Case 2002”) to the Government of Alberta. The Business Case 2002 was reviewed by a committee of Alberta Deputy Ministers convened by Julian Nowicki, then Deputy Minister of Executive Council, and yielded some positive outcome. This includes a proposal for a tripartite regional development agreement between the RMWB, the Government of Alberta and the Government of Canada, aimed at coordinated funding of the RMWB infrastructure needs within a governance structure that respects roles, responsibilities and the jurisdictions of each order of government.⁵²

Regardless of the achievements of the Business Case 2002, public infrastructure needs in the region were not met, and were not dealt with in a timely manner. While the provincial government committed to address a substantial portion of the transportation requirements identified in the Business Case, much of this was still in the design and planning stage and a

Regional Issues Working Group Association to The Oil Sands Developers Group with a mandate to work toward resolution of issues of concern to all stakeholders in the region. Online: OSDG Homepage <<http://www.oilsandsdevelopers.ca/index.php/about-osdg/history/>>

⁵¹Wood Buffalo Business Case 2005, *supra* note 9 at 4.

⁵²*Ibid.* at 4 and 38. Response to the 2002 Business Case was positive in that it moved all orders of government towards thinking about cooperating and collaborating in innovative ways. It was noted that “the business case submission was followed by a series of cordial and fruitful discussions with senior officials from the Government of Alberta and Government of Canada on how the needs might be met in a collaborative, cooperative, and coordinated way.” See Regional Municipality of Wood Buffalo, Media Release, “Regional Municipality of Wood Buffalo Council requests infrastructure assistance from the Prime Minister and Premier” (10 June 2004).

significant portion was unfunded.⁵³ The Wood Buffalo Business Case 2005 argued that the existing government planning cycles, policies and models were too protracted to address the existing shortfall and emerging infrastructure needs in a timely way. It argued that failure by Government to pre-invest in the public infrastructure and services required to support oil sands growth could result in increased oil sands project costs and delays, which in turn would delay or reduce expected royalties and taxes from oil sands development as well as jeopardize the shared government-industry vision for ongoing oil sands development.⁵⁴

An important view of the Business Case 2005 is the respective responsibilities of industry and government in oil sands development. While industry's role is to invest in capital required for building, operating and sustaining oil sands facilities in a responsible manner, government's responsibility is the delivery of timely public infrastructure and supporting programs to the communities and the people it serves.⁵⁵ Industry requires certainty and assurance that government will fulfill its responsibilities in order to create investor confidence for oil sands development. Among others, the Business Case 2005 requested expedited completion and execution of the tripartite Regional Development Agreement amongst the three orders of government.⁵⁶

⁵³ *Investing in our Future*, *supra* note 19 at 6.

⁵⁴ *Wood Buffalo Business Case 2005*, *supra* note 9 at 6, 38-39.

⁵⁵ *Ibid.* at 6-7.

⁵⁶ Other requests include policy models that will allow the RMWB and local service providers longer term planning to properly prepare for further oil sands development as the existing policy principles and model cannot keep pace with the unique level of sustained growth, continued dialogue to facilitate solutions at all three levels of government, collective issues management as the key to collaborative effort, and collaboration as the key to increased credibility and data validity. See M. Glennon, "Oil Sands: Developing Infrastructure to Facilitate Growth" (RIWG Presentation International Heavy Oil Conference, 15 February 2006) at 23-24.

With effective lobbying efforts and media attention, the Business Case 2005 resulted in a new policy movement and commitment of political will in the provincial government through a cross-ministerial committee mandated by then Premier Klein, and led by then Energy Minister, Greg Melchin, specifically to address the infrastructure issues of the RMWB.⁵⁷ According to the Mayor of the RMWB, an intergovernmental forum to meet with and present to MLAs, Cabinet members and key senior bureaucrats⁵⁸ was a vital and necessary step in ensuring that the RMWB had the focused attention of the provincial government on the Business Case recommendations and rationale.⁵⁹ While the RMWB welcomed the \$10 million gas tax funds from the New Deal for Cities and Communities agreement between Alberta and Canada, the most crucial was the precedent of the federal and provincial government working with municipalities to address socio-economic issues.⁶⁰

5.3.3 Intervention at ERCB Oil sands Scheme Approval Hearings

Despite the Wood Buffalo Business Cases and their accomplishments, the RMWB still did not have the full attention of the provincial government. With no other forum to air its concerns and obtain resolution, the RMWB decided to intervene at three Energy and Utilities Board (“EUB”)

⁵⁷ “State of the Region Address 2005,” *supra* note 30 at 5-6.

⁵⁸ The Mayor described the forum as “[a] very jam-packed meeting room - with policy makers asking us good, thorough questions after we presented our Business Case.”

⁵⁹ “State of the Region Address 2005,” *supra* note 30 at 5-6 and 17. The Mayor believed that the regional infrastructure development agreement by all three orders of government which the Business Case 2002 had proposed will enable each government to act with a clear understanding of roles, responsibilities and respect for jurisdiction, and that a collaborative approach will be a vital building block to secure the future of the region. The RMWB had written letters dated May 21, 2004 to the Prime Minister of Canada and the Premier of Alberta formally requesting that they assist in meeting the critical infrastructure needs of the region, after several months of discussion among senior officials of all three orders of government. See Media Release, *supra* note 52.

⁶⁰ “State of the Region Address 2005,” *ibid.* at 17. In furtherance of the collaborative approach, the Mayor went to Ottawa from on May 3 to 6, 2005 for meetings with key federal politicians and senior officials (including Federal Minister of Communities and Infrastructure and his senior policy advisor). See also Regional Municipality of Wood Buffalo, Media Release, “Mayor to meet with federal government officials” (13 April 2005); and Media Release, “Mayor addresses federal Finance Committee” (4 October 2006) for RMWB address to the House of Commons Standing Committee on Finance meeting in Fort McMurray as part of a nationwide pre-budget consultation process. Mayor Blake also asked for the federal government’s participation in a “bilateral intergovernmental relations program” based on common interests, outcomes and opportunities within the oil sands region.

oil sands mine scheme approval hearings in 2006 and one ERCB hearing in 2010. The RMWB emphasized that the purpose of its interventions was not “to stop development but to make the compelling case that [it] needed help to keep pace with unprecedented growth.”⁶¹ It indicated that the review on a project-by-project basis in a singular context did not reveal the implications on the community; therefore it wanted to show the cumulative effects of having the approved projects residing in the region without the capacity of offsetting those project requirements.⁶² The following decision summaries focus on the RMWB position, the provincial government’s view and the Board’s decisions on socio-economic challenges of oil sands development and expansion.

The first intervention was *Suncor Energy Inc., Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension)*⁶³ where Suncor applied to construct and operate its oil sands surface North Steepbank Mine Extension and a bitumen upgrading facility (Voyageur Upgrader) in the Fort McMurray area. Among the interveners at the hearing were the RMWB, the Northern Lights Health Region (“NLHR”)⁶⁴ and the Government of Alberta. Project benefits, public infrastructure and services, availability of housing and affordable housing were all considered by the Board under the umbrella of “Social and Economic Effects” of the project. Suncor argued that given the taxes and royalties it paid and its active role through the RIWG in assisting the RMWB to plan for and manage regional growth pressures, it could not take on the responsibility

⁶¹ See generally “State of the Region Address 2009,” *supra* note 26 at 6- 7.

⁶² Interview with Melissa Blake, *supra* note 39.

⁶³ *Re Suncor Energy Inc., Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area* (14 November 2006), Decision 2006-112 (E.U.B.) at 6-17 [hereinafter EUB Decision 2006-112].

⁶⁴ Now the Alberta Health Services Northeast Region (“AHSNR”). While NLHR took no position on the application, it provided evidence that the Voyageur Project would adversely affect the delivery of health services in the region and asked the Board to convene a broad-based inquiry to examine the socio-economic impacts of oil sands development.

of governments and public service agencies to meet the service and infrastructure needs of the Wood Buffalo residents.⁶⁵

The RMWB argued that the cumulative negative impacts of the Voyageur Project outweighed the benefits, and that any new development that would exacerbate an already stressed situation was not in the public interest. The RMWB further argued that work camps did not mitigate the impacts on the municipality. Industry workers still used community infrastructure and services, and work camps did not respond to the long-term challenge of creating a complete, integrated and sustainable community that would attract and keep employees and their families within the region. The RMWB requested that the Board conduct a comprehensive inquiry into the socio-economic issues of oil sands development, and delay the approval of the project until the results of the inquiry were available and needed infrastructure arrangements had been made. The provincial government argued that it was fully aware of the issues through the efforts of the RMWB, NLHR and RIWG and that it was responding with resources and funding. The government stated that it would continue to work with the RMWB and the NLHR to address the infrastructure and service delivery challenges through the Northern Alberta Strategy Committee (which later became the Oil Sands Ministerial Strategy Committee – “OSMSC”).⁶⁶

⁶⁵ Suncor’s mitigation efforts for the project included operating workforce camps during construction, building an overpass over Highway 63, bussing workers between the camps and Edmonton, providing enhanced on-site medical services, camp security, and on-site fire and ambulance service.

⁶⁶ The OSMSC is an internal provincial government committee that Cabinet directed to develop a coordinated short-term government action plan to address the social, environmental, and economic impacts of oil sands development in local communities. The OSMSC, chaired by the Minister of Justice and Attorney General, commissioned the Radke Report. The OSMSC played a coordinating role between provincial ministries and had only an advisory role. It provided information to individual ministers, Treasury Board, and cabinet on how the issues were interrelated, on which issues were the highest priorities and have the most immediate positive impact. The committee neither had a policy setting role nor authority to allocate money. Most importantly, it did not have municipal government representation.

Noting that the RMWB intervention clearly spoke to the seriousness of the situation, the Board considered the following three key questions in weighing evidence on socio-economic impacts: (a) what is the significance of socio-economic impacts after taking into account efforts to mitigate the impacts; (b) what is the appropriate mechanism for managing socio-economic impacts; and (c) who should bear the cost of addressing socio-economic impacts? To determine the significance of socio-economic impacts, the Board looked for indications that the impacts are being effectively managed. The Board viewed the impacts in light of the mitigation efforts proposed by Suncor, the efforts made by the RMWB and NLHR to respond to the challenges they face, and the actions taken by the provincial and federal governments. The Board held that the responsible government agencies are aware of and are responding to a number of the socio-economic impacts.

On the second and third issues, the Board held that government has the jurisdiction and the responsibility to ensure that the necessary public infrastructure is in place to accommodate growth. It also held that capacity constraints related to socio-economic impacts can be avoided or reduced to a manageable level with proper planning and immediate response by the appropriate government authorities through investments in parallel with continued oil sands development. Some interveners argued that the Board's faith in government authorities to find efficient and workable solutions to the socio-economic issues has been misplaced. In response the Board stated:

The Board wants to be clear on this point: the Board must rely on government bodies, including the RMWB and NLHR, to address public infrastructure and public service impacts in a meaningful and timely manner. The Board does not have the mandate to resolve these issues. That responsibility rests with the appropriate government bodies in a position to provide direct assistance in these matters.⁶⁷ [Emphasis added].

⁶⁷ EUB Decision 2006-112, *supra* note 63 at 13.

The Board specifically noted the apparent lack of a coordinated response among government departments and the various orders of government given that in practice infrastructure investments have long lead times and large lumpy costs. While the RMWB questioned the Alberta Government panel about the provincial government's "apparent *ad hoc* response to the recommendations" outlined in the Wood Buffalo Business Case 2005, Alberta did not provide the Board with evidence of a coordinated response by government to the recommendations. The Board also noted that a coordinated approach was not evident. While the Board acknowledged the role the RIWG and other regional issues management forums in advancing socio-economic issues, it recommended that "a process is needed that takes this information and provides a coordinated and effective channel through which regional and cumulative socio-economic impacts can be addressed in a meaningful and demonstrated way."⁶⁸ The Board emphasized that coordinated action be taken at all orders of government to ensure that the RMWB has the ability to service the anticipated level of sustained growth in the region. It held that continued coordination and cooperation among governments is needed to ensure that the supply of land ready for residential development and the necessary planning are in place to meet the existing and expected housing demand in the region.

Given that the RMWB and other interveners were seeking a framework that would allow both the provincial government and the RMWB to confidently plan for and provide infrastructure and services in a manner that is predictable, manageable, and appropriately resourced, the Board decided to forward the RMWB's request for a public inquiry to the full Board, but refused to delay its decision on the Project. With respect to the RMWB's alternative request, that Suncor be mandated to enter into an industrial agreement with the RMWB for contribution toward

⁶⁸ *Ibid.* 12-13.

development costs of new or expanded infrastructure and services required as a result of the population growth from the project, the Board held that just as it believed that government has the responsibility to address socio-economic issues, it also believed that the determination of an appropriate funding mechanism and possible contributors rests with government.

The second intervention of the RMWB was in *Albian Sands Energy Inc., Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine Fort McMurray*⁶⁹ where Albian applied for an expansion of the existing Muskeg River Mine mining areas and the construction and operation of a bitumen extraction plant 70 km north of Fort McMurray. Also among other interveners were the RMWB, NLHR⁷⁰ and the Government of Alberta. The most critical issues centered on cumulative environmental and socio-economic impacts of the project. Similar arguments in EUB Decisions 2006-112 were proffered by interveners. Albian also argued that socio-economic issues such as land for housing, municipal infrastructure, education, and health care are the responsibilities of the various levels of government to invest in the future and not the responsibility of industry.

The RMWB demanded tangible solutions to the recommendations contained in the Wood Buffalo Business Cases. It demanded better mechanism to address cumulative regional social and economic impacts and to monitor and verify predictions on socio-economic and health

⁶⁹ *Re Albian Sands Energy Inc., Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine Fort McMurray, Joint Panel Report* (17 December 2006), Decision 2006-128 at 10-18 (E.U.B) [hereinafter EUB Decision 2006-128]. Albian also submitted an EIA.

⁷⁰ NLHR stated that its past requests to the province for action had “fallen through the cracks” and no other mechanism existed for it to obtain the resources it needed to respond to the projected population growth. It stated that it was seeking an EUB-led, multi-stakeholder, multi-departmental inquiry to bring together those who had the power to make policy and to fund a multidimensional solution to the problems of housing, employee recruitment and retention, and the overall funding of health services in the region. *Ibid.* at 12.

issues.⁷¹ Again, it requested a delay of the project so that an EUB-led inquiry process could measure the cumulative socio-economic impact of all oil sands development in the region. The inquiry was to bring together stakeholders, senior orders of government, and the municipality to formulate an appropriate plan and assign financial responsibilities. The RMWB argued that the inquiry process would provide an appropriate forum where evidence could be brought forward, tested, and used as the basis for an integrated framework for responsible development of the oil sands.

The Government of Alberta testified that in July 2005, shortly after the presentation of the Wood Buffalo Business Case 2005 to the province's Standing Policy Committee on Energy and Sustainable Development, thirty Members of the Legislative Assembly ("MLAs"), including ten Cabinet ministers, toured the region to learn firsthand about the issues being experienced by the RMWB. Initial steps were taken to address some of the issues raised in the Wood Buffalo Business Case 2005 immediately following the visit, and the rest was taken to the caucus table to find long-term strategies to support growth in the region. The Government committed to continue finding solutions following the work of the OSMSC which was expecting a full Report with three to five years forecasts and recommendations.⁷²

The joint provincial-federal panel ("Joint Panel") adopted a similar view as in EUB Decision 2006-112, reiterating that coordinated action needs to be taken by all orders of government to resolve the existing socio-economic issues. It stated that if public infrastructure investments are not made in parallel with continued investment in oil sands development, socio-economic issues

⁷¹ *Ibid.* at 13.

⁷² *Investing in our Future*, *supra* note 19.

will increasingly become a critical part of the decision-making regarding oil sands applications in the Wood Buffalo region.⁷³ The Joint Panel reiterated that a process is needed that provides a coordinated and effective channel through which regional and cumulative socio-economic impacts can be addressed. As the EUB had no mandate to “resolve” the socio-economic issues raised in the proceeding, the responsibility rests with the appropriate government bodies (including the Alberta Government, NLHR, and RMWB) that are in a position to provide direct assistance in these matters.⁷⁴

Again, the Joint Panel found that there was no merit in delaying Albion’s project as public infrastructure investments are possible in parallel with continued oil sands development. The Joint Panel agreed that while the OSMSC held promise for coordination and response within the provincial government, better coordination was needed among all levels of government to enhance the planning, communication, and response on socio-economic and health issues in the Wood Buffalo region. Given that adequate monitoring and verification of predictions (by identifying gaps, establishing indicators, and measuring progress) are powerful catalysts for strategic thinking and collaborative action on socio-economic issues, the Joint Panel recommended public annual reporting on socio-economic issues which will provide guidance to the responsible authorities and elected officials working to bring about positive change in the region.

The third RMWB intervention was *Imperial Oil Resources Ventures Ltd., Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray*

⁷³ EUB Decision 2006-128, *supra* note 69 at 10.

⁷⁴ *Ibid.* at 16.

Area.⁷⁵ Imperial applied for the construction and operation of a new world-scale greenfield Kearl Oil Sands mine project and bitumen extraction facilities located about 70 kilometers north of Fort McMurray. Also among other interveners were the RMWB, NLHR and the Government of Alberta. The RMWB reiterated that while it had supported oil sands development and its long-term economic benefits, it was unable to manage the adverse cumulative social effects of additional oil sands development within acceptable levels in the absence of immediate and tangible solutions. Acknowledging that some actions had been taken by senior orders of government, the RMWB argued that infrastructure and services deficit still existed and current provincial government policies did not provide effective solutions. The RMWB suggested a collaborative effort by all orders of government including a tripartite regional development agreement.

While Imperial's proposed camp-based, fly-in/fly-out mitigation approach⁷⁶ would be responsive to the pressures on the municipality in the short term, the RMWB argued that it would create negative impacts on the local community in the long term, as many of the economic benefits from the project would bypass the community which normally would benefit if the workers and their families were living and investing in the community. Although it acknowledged the efforts of the OSMSC, the RMWB argued that the OSMSC's terms of reference did not meet the needs of the municipality, as the Committee was merely advisory without policy-making powers, and

⁷⁵ *Re Imperial Oil Resources Ventures Ltd., Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area, Joint Panel Report* (27 February 2007), Decision 2007-013 at 20-32 (E.U.B) [hereinafter EUB Decision 2007-013]. Imperial also submitted an EIA.

⁷⁶ Imperial's mitigation measures on public and private infrastructure and services included a camp-based operation with 90 per cent of its workforce living outside the region who would fly to and from the KOS Project and stay in camp accommodations during shift rotations ("fly-in/fly-out approach"). The camp would have its own water and sewer system and would provide workers with a health centre and a range of retail, recreation, and other services that would reduce the demands on local service providers. See Regional Municipality of Wood Buffalo, Media Release, "Municipality Opposes Fly-in/Fly-Out Oilsands Development" (21 November 2006).

focused on short-term issues rather than an integrated approach involving all partners.⁷⁷ The RMWB requested a delay of additional oil sands projects so that it could collaborate with senior orders of government and industry to formulate an appropriate plan and assign financial responsibility to address outstanding infrastructure issues.

The Joint Panel adopted a similar view to those in EUB Decisions 2006-112 and 2006-128. It confirmed that the critical socio-economic issues surrounding oil sands development had to do with the pace of development, and the capacity of the regional environment to accept such developments, without creating impacts to the point that the developments could no longer be perceived in the public interest. The Joint Panel held that with each additional oil sands project, the growing demands and the absence of sustainable long-term solutions weigh more heavily in the determination of the public interest. Therefore the uncertainty in the management of cumulative impacts for key environmental parameters and the socio-economic impacts on the region “weighed heavily” in the approval process.⁷⁸ Noting previous recommendations in Decisions 2006-112 and 2006-128, the Joint Panel found the Kearl project to be in the public interest. It held that the key issues must be addressed with urgency if oil sands development was to continue at that pace.⁷⁹ The Joint Panel reiterated that coordinated action be taken at all levels of government to ensure that the RMWB has the ability to service the anticipated level of sustained growth in the region.

⁷⁷ EUB Decision 2007-013, *supra* note 75 at 26.

⁷⁸ *Ibid.* at viii and 4. The Joint Panel emphasized the importance of the Governments of Alberta and Canada giving priority attention to the acute and growing issues faced by both the RMWB and the NLHR.

⁷⁹ *Ibid.* at 4.

While the tripartite agreement proposed by the RMWB did not materialize,⁸⁰ tangible results in resolving socio-economic challenges in the region began to be seen after the RMWB's interventions in these three oil sands mines approval hearings.⁸¹ Although much did not come out of this first intervention, it provided an opportunity for the RMWB to get on the record for the first time and to ask the provincial government questions in areas where it had previously had difficulties obtaining information or understanding what was being provided in terms of support.⁸² It appears that the strong wording of the recommendations by the panel in the second and third interventions sent a signal to the province to put their ducks in a row. It was noted that the interventions "dramatically expanded the scope of the evidence dealing with socio-economic impacts of development... a departure from the way in which socio-economic issues have been dealt with in the past."⁸³

Thus, the Board's increased acceptance of socio-economic issues in the scope of future hearings, including an increased scrutiny of the province's responses and evidence, and the senior governments' increased receptivity to expanding dialogue and discussions with the municipality, were noted among the most significant results of the RMWB's interventions. Accordingly, in a 2010 intervention in *Total E&P Joslyn Ltd., Application for the Joslyn North Mine Project*,⁸⁴ the tone of the RMWB's submissions, the mood of the hearing, and the views of the Board in relation to socio-economic issues, were different than in the 2006 hearings. Total applied for the

⁸⁰ E-mail correspondence with Lisa Pottle, *supra* note 44. However, see the Canada-Alberta Infrastructure Framework Agreement April 29, 2008 online: Alberta Infrastructure Homepage <<http://www.infrastructure.gc.ca/prog/agreements-ententes/bcf-fcc/ab-eng.html>>

⁸¹ "State of the Region Address 2009," *supra* note 26 at 6-7.

⁸² Interview with Melissa Blake, *supra* note 39.

⁸³ Regional Municipality of Wood Buffalo, Media Release, "Municipality's EUB Interventions Crystallized Focus on Region's Challenges" (10 April 2007) quoting Ray Purdy, the municipality's legal counsel for the EUB hearings.

⁸⁴ *Re Total E&P Joslyn Ltd., Application for the Joslyn North Mine Project* (27 January 2011), ERCB Decision 2011-005, *supra* note 7 at 108-113. Total submitted an EIA.

construction, operation, and reclamation of the Joslyn North Mine Project about 70 kilometres north of Fort McMurray. The RMWB originally objected to the project but withdrew its objection when it reached an agreement with Total.⁸⁵

The RMWB, at the hearing, noted its appreciation of the steps the province had taken to work with the RMWB to address the socio-economic challenges.⁸⁶ However, it advised that affordable housing remained a major challenge, as the housing gap that existed in 2006 continued and would widen if key barriers to increasing the housing supply were not addressed. The lack of housing has carry-through effects for local businesses, the public sector and industry, and has increased the homeless population including the employed. The RMWB advised that current initiatives to increase the housing supply were only a part of the solution, were still in the development stage, and would take some time before their effects are felt. While the Panel found substantive improvement in public infrastructure and municipal services since 2006, it noted that increase in demand for housing resulting from new oil sands development and expansions could cause a return to conditions as existed in 2006 if affordable housing was lacking. It therefore recommended that the province continue to work with the RMWB to ensure that the supply of land for residential development and the necessary planning are in place to meet the existing and expected housing demand in the region.⁸⁷ The Panel also encouraged the Government of Canada to invest more in the region in proportion to the significant fiscal and economic benefits it derives.

⁸⁵ RMWB entered into a memorandum of understanding with Total to address and mitigate its socio-economic concerns associated with the safety of the water supply, the timeliness of municipal revenues, the impact of “fly-in-fly-out” operations, and impacts on public health and safety.

⁸⁶ Include approximately \$306 million allocated to water management, recreational facilities, housing, and policing needs and the approximately \$700 million allocated to roads and interchanges.

⁸⁷ The Panel also found that Total’s commitment to establish an on-site medical centre and the progress of the Government of Alberta in addressing health service issues in the region mitigated the effects of the project. ERCB Decision 2011-005, *supra* note 84 at 113.

5.4 ERCB's Previous Treatment of Socio-economic Challenges of the Oil Sands Development Prior to the RMWB Intervention

To better appreciate the significant results of the RMWB interventions discussed above, it is worthwhile to consider here the way in which socio-economic issues have been dealt with in the past by the ERCB and the predecessor Board, the EUB. This part and the Board decisions discussed above support the conclusion that there is no forum or mechanism in Alberta's oil and gas development regulatory framework for resolving socio-economic challenges of large scale energy development. The regulatory hearing is the only forum where an affected municipality is allowed, as a member of the concerned public, to air its views on an issue relating to the project under consideration. As shown in the regulatory decisions discussed above and below, the Board consistently stated that it did not have the mandate to "resolve" socio-economic issues, such as adequacy of public infrastructure and services, as these are the provincial and municipal government's responsibilities. The Board decisions below show that socio-economic issues are just one among a range of factors considered by the Board, and indeed did not weigh much, in the Board's public interest determination. But the RMWB's interventions have resulted in socio-economic challenges, which used to be a back-burner issue, becoming increasingly weighty in EUB's "public interest" determination for these large scale projects.

The first oil sands approval, after the shift towards oil sands and the encouragement of its development through the generic royalty and accommodating tax arrangements, was Suncor's application in 1997 to amend its existing approval for the development of the Steepbank Mine.⁸⁸ As far back as this time, Suncor identified that the Steepbank Mine project would result in a number of socio-economic changes in the area. The Board accepted that some social impact is an

⁸⁸ *Re Suncor Inc. Application for Amendment of Approval No. 7632 for Proposed Steepbank Mine Development* (22 January 1997), Decision 97-01 at 10-11 (E.U.B.) [hereinafter EUB Decision 97-01].

inevitable consequence of further development which could be managed within acceptable levels. Noting that the people of the region and public officials were generally in favor of the development, the Board was satisfied that there was, or could be, sufficient infrastructure provided in the region to handle the development.

The same year, Syncrude's application for the Aurora Mine came before the Board for approval.⁸⁹ Syncrude also identified that the Aurora Mine project would result in a number of negative socio-economic changes in the region, including impacts on the services and social infrastructure. It, however, suggested that the impacts were mitigable by work camps. Syncrude undertook a socio-economic analysis based on the assumption that all the announced projects went forward in the given timeframe.⁹⁰ The analysis showed that while the Aurora project alone would not significantly impact the long-term population of Fort McMurray, the combined projects could increase the population of Fort McMurray by 15 to 17 percent thereby increasing the demand for community infrastructure and services. Syncrude also predicted a long-term stable increase in the demand for housing due to new operational employment that would be created. Given the extended period that the construction workforce would be needed, it expected more people to choose to live in Fort McMurray rather than stay extended periods of time in construction camps. However, Syncrude noted that the municipal infrastructure would be capable of handling the anticipated increases in population at that time.⁹¹ The EUB adopted the

⁸⁹ *Re Syncrude Application for the Aurora Mine* (24 October 1997), Decision 97-13 at 21-22 [hereinafter EUB Decision 97-13].

⁹⁰ Those projects included Suncor's Steepbank, Solv-Ex Corporation's, Shell's, and Mobil's Kearn.

⁹¹ EUB Decision 97-13, *supra* note 89 at 22.

same view it took in Suncor's Steepbank Mine approval given that public officials supported the project.⁹²

In 1999, Suncor's application for the Project Millennium came before the Board for approval.⁹³ Socio-economic impacts to the First Nation communities in the region were considered. The Board held that the direct discussions and negotiations between the community and Suncor was the most appropriate means of resolutions of these issues, and any outstanding concerns should be directed to provincial agencies charged with addressing socio-economic issues. The Board stated that it would direct the comments and concerns raised at the hearing to the RIWG and the appropriate provincial ministry, which may be in a position to assist in such matters.⁹⁴ Socio-economic impacts also came up in the context of an in situ Steam-Assisted Gravity Drainage ("SAGD") project in the Athabasca area in 2000.⁹⁵ The Board reiterated that while it was required to address socio-economic impacts as part of its review of project proposals, the lead roles fall to the government. Further, the RIWG could be used as a mechanism for identifying issues to industry and local or provincial governments.⁹⁶

⁹² In both of the 1997 Suncor and Syncrude approvals public hearing was not necessary and therefore not conducted. However, the Board documented its consideration of the submissions in a Decision report and outlined the direction proposed by the Board to address the outstanding issues.

⁹³ *Re Suncor Energy Inc. Application by Suncor Energy Inc. for Amendment of Approval No. 8101 for the Proposed Project Millennium Development (Application 980197)* (29 March 1999) Decision 99-07 + Addendum A and B at 32-33 and 40 (E.U.B.) [hereinafter EUB Decision 99-07].

⁹⁴ *Ibid.* at 33 and 40.

⁹⁵ *Re PanCanadian Resources Application for a Steam-Assisted Gravity Drainage (SAGD) Recovery Scheme - Christina Lake Thermal Project in the Athabasca Oil Sands Area* (10 February 2000), Decision 2000-007 at 9-11 (E.U.B.) [hereinafter EUB Decision 2000-007].

⁹⁶ *Ibid.* at 10 and 11.

Closer to the 2002 Wood Buffalo Business Case was another application for the Fort Hills oil sands mine 90 km north of Fort McMurray by TrueNorth Energy Corporation.⁹⁷ The EUB held that the responsible government agencies were aware of the concerns on the impact on services and the appropriate authorities are responding to these concerns. However, the Board suggested that a process is needed that provides a more coordinated and effective channel through which regional and cumulative socio-economic impacts can be addressed in a meaningful and demonstrable way. The Board noted that a resumption of the concept of a Northeast Area Commissioner being discussed was one alternative to address regional socio-economic issues and provide some focus from a government perspective on addressing the concerns of the region. The Board rejected the recommendation by the province to include a condition in the approval requiring TrueNorth to take a leadership role on the issue of affordable housing.⁹⁸

Socio-economic issues gained momentum in two oil sands mine applications in 2004 approximately 70 km north of Fort McMurray by Shell Canada Ltd.⁹⁹ and Canadian Natural Resources Limited.¹⁰⁰ Shell at its hearing acknowledged that the project would contribute to a

⁹⁷ *Re TrueNorth Energy Corporation, Application to Construct and Operate an Oil Sands Mine and Cogeneration Plant in the Fort McMurray Area* (22 October 2002 Amendment released 30 October 2002), Decision 2002-089 at 55-60 (E.U.B.) [hereinafter EUB Decision 2002-089]. Fort McMurray Medical Staff Association intervened in this proceeding arguing that public safety would be at risk if additional demands were placed on a medical system very near or already stretched to capacity.

⁹⁸ *Ibid.* at 59-60. The Government of Alberta intervened in this proceeding and indicated that it was aware of the adverse consequence of cumulative oils sands expansions in the Fort McMurray region. However Alberta recommended that a condition be included in the approval which would require TrueNorth to spearhead a joint industry-municipality initiative to address the lack of affordable housing in the region, focusing on the displaced renters from low-cost accommodations not on the company's own workforce, and to produce a work plan outlining achievable milestones and appropriate timelines aimed at relieving the pressures on affordable housing in the short and long term.

⁹⁹ *Re Shell Canada Ltd. Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant and Water Pipeline, Fort McMurray Area, Joint Review Panel* (5 February 2004), Decision 2004-009 at 79-84 (E.U.B.) [hereinafter EUB Decision 2004-009].

¹⁰⁰ *Re Canadian Natural Resources Limited Application for an Oil Sands Mine, Bitumen Extraction Plant, and Bitumen Upgrading Plant - Fort McMurray Area* (27 January 2004), Decision 2004-005 at 79-83 (E.U.B.) [hereinafter EUB Decision 2004-005].

number of broad social and economic cumulative impacts from oil sands developments in the region including employment, housing, education, health and emergency services, social services, and transportation infrastructure. CNRL also admitted that its project would be one of a total of 26 different oil sands projects either operating or planned for the region, all of which added to the cumulative socio-economic impact on Fort McMurray and the outlying communities.¹⁰¹

In the Shell decision, the Joint Panel agreed that the benefit to oil sands companies and to the broad public interest, derived from a mobile labour force moving into the region to construct a major oil sands project, should not come at the expense of an adequate level of public services to long-term Wood Buffalo residents.¹⁰² However, adopting previous views of the EUB, the Joint Panel held that “to determine the significance of socio-economic impacts, the Panel looks to the evidence presented for indications that the appropriate authorities are effectively managing the impacts.”¹⁰³ While the Joint Panel heard evidence suggesting that the appropriate authorities are responding, and believed that was still the case, little information was provided beyond assurances that the social impacts were being managed. There was no evidence to indicate that the subcommittees of the RIWG were effective in achieving the desired results, and the work of the interdepartmental committee was neither available nor released to the public. In this regard, the Joint Panel recommended a formal, coordinated annual compilation of the activities, outcomes and progress statement on socio-economic issues from existing committees and relevant government departments. In the CNRL decision, given that the same concerns were

¹⁰¹ *Ibid.* at 79. The Fort McMurray Medical Staff Association also intervened in both hearings arguing that it was very concerned about the effects of further oil sands development on an already overstretched health care system.

¹⁰² EUB Decision 2004-009, *supra* note 99 at 82.

¹⁰³ *Ibid.*

identified by CNRL in its socio-economic impact assessment in accordance with Directive 023 and by the interveners, the Panel found that there may have been insufficient communication among the relevant government departments and the many multistakeholder committees. The Panel recommended better coordination and communication process for addressing socio-economic issues that involves all affected stakeholders.¹⁰⁴

It is notable that cumulative impacts of a proposed project, although a broader concept, have been considered by the Board as a separate class of factors from socio-economic effects in oil sands approval decisions. The Board is supposed to consider cumulative impacts in determining the public interest of projects.¹⁰⁵ On this ground, the EUB had earlier stated that “in regions where cumulative development may result in unacceptable environmental or social effects, consideration of the public interest needs to address acceptable levels of activity and emissions, as well as the most appropriate allocation of development and emissions approvals.”¹⁰⁶ Yet in some of its later decisions, it appears that only the environmental component of cumulative impacts is highlighted by the Board.¹⁰⁷ For instance, in assessing the cumulative impacts of True North’s Fort Hills oil sands project, the Board relied heavily on the work of the Cumulative Environmental Management Association (“CEMA”) and stated:

¹⁰⁴ EUB Decision 2004-005, *supra* note 100 at 82-83.

¹⁰⁵ In fact, at that time, the only guidance on cumulative effects assessment is that provided in *Cumulative Effects Assessment in Environmental Impact Assessment Reports Required under the Alberta Environmental Protection and Enhancement Act* (July 2000) prepared jointly by Alberta Environment (AENV), the Energy and Utilities Board (EUB) and the Natural Resources Conservation Board (NRCB) relating to the scope and content of the cumulative effects assessment in an EIA Report [hereinafter *Cumulative Effects Assessment Guide*], online: NRCB Homepage <http://www.nrcb.gov.ab.ca/Content_Files/Files/NRP_Guides/Cumulative_Effects.pdf>. This is therefore for projects requiring a full EIA Report. For a discussion of the EIA report and its content and relationship with socio-economic impact assessment see Part 4.5.4 above and text accompanying note 361. The federal CEEA is not within the scope of this thesis.

¹⁰⁶ EUB Decision 99-07, *supra* note 93 at 36.

¹⁰⁷ The definition of cumulative effects in the Cumulative Effects Assessment Guide states that it means changes to the environment caused by an activity in combination with other past, present, and reasonably foreseeable human activities. See *Cumulative Effects Assessment Guide*, *supra* note 105 at 2.

In a series of decision in this area, the Board has placed significant reliance on the success of the CEMA process to verify that both existing and future oil sands developments remain in the public interest. The Board believes that CEMA's work is important and that the results will assist the Board in meeting its regulatory mandate to ensure that energy developments are carried out in an orderly and efficient manner that protects the public interest.¹⁰⁸

Looking at the scope of CEMA's mandate and work, it seems that the focus is on the land, water and air components of the environment.¹⁰⁹ There is no evidence that the human or social environment comes within CEMA's work. There is also no indication that socio-economic effects are given adequate attention under the "cumulative impact" rubric of the Board's decisions. Where they are mentioned at all, it is in the context of aboriginal traditional land uses.

In sum, from the pre-and-post 2006 Board decisions, the following principles and conclusions emerge in respect of socio-economic challenges of oil sands development and expansion:

- Social impact is an inevitable consequence of development which could be managed "within acceptable levels." In the late 1990s pressures on public infrastructure and services were identified and future demands were forecast but the Board found that there was, or could be, sufficient infrastructure provided in the region to handle proposed developments at the time.
- Critical socio-economic challenges have to do with the pace of development, and the capacity of the regional environment to accept such developments, without creating level of impacts such that the developments could no longer be seen to be in the public interest.

¹⁰⁸ EUB Decision 2002-089, *supra* note 97 at 55.

¹⁰⁹ CEMA's work includes recommending the best management tools to protect and restore the health of the landscape, vegetation, soil, and watersheds; developing a system that minimizes the long-term environmental impacts on surface water quantity and quality; and recommending actions to keep the air clean and minimize the effects of emissions. See online: Cumulative Environmental Management Association Homepage <<http://cemaonline.ca/index.php/about-us/cema-scope>>. The same applies to the work of the Regional Sustainable Development Strategy for the Athabasca Oil Sands Area ("RSDS").

- The Board answers three key questions to weigh evidence on socio-economic impacts: (i) what is the significance of socio-economic impacts after taking into account efforts to mitigate the impacts; (ii) what is the appropriate mechanism for managing socio-economic impacts; and (iii) who should bear the cost of addressing socio-economic impacts.
- To determine the significance of socio-economic impacts, the Board looks for indications that the impacts are being effectively managed by the appropriate authorities. In other words the Board views socio-economic impacts in light of the mitigation efforts. As long as the responsible government is aware of the impacts and the appropriate authorities are responding to the concerns, the significance of socio-economic impacts of a proposed project diminishes in the Board's process.
- Government has the jurisdiction and the responsibility to ensure that the necessary public infrastructure is in place to accommodate growth in a meaningful and timely manner. Therefore socio-economic impacts can be avoided or reduced to a manageable level with proper planning and immediate response by the appropriate government authorities.
- The regulatory Board does not have the mandate to "resolve" socio-economic challenges. That responsibility rests with the appropriate government bodies in a position to provide direct assistance in such matters. Determination of an appropriate funding mechanism and possible contributors also rests with government. While the Board is required to address socio-economic impacts as part of its review of project proposals, the lead role for ensuring that such impacts are resolved falls to other areas of government charged with addressing socio-economic issues.

- If public infrastructure investments are not made early or in parallel with continued investment in oil sands development, socio-economic issues will increasingly become a critical part of the Board's decision-making regarding oil sands applications. With each additional oil sands project, the growing demands and the absence of sustainable long-term solutions weigh more heavily in the determination of the public interest. Therefore a lack of certainty in the management of the socio-economic impacts on the region is a weighty factor in ERCB's process. Nevertheless, socio-economic impacts, viewed in the light of proposed mitigation, are not weighty enough to delay or deny proposed developments and expansions.
- There was an apparent lack of coordination and insufficient communication among government departments and the various orders of government with respect to oil sands development and expansion. While the role of the RIWG (OSDG) and other regional issues management forums in advancing socio-economic issues are relevant, a process is needed which takes the information accumulated and provides a coordinated and effective channel through which regional and cumulative socio-economic impacts can be addressed in a meaningful and demonstrated way. A framework that would allow both the provincial government and the municipality to confidently plan for and provide infrastructure and services in a manner that is predictable, manageable, and appropriately resourced is a *sine qua non* for major energy developments and expansions such as oil sands.
- While the OSMSC held promise for better coordination and response "within the provincial government," coordinated action must be taken by all orders of government. Continued coordination and cooperation among governments is necessary to enhance the

planning, communication, and response on resource development associated socio-economic and health issues.

- Adequate monitoring and verification of predictions, identifying gaps, establishing indicators, and measuring progress, are powerful catalysts for strategic thinking and collaborative action on socio-economic issues. A formal, coordinated annual compilation and publication of the activities, outcomes and progress statement on socio-economic issues from the existing committees and relevant government departments is necessary. Such annual public reporting on socio-economic issues will serve to provide guidance and focus for the responsible authorities and elected officials.
- The Board relied heavily on the success of the CEMA process in meeting its regulatory mandate to ensure that energy developments are carried out in an orderly and efficient manner that protects the public interest. CEMA's mandate and work does not address, and cannot resolve, shortage of physical infrastructure and public services in energy development regions.

5.5 Provincial Governmental Efforts to Deal with Oil Sands Development Expansion Challenges

While the Government of Alberta was aware of the socio-economic challenges of oil sands development and expansion, it did not get involved or seek a coordinated solution early. In fact, in the 2002 Fort Hills oil sands application by TrueNorth, the Government of Alberta recommended that the Board include a condition in the approval that would require TrueNorth to spearhead a joint industry-municipality initiative to address the lack of affordable housing in the region. As at 2002, therefore, Alberta was aware but unengaged with socio-economic challenges of energy development. It just did not see the challenges as provincial government responsibility.

The provincial government only began to show some interest after the presentation of the Wood Buffalo Business Case 2005 and the tour of the region by MLAs and Cabinet members in July 2005. The following are some initiatives the government adopted including commissioning independent inquiries and formulating new policies.

5.5.1 Independent Reports

Investing in our Future: Responding to the Rapid Growth of Oil Sands Development

The RMWB interventions at the regulatory Board and a change in leadership of the provincial government, in part, led to a new relationship between the provincial government and the RMWB.¹¹⁰ The Oil Sands Ministerial Strategy Committee (“OSMSC”) was directed by the provincial Cabinet to develop a coordinated short-term action plan to address the social, environmental and economic impacts of oil sands development in local communities. The OSMSC commissioned an inquiry to support that initiative and to provide a foundation of facts and information about oil sands developments at that time and the most likely forecasts for the next five years (2006-2011). The inquiry resulted in a final Report, *Investing in our Future: Responding to the Rapid Growth of Oil Sands Development* (the “Radke Report”). The report identified significant current and anticipated gaps in infrastructure and services in critical areas, and provided 30 recommendations to address the challenges surrounding oil sands developments.¹¹¹ Apart from funding challenges,¹¹² the Report found that planning for new municipal infrastructure and updating various infrastructure master plans were major

¹¹⁰ Municipal Affairs began working with the RMWB and RIWG on a Municipal Fiscal Impact Model designed, inter alia, to forecast future revenue streams as a means of quantifying the extent of the municipality’s ability to pay for needed infrastructure. See *Investing in our Future*, *supra* note 19 at 123.

¹¹¹ *Ibid.* at 4, 8-16. The Radke Report is seen by some as “kick starting” a new commitment by the Alberta Government to recognize and address several outstanding socio-economic issues affecting the Fort McMurray area stemming from the rapid pace of oil sands development.

¹¹² The Report stated that “It is, perhaps, unfair to expect a relatively small regional municipality to undertake all of the investment necessary to ensure the future prosperity of the entire province.” *Ibid.* at 123 and 137.

undertakings that require a significant amount of time and resources to accomplish. Yet future population forecasts which are dependent on oil sands project announcements, regulatory approvals, and timing of construction, are all done without coordination with the host municipality.¹¹³

According to the Report, the challenges in securing appropriate and timely services and infrastructure during periods of high growth are due in part to policy anomalies that may require changes to statutes or to regulation.¹¹⁴ The Report found that a number of lessons can be learned from the manner in which the province has identified, managed and responded to unexpected and unprecedented growth in the oil sands areas. These lessons call for new approaches to future planning, decision-making and coordination activities.¹¹⁵ Integrated decision-making was specifically noted as one of the elements lacking in the regulatory framework.¹¹⁶ Among the recommendations was a coordinated decision-making process that considers all priority needs at the same time, and a common forecast model designed to address planning needs in health, education, infrastructure, and other necessities.¹¹⁷

¹¹³ *Ibid.* at 78-79.

¹¹⁴ *Ibid.* at 145.

¹¹⁵ *Ibid.* at 116.

¹¹⁶ It was noted that while information exists in every department about the trends, issues, problems and potential solutions to myriad issues, the information does not seem to be regularly packaged in a cohesive, coordinated and comprehensive way that allows decision makers to address an issue in an integrated fashion. And even when that does happen, as in the case of the report prepared by a multi-department committee in response to the original RMWB Business Case in 2003, it is not always immediately apparent what decisions, if any, resulted at the central decision-making level. See *ibid.* at 118.

¹¹⁷ *Ibid.* at 9 and 98. Apart from lack of hard infrastructure the Report found, citing the quality of life indicators published by Federation of Canadian Municipalities, that quality of life and availability of key social services in the community are also important factors to consider in preparing for and addressing growth. These indicators include affordable housing, civic engagement, community and social infrastructure, education, local economy, natural environment, personal and community health, personal financial security, and personal safety.

Oil Sands Consultations: Multi-stakeholder Committee Final Report

In 2005, the provincial government accepted the recommendations of the Oil Sands Consultation Advisory Group (“CAG”)¹¹⁸ including the formation of a Multistakeholder Committee (“MSC”) to lead the public consultation on the development of Alberta’s oil sands. The MSC was formed in 2006 and produced its Final Consultation Report in June 2007.¹¹⁹ In the Report, there was consensus that the government has the role to provide an effective governance structure for oil sands development which considers all aspects of development, from exploration to reclamation and all the needs in between relating to economic, social and environmental issues.¹²⁰ A vision framework was proposed.

Among the visions were to (a) provide a high quality of life; (b) build healthy communities; (c) provide high quality infrastructure and services for all Albertans; and (d) provide world class governance. The principles underlying these visions include: (i) planning and implementation of orderly development; (ii) timely funding, planning and delivery of infrastructure and services at the same pace with development;¹²¹ (iii) certainty and flexibility in regulatory structures and systems upheld through government regulations, policies and plans;¹²² and (iv) aligning and coordinating the actions of the province, municipalities and other parties to maximize resources, integrate policies, share information, and assess performance.¹²³ The recommended strategies

¹¹⁸ Concerns about the consultation process for the Mineable Oil Sands Strategy led to the formation of the CAG with a mandate to recommend a public consultation process for oil sands development.

¹¹⁹ Alberta, *Oil Sands Consultations: Multi-stakeholder Committee Final Report* (Edmonton: Alberta Energy, 2007), online: Alberta Energy Homepage <http://www.energy.alberta.ca/OilSands/pdfs/FinalReport_2007_OS_MSC.pdf> [hereinafter *Multi-stakeholder Committee Final Report*].

¹²⁰ *Ibid.* at 5.

¹²¹ *Ibid.* at 14.

¹²² It was noted that the Government of Alberta, as steward of the resources, is responsible for regulatory reevaluating and adjusting, as necessary, its legislation, regulations, policies, fiscal terms and plans to ensure orderly development and to maximize the public’s benefits from development.

¹²³ *Multi-stakeholder Committee Final Report*, *supra* note 119 at 2 and 15.

included adopting and implementing standardized quality of life indicators for all Alberta communities. These indicators would be used to assess communities on a regular basis, and to develop and implement plans to address identified deficiencies in oil sands impacted communities.¹²⁴

Among the recommended key actions were advance planning and forecasting to provide resources ahead of their need in order to reduce the impact of increases in activity and population.¹²⁵ These key actions would be performed within an effective governance structure for oil sands development. Governance was considered to be one of the most important elements in achieving the proposed visions and there was consensus on the critical need for better coordination, communication and understanding, integration and planning across governments. The MSC Report recommended that the provincial government undertake a thorough and transparent review of legislation, policies and institutional structures, in order to identify gaps, strengths and weaknesses as they relate to oil sands development. The results of this review would be used to plan decisively, to fill the gaps, and to ensure accountability for outcomes.¹²⁶ It is notable that the municipal sector did not support a moratorium on new oil sands development. The municipal sector argued that if the recommendations of the Radke Report were implemented along with continued cooperation between the RMWB and the provincial government in respect of planning and development of social support systems and regional infrastructure and service needs, oil sands should proceed at an orderly pace and be very beneficial to all Albertans.¹²⁷

¹²⁴ *Ibid.* at 17.

¹²⁵ *Ibid.* at 24 and 28.

¹²⁶ *Ibid.* at 29. A new ministerial portfolio was suggested with responsibility and authority for cross-ministry communication, integration, co-ordination and planning of oil sands development so the visions are achieved and principles are followed. It was also recommended that the mineral disposition process is communicated clearly to Albertans and others.

¹²⁷ *Ibid.* at 51.

5.5.2 Provincial Government Policies

Land-Use Framework

As the socio-economic and other challenges associated with oil sands development gathered momentum, academic and other critics blamed the government for lack of prior planning for development in Alberta.¹²⁸ Critics called for legally-mandated planning processes and legally binding land-use plans.¹²⁹ The government of Alberta took up the challenge and commissioned an inquiry in 2005 on the development of an Alberta Land-Use Framework. The Report of the inquiry noted that cracks had appeared in the existing policy approach to land management which reflected the combined pressures of population growth and economic development. The Report recommended a comprehensive and integrated Land-Use Framework for handling both current tensions and the inevitable future pressures.¹³⁰ The provincial government commenced work on an integrated Land-Use Framework. Municipal consultation on the provincial Land-Use Framework initiative was conducted by a private consulting company hired by the province, the Praxis Group.¹³¹ No intergovernmental consultation or discussions took place between the

¹²⁸ At a press conference on July 31, 2006, Premier Klein admitted that the Alberta government did not have a plan to deal with the development challenges. Premier Klein was quoted as saying, "I think that we've handled as best as we possibly can...initially, we handled it by reacting to the pressure areas like Fort McMurray, Grande Prairie, Brooks and so on [and] now we're putting in place very specific plans to deal with the growth." See CBC News Edmonton, "Klein admits government had no plan for boom" (1 September 2006), online: CBC Homepage <<http://www.cbc.ca/news/canada/edmonton/story/2006/09/01/klein-no-plan.html>>

¹²⁹ See N. Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis* (Canadian Institute of Resources Law Occasional Paper #21 August 2007) at 7 and the literature cited therein [hereinafter *Regulatory Framework for Oil Sands*]. See also J. Hierlmeier & D. Watt, *Submissions to the Oil Sands Panel on Developing a Framework for Oil Sands Development in Alberta* (Edmonton: 26 September 2006), online: <<http://www.oilsandsconsultations.gov.ab.ca>>.

¹³⁰ See R. Gibbins and B. Worbets, *Managing Prosperity Developing a Land Use Framework for Alberta* (Calgary: Canada West Foundation, September 2005) at 1, online: Canada West Foundation Homepage <https://www.landuse.alberta.ca/Documents/LUF_Managing_Prosperty_Developing_a_Land_Use_Framework_for_Alberta_Report-2005-09.pdf> [hereinafter *Managing Prosperity*]. The Canada West Foundation was hired by Alberta Sustainable Resource development to conduct a scoping exercise relating to the Government of Alberta's commitment to develop a comprehensive land use policy for the province.

¹³¹ Alberta, *Municipal Consultation on the Provincial Land Use Framework Initiative Summary Report* (November 2006), online: Land-Use Secretariat Homepage <https://www.landuse.alberta.ca/Documents/LUF_Municipal_Consultation_on_the_Provincial_Land_Use_Framew

province and the municipalities on the Land-Use Framework. Rather, individual municipal views collected from the Praxis workshops were collapsed into broad themes and submitted along with the view of the public.¹³²

In December 2008, the provincial government delivered the Land-Use Framework (“LUF”) as the blueprint for smart growth.¹³³ The LUF established seven strategies to improve land-use decision-making in Alberta including developing seven land-use regions and regional land-use plans,¹³⁴ creating a central Land-Use Secretariat, and a Regional Advisory Council for each region. For the first strategy, the LUF stated:

[there is no] formalized coordination between Government of Alberta land-use decisions on Crown lands and municipal land-use decisions. To remedy this, the government will create seven new land-use regions and develop a regional plan for each. The regional plans will integrate provincial policies at the regional level; set out regional land-use objectives and provide the context for land-use decision-making within the region; and reflect the uniqueness and priorities of each region. Municipalities, other local authorities and provincial government departments will be required to comply with each regional plan.¹³⁵

The Land-Use Secretariat was established as a formal governance structure with a mandate to develop Regional Plans. It worked in conjunction with government departments with an interest in land use, and in consultation with Regional Advisory Councils that provided advice on trade-off decisions regarding land-uses, and set thresholds for cumulative effects. Members of the Regional Advisory Councils are appointed by the provincial government and include municipal

ork_Initiative_Report-2006-11.pdf> [hereinafter *Municipal Consultation*]. The methodology for municipal consultation and how the conclusions were derived was described in the Report.

¹³² See online: Environment and Sustainable Development Homepage <<https://www.landuse.alberta.ca/Governance/MunicipalLocalPlanning/Pages/default.aspx>>

¹³³ Alberta, *Land-Use Framework* (December 2008), online: Land-Use Secretariat Homepage <https://www.landuse.alberta.ca/Documents/LUF_Land-use_Framework_Report-2008-12.pdf> [hereinafter *LUF*].

¹³⁴ Lower Peace, Upper Peace, Lower Athabasca, Upper Athabasca, North Saskatchewan, South Saskatchewan, and Red Deer.

¹³⁵ *LUF*, *supra* note 133 at 3.

government interests.¹³⁶ However the members provide a perspective based on their personal knowledge of the region and not that of the organizations they are affiliated with. Apart from the public sessions and general stakeholder consultations, there appears to be no role assigned to municipal authorities in the development of Regional Plans. After Regional Plans are in place, the Secretariat will, among other duties, communicate with local planning bodies to clarify and interpret Regional Plans.¹³⁷ Among the five immediate priorities that the provincial government proposed to implement under the LUF was the ALSA discussed in chapter 4 above.¹³⁸

20-Year Strategic Capital Plan to Address Alberta's Infrastructure Needs¹³⁹

While the LUF was still in the works, the Government of Alberta launched its 20-year strategic capital expenditure plan to address infrastructure needs generally in Alberta up to 2028. Recognizing that modern and efficient infrastructure is key to Alberta's energy future, the plan provides a long-term blueprint to guide decisions about infrastructure projects and essential support to municipalities to maintain quality of life. The 20-year strategic capital plan states that it uses a coordinated approach to anticipate and manage growth and to ensure that the right infrastructure is where it is required at the right time through wide-ranging demographic and economic forecasts. The strategic capital plan focuses on three time spans: (a) short-term plans – the most predictable and certain including projects already funded or announced; (b) medium-term plans – based on projections and forecasts of infrastructure needs given changes in

¹³⁶ The Alberta Association of Municipal Districts and Counties and the Alberta Urban Municipalities Association have representation on each Regional Advisory Council.

¹³⁷ *LUF*, *supra* note 133 at 29.

¹³⁸ S.A. 2009, c. A-26.8.

¹³⁹ Alberta, *Alberta's 20-Year Strategic Capital Plan to address Alberta's infrastructure needs* (Edmonton: Department of Finance, 29 January 2008), online: <<http://finance.alberta.ca/business/planning-accountability/Alberta-20-Year-Strategic-Capital-Plan.pdf>> [hereinafter *Alberta's 20-Year Strategic Capital Plan*].

population and economy;¹⁴⁰ and (c) longer-term plans – to build on the success of completed short-term and medium-term projects to fulfill the vision for Alberta in 2028.

The plan targets priority infrastructure in eight key areas: municipal infrastructure; provincial highway network, other transportation and corridors;¹⁴¹ health facilities; schools; post-secondary facilities; housing and provincial government projects; community facilities; and water and wastewater facilities. While broad objectives and priorities are outlined, the details of specific projects, their costs and timelines are left to government's ongoing budget process and as part of individual ministry business plans.¹⁴² For municipal infrastructure, the provincial government committed, in the short-term, to providing municipalities with long-term sustainable funding to assist them in meeting the challenges of growth. This includes a number of grant programs such as the Municipal Sustainability Initiative and the Alberta Municipal Infrastructure Program.¹⁴³ In the medium term, details of future funding programs are to be determined based on an ongoing assessment of needs and priorities.¹⁴⁴ Through partnerships with municipalities the provincial government committed to providing community facilities such as arts and cultural facilities, museums, parks, and sports and recreation centers that are key to enhancing the quality of life in

¹⁴⁰ Specific details, timelines, and the necessary resources will be announced as part of the provincial government's ongoing budget process. *Ibid.* at 12.

¹⁴¹ This includes infrastructure necessary to support the development and extraction of oil sands and the planned refining developments in Alberta's Industrial Heartland.

¹⁴² There are three primary funding sources for Alberta's Capital Plan: current year revenue; the Capital Account, and alternative financing. Alternative financing for capital projects may include direct government borrowing, capital leases, bonds, public-private partnerships (P3) and borrowing by local authorities. Looking ahead, the provincial government will determine how the required level of capital spending will be funded. *Alberta's 20-Year Strategic Capital Plan*, *supra* note 139 at 7 and 70.

¹⁴³ Other ongoing grant programs are the City Transportation Fund, Basic Capital Grant, Provincial Highway Maintenance Grant, and the Streets Improvement Program.

¹⁴⁴ Short-term plans also include federal flow-through funding for affordable and off-reserve aboriginal housing. *Alberta's 20-Year Strategic Capital Plan*, *supra* note 139 at 53. Medium-term plans include new affordable housing units in municipalities and additional funds to maintain existing units and provide temporary shelter.

communities and supporting the health and wellness of Albertans.¹⁴⁵ The Government of Alberta proposes to monitor this strategic capital plan and issue a progress report on an annual basis.¹⁴⁶

Provincial Energy Strategy¹⁴⁷

Challenged by critics for lack of comprehensive strategy and plans, the provincial government released the Provincial Energy Strategy in December 2008, shortly after the LUF. The Strategy is said to be an action plan that reflects the resourceful and responsible approach Alberta will take toward the long-term development of its energy resources. The Provincial Energy Strategy includes an energy vision, desired outcomes, and the series of levers toward Alberta's energy future. The vision is to make Alberta remain a global energy leader recognized as a responsible world-class energy supplier; an energy technology champion; a sophisticated energy consumer; and a solid global environmental citizen. One of the assertions that represent fundamental guideposts is that Alberta will invest in energy infrastructure and policy development.¹⁴⁸ Investment in this context is defined as funding for tangible infrastructure, and time and effort on policies, regulations and institutional capacity that promote and ensure efficient and sustainable development.

The actions to realize the vision include ensuring alignment with related provincial and federal initiatives, and changes to ensure that other provincial government regulatory and institutional

¹⁴⁵ *Ibid.* at 56-7. Programs include the Major Community Facilities Program which provides financial support to assist municipalities and not-for-profit organizations to plan, upgrade and develop large outdoor and indoor community-use facilities, and the Community Facilities Enhancement Program.

¹⁴⁶ *Ibid.* at 76.

¹⁴⁷ Alberta, Provincial Energy Strategy (Edmonton: Department of Energy, December 2008), online: Alberta Energy Homepage <http://www.energy.alberta.ca/Org/pdfs/AB_ProvincialEnergyStrategy.pdf> [hereinafter *Provincial Energy Strategy*]. See also Alberta, News Release, "Provincial Energy Strategy charts course for sustainable prosperity" (11 December 2008).

¹⁴⁸ *Provincial Energy Strategy, ibid.* at 20.

policies align with the energy strategy.¹⁴⁹ It was noted that many provincial government departments and the private sector will be directly involved in executing the strategy. It will also encompass the activities of a number of energy agencies, including the AUC and the ERCB.¹⁵⁰ There is no indication of coordination with municipalities in infrastructure investment or implementation of the strategy.

Responsible Actions: A Plan for Alberta's Oils Sands¹⁵¹

The provincial government did not stop at the energy strategy. In February 2009, the government released *Responsible Actions: A Plan for Alberta's Oils Sands*, which is Alberta's 20-year strategic plan specifically for oil sands development. Building on existing government policies, particularly the Provincial Energy Strategy and Land-use Framework,¹⁵² the Plan outlines an integrated approach for all orders of government, industry, and communities to address the economic, social and environmental challenges and opportunities in the oil sands regions and in the Industrial Heartland. It identifies short-term priority actions to address immediate challenges associated with oil sands development, looks to the future to guide long-term investment in social and physical infrastructure and people, and identifies ways to improve planning and coordination.¹⁵³

¹⁴⁹ *Ibid.* at 31.

¹⁵⁰ *Ibid.* at 47.

¹⁵¹ Alberta, *Responsible Actions: A plan for Alberta's Oils Sands* (Edmonton: Department of Energy, February 2009), online: Alberta Energy Homepage <http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions_web.pdf> [hereinafter *Responsible Actions*]. See also Alberta, News Release, "Province outlines long-term development plan for Alberta's oil sands" (12 February 2009).

¹⁵² It also builds on best practices and stakeholder consultations outlined in three reports, (a) *Investing in our Future: Responding to the Rapid Growth of Oil Sands Development*; (b) *Oil Sands Consultations: Multi stakeholder Committee Final Report*; and (c) *Oil Sands Consultations: Aboriginal Consultation Final Report*.

¹⁵³ *Responsible Actions*, *supra* note 151 at 10.

The Plan comprises visions with guiding principles, desired outcomes, and strategies to achieve the outcomes. The long-term vision for the oil sands is that development occurs responsibly, sustains growth for industry and the province over the long term, and done in a manner that enhances the quality of life of Albertans. Among the guiding principles are: (a) to foster healthy communities by managing social impacts and improving the quality of life for present and future generations; (b) to seek intergovernmental co-operation that respects the constitutional division of powers when addressing issues of mutual concern, collaborate and encourage co-operation, participation, and partnership with key stakeholders; and (c) to support economically efficient regulatory structures within the public interest, consider input from all interested parties and communicate actions clearly to stakeholders.¹⁵⁴ Some of the desired outcomes are optimized economic growth and increased quality of life for Albertans. The most relevant for our purpose among the strategies to achieve these outcomes is to promote healthy communities and a quality of life that attracts and retains individuals, families, and businesses.¹⁵⁵

In order to maximize industrial infrastructure and address workforce needs to support economic development of the oil sands, the Plan proposed establishing innovative partnerships with industry, the federal government, and municipalities to facilitate timely investment in infrastructure.¹⁵⁶ The Plan also proposed development of sustainability indicators at the community, regional, and provincial level to measure social, economic, and environmental performance, and report to the public annually. The Plan put increased emphasis on

¹⁵⁴ *Ibid.* at 9.

¹⁵⁵ Strategy 2. See *Ibid.* at 11 and 20-23. In the 2011 Annual Progress Report, it was noted that over five years the Government of Alberta invested nearly \$1.8 billion on infrastructure projects in the Athabasca Oil Sands Area to help build communities that families are proud to call home. Projects include three new schools, the Athabasca River Bridge, important interchanges, the twinning of Highway 63, and improvements to water and sewage facilities. See Alberta, *Progress Report 2011 Responsible Actions: A Plan for Alberta's Oil Sands* (Edmonton: Department of Energy, 2011) at 6.

¹⁵⁶ *Responsible Actions*, *ibid.* at 27.

intergovernmental collaboration, seamless and timely communication among stakeholders and all planes of government, and effective engagement processes and information-sharing. However, references to intergovernmental relations are limited to relations between the Government of Alberta and the federal government, First Nations, and other provinces or territories.¹⁵⁷

For implementation, the Plan would be used by the Land-Use Secretariat in leading the development of Regional Plans for the oil sands areas. Many areas requiring integrated solutions through cross-ministry approaches will be led or coordinated by the Oil Sands Sustainable Development Secretariat (“Oil Sands Secretariat”) in collaboration and partnership with Government of Alberta ministries and stakeholders. The Oil Sands Secretariat was created by the Government of Alberta in the summer of 2007 to address rapid growth issues in the oil sands regions of Alberta. The Secretariat collaborates with ministries, industry, communities and stakeholders to address the social, infrastructure, environmental and economic impacts of oil sands development. On May 8, 2012, the Oil Sands Secretariat became part of Alberta Energy.¹⁵⁸

Comprehensive Regional Infrastructure Sustainability Plan for the Athabasca Oil Sands Area

To assist in achieving the vision for oil sands development outlined in *Responsible Actions*, the Oil Sands Secretariat developed a social and infrastructure assessment model to determine the social investment that is required to provide the public services and goods associated with oil sands development. This model is called the *Comprehensive Regional Infrastructure*

¹⁵⁷ *Ibid.* at 46. See also the Implementation Plan, online: Alberta Energy Homepage <<http://www.energy.alberta.ca/pdf/OSSResponsibleActionsImplementation.pdf>>

¹⁵⁸ See online: Alberta Energy Homepage <<http://www.energy.alberta.ca/Initiatives/3214.asp>>

Sustainability Plans (“CRISP”).¹⁵⁹ CRISP is a key implementation activity under Strategy 2 of *Responsible Actions*. The plans are long-term collaborative frameworks to planning infrastructure in Alberta’s three oil sands areas based on possible future oil sands production rates and associated population growth. They are said to enhance the way provincial and municipal governments work and plan together.¹⁶⁰

The scope of these plans are specific to infrastructure that is critical to facilitating the further development of the oil sands, increasing quality of life in communities, as well as attracting and retaining workers. They cover a wide range of infrastructure including schools, health facilities, water and wastewater treatment, transportation and multi-use corridors.¹⁶¹ Each CRISP will make recommendations to the province’s capital planning process, which considers overall provincial priorities in addition to regional needs. The Athabasca Oil Sands Area CRISP was released in April 2011.¹⁶² It was noted in the Athabasca Oil Sands Area CRISP that its successful implementation will require extensive coordination across the various departments of the Government of Alberta, as well as between all orders of government and industry. However, the Government of Alberta will serve as the primary coordinating body for implementing the CRISP. Activities will include completing the Urban Development Reserve project for timely release of

¹⁵⁹ Comprehensive Regional Infrastructure Sustainability Plan, online: Alberta Infrastructure Homepage <http://www.infrastructure.alberta.ca/Content/docType3702/production/AOSA_CRISP_Final.pdf> [hereinafter *CRISP*]

¹⁶⁰ Each CRISP will identify what infrastructure will be needed (but not the funding mechanism) based on incremental population growth and oil sands production levels to a maximum of 6 million barrels per day (the estimated amount that potentially could be reached by the year 2045), and will recommend the sequence in which the infrastructure should be developed. See online: Alberta Energy Homepage <<http://www.energy.alberta.ca/Initiatives/3224.asp>>

¹⁶¹ Other types of hard and soft infrastructure, including emergency services, waste management facilities and recreation facilities are not covered under CRISP.

¹⁶² See Athabasca Oil Sands Area CRISP (April 2011), online: Alberta Energy Homepage <http://www.energy.alberta.ca/pdf/ossAOSA_CRISP_Final.pdf> [hereinafter *AOSA CRISP*]. The CRISP for the Cold Lake Oil Sands Area is currently underway and that for the Peace River Oil Sands Area will be completed over the next two years.

Crown land, determining potential funding mechanisms, and integrating the CRISP with regional planning efforts under the Land-Use Framework.¹⁶³

The Urban Development Sub-Region¹⁶⁴

Pursuant to its commitment under the Athabasca Oil Sands Area CRISP, the Government of Alberta entered into a Memorandum of Understanding with the RMWB on August 29, 2011 (“MOU”).¹⁶⁵ The MOU outlined a framework of cooperation to establish the Fort McMurray Urban Development Sub-Region (“UDSR”) in the area surrounding Fort McMurray that will facilitate land-use planning, timely release of land for urban development, and efficient infrastructure planning and construction to accommodate population growth and urban expansion.¹⁶⁶ The UDSR is a provincially-designated area of Crown land within which urban development is the primary intended land use. It gives the municipality jurisdiction over sufficient land to undertake residential, commercial and industrial development in the long term. According to Mayor Melissa Blake, “[n]ever before has Wood Buffalo had such a close, respectful relationship with the provincial government.”¹⁶⁷

The Oil Sands Secretariat, on behalf of the Government of Alberta, leads the preparation, designation, approval and subsequent implementation of the UDSR. These include establishing

¹⁶³ *Ibid.* at 4.

¹⁶⁴ See online: Land-Use Secretariat Homepage

<<https://www.landuse.alberta.ca/Governance/SubregionalIssueSpecificPlans/Pages/default.aspx>>

¹⁶⁵ Memorandum of Understanding between the Province of Alberta and the Regional Municipality of Wood Buffalo (29 August 2011). See online: Alberta Energy Homepage
<<http://www.energy.alberta.ca/pdf/FtUDSRBackgrounder.pdf>>

¹⁶⁶ A sub-Regional Plan goes into more depth than a Regional Plan to address a sub-regional concern or specific issue. If accepted by Cabinet a sub-Regional Plan can be incorporated into an ALSA Regional Plan. See ALSA, *supra* note 138, s. 10.

¹⁶⁷ Regional Municipality of Wood Buffalo, Media Release, “Province to release 20-year land supply to Wood Buffalo for urban development” (29 August 2011).

its boundaries and associated setbacks to ensure appropriate interface between urban development and oil sands development.¹⁶⁸ The RMWB is responsible to plan urban development within the UDSR, including the determination of priority growth areas, municipal infrastructure required to facilitate development, and services to support development within those areas. The RMWB will approve statutory plans and process subdivision and development applications pursuant to the MGA. The MOU also outlined a framework of cooperation to establish an advisory Athabasca Oil Sands Area Transportation Coordinating Committee (“TCC”). The TCC will advise the Alberta government on the current and future transportation needs of the Athabasca oil sands region. It will also coordinate multi-modal transportation planning, construction, operations and maintenance, including roads, transit, rail and air traffic, in priority order, first by the Fort McMurray UDSR, and second by the Athabasca Oil Sands Area.¹⁶⁹ On July 25, 2013, the Alberta Government announced the UDSR comprising more than 55,000-acres of Crown land available for sale to the RMWB for urban expansion in Fort McMurray.¹⁷⁰

Regional Plans and the Lower Athabasca Regional Plan, 2012-2022

Regional Plans among other purposes: (a) reflect the vision, principles and outcomes of the LUF and align provincial policies; (b) define regional outcomes (economic, environmental and social) and a broad plan for land and natural resource use for public and private lands; (c) define the cumulative effects management approach for the region, identifying targets and thresholds; and

¹⁶⁸ See also the two-phased land release strategy for Fort McMurray in Alberta, News Release, “New plan for land gives Fort McMurray room to grow” (21 March 2012).

¹⁶⁹ The TCC has municipal, industry and provincial representatives. The Mayor of RMWB was quoted to have said, “[b]y having the municipality as part of this committee, a local perspective is guaranteed to be present and active in transportation decision making. We look forward to collaborating with the Province and industry to improve and enhance our transportation networks and resolve the region’s transportation challenges.” See Alberta, News Release, “New advisory body to coordinate transportation planning in oil sands region” (4 January 2012).

¹⁷⁰ Alberta, News Release, “Building Fort McMurray” (25 July 2013).

(d) as government land-use policies for the region, provide direction and context for local statutory plans while recognizing the authority and role of municipalities in local decision-making.¹⁷¹ Regional Plans propose to manage the environmental and community effects of development within the combined impact of all activities, support conservation and stewardship, and address community infrastructure and recreational needs.¹⁷² Apart from various responsibilities assigned to statutory decision-makers in relation to their respective mandates, Regional Plans are mainly administered by the Cabinet, the Stewardship Minister, the Stewardship Commissioner, and the Land-Use Secretariat.¹⁷³

The Lower Athabasca Regional Plan (the “LARP”) was approved by the Government of Alberta on August 22, 2012, became effective September 1, 2012, making it the first Regional Plan to be completed under the LUF and ALSA.¹⁷⁴ The Regulatory Details Plan of the LARP has legal force and binds the Crown, decision-makers, local government bodies and all other persons

¹⁷¹ See online: Land-Use Secretariat Homepage

<<https://www.landuse.alberta.ca/Governance/MakingAmendingRegionalPlans/Pages/default.aspx>>

¹⁷² See online: Land-Use Secretariat Homepage

<<https://www.landuse.alberta.ca/Governance/NatureEffectofRegionalPlans/Pages/default.aspx>>

¹⁷³ See online: Land-Use Secretariat Homepage

<<https://www.landuse.alberta.ca/Governance/Administration/Pages/default.aspx>>. The Cabinet provides provincial oversight of planning, decides terms of reference for Regional Plans, make final decisions on its content, ensures integration of provincial land-use related policies and implemented of Regional Plans to achieve provincial outcomes. The Stewardship Minister is responsible for administering ALSA and has many responsibilities thereto. The Stewardship Commissioner oversees the development, implementation, review and amendment of Regional Plans, reviews and investigates complaints of non-compliance, and may issue Interpretation Bulletins if further explanation or clarification of the Act or Regional Plan is needed. The Land-Use Secretariat reports to the Stewardship Commissioner and works independently of a provincial department subject only to directives issued by the Stewardship Minister. Among other duties, the Secretariat supports development of the terms of reference and leads development of Regional Plans, communicates with local planning bodies to clarify and interpret Regional Plans, supports policy reconciliation and advises regional bodies on provincial policy, assists provincial departments, municipalities and other local authorities in reconciling their respective roles under the LUF, and ensures application of cumulative effects assessments.

¹⁷⁴ Alberta, the *Lower Athabasca Regional Plan*, O.C. 268/2012 (*Alberta Land Stewardship Act*) [hereinafter LARP]; and Alberta, News Release, “Albertans help shape responsible growth for oil sands region” (23 August 2012).

subject to the right of variance under section 15.1 of the ALSA.¹⁷⁵ The rest of the LARP are statements of provincial policy to provide guidance for activities in the region which, nevertheless, must be considered by all decision-makers and local government bodies in the exercise of their functions.¹⁷⁶

One significant provision on the binding effect of the LARP is 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, simply because of the Crown's non-compliance with a provision of either the LARP Strategic Plan or the LARP Implementation Plan, or because of the incompleteness by the Crown or anybody of any direction or commitment made in a provision of these LARP policy statements.¹⁷⁷ This provision seems to specifically direct decision-makers upon receiving such requests as that made by the RMWB to the EUB in 2006. The RMWB had asked the Board to delay approval of oil sands projects pending its collaboration with senior orders of government and industry to formulate an appropriate plan and assign financial responsibility to resolve outstanding infrastructure issues.¹⁷⁸ Further, although the LARP states that it will employ various reporting mechanisms including annual reports, the legally enforceable reporting timelines are those in the ALSA¹⁷⁹ and Regulatory Details Plan Part 1, section 9(1). Under this provision, the designated Ministers responsible for certain specified

¹⁷⁵ LARP, *ibid.*, Regulatory Details Plan Part 1, s. 6. LARP has four key components: (a) the Introduction which informs; (b) the Strategic Plan which guides by providing the vision for the future of the region along with desired regional outcomes; (c) the Implementation plan which directs by providing regional objectives, strategies and actions, to achieve the regional vision and outcomes, and indicators to measure and evaluate progress; and (d) the Regulatory Details Plans which enables achieving the strategies. LARP, *ibid.* at 6.

¹⁷⁶ LARP, *ibid.*, Regulatory Details Plan Part 1, ss. 4, 5 and 7.

¹⁷⁷ *Ibid.*, s.7(3).

¹⁷⁸ EUB Decisions 2007-013, *supra* note 75; EUB Decisions 2006-128, *supra* note 69; and EUB Decision 2006-112, *supra* note 63.

¹⁷⁹ See ALSA, *supra* note 138, ss. 6 and 58.

elements or provisions of the LARP are required to report a minimum of once within the first 4 years, and a minimum of once within the following 5 years after the expiry of the first 4 years.

Recognizing that the rapid rate of growth in the Lower Athabasca Region is expected to continue, and the ability to attract and retain skilled workers is essential to enable the region's future economic growth and diversification, the LARP policies note the need to meet increased demands on the region's social and physical infrastructure and for more recreation opportunities.¹⁸⁰ Also noting that investment and work on oil sands projects begin years in advance of production and that planning process should focus on anticipated investment and population growth, the LARP policies suggest a proactive approach to planning for infrastructure and urban growth to ensure the region is an attractive place to live and do business. Accordingly, the LARP projects for the next 50 years concentrating on desired environmental, economic and social, outcomes and actions for the region including: (a) setting regional environmental limits and triggers for air and surface water quality, and regional groundwater management framework with interim triggers;¹⁸¹ (b) establishing six new conservation areas; (c) addressing infrastructure challenges and new strategies to plan for urban development around Fort McMurray; and (d) creation of nine new provincial recreation areas.¹⁸²

The vision for the LARP describes a desired future in which the region's diverse economic opportunities are balanced with social and environmental considerations using a cumulative

¹⁸⁰ LARP, *supra* note 174 at 31 and 59.

¹⁸¹ See LARP, *ibid.*, Regulatory Details Plan: Part 4 Air Quality, Part 5 Surface Water Quality, Part 6 Groundwater; Schedule A: Air Quality Management Framework Limits and Triggers; Schedule B: Surface Water Quality Management Framework Limits and Triggers; and Schedule C: Groundwater Management Framework Interim Quality Triggers.

¹⁸² See online: Land-Use Secretariat Homepage

<<https://www.landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/Pages/default.aspx>>

effects management approach. To support the achievement of the three province-wide outcomes under the LUF¹⁸³ and the LARP vision, the LARP identifies seven desired regional outcomes among which are: (a) infrastructure development that supports economic and population growth; and (b) enhanced quality of life of residents through increased opportunities for recreation and active living.¹⁸⁴ The LARP adopts strategic directions and implementation plans to achieve these regional outcomes. For implementing the first regional outcome, the LARP uses the Athabasca Oil Sands Area CRISP to augment and facilitate the planning in the growth pressure areas identified in Alberta's 20-Year Strategic Capital Plan.¹⁸⁵ To respond effectively to changing circumstances and new information, a series of economic, environmental and social indicators and strategies identified in Tables 1 and 2 of the LARP Implementation Plan will be regularly monitored, evaluated and reported to assess whether regional outcomes and objectives are being achieved.¹⁸⁶

These indicators include current, approved and pending oil sands projects, regional population, traffic counts, cost of living, rental affordability, satisfaction with recreational opportunities within the region, area per capita of parks or designated open space for recreation, and recreation infrastructure such as number of campsites and kilometers of designated trails.¹⁸⁷ In this regard, the Designated Minister shall establish and maintain programs monitoring and evaluating the status of each supporting indicator, and the effectiveness of each strategy in achieving the

¹⁸³ Healthy economy supported by our land and resources, Healthy ecosystems and environment, and People-friendly communities with ample recreational and cultural opportunities.

¹⁸⁴ See LARP, *supra* note 174 at 37. Other LARP desired outcomes are that: economic potential of oil sands resource is optimized; region's economy is diversified; landscapes are managed to maintain ecosystem function and biodiversity; Air and water are managed to support human and ecosystem needs; and aboriginal peoples are included in land-use planning.

¹⁸⁵ LARP, *ibid.* at 58-59.

¹⁸⁶ *Ibid.* at 65.

¹⁸⁷ *Ibid.*, Regulatory Details Plan, Part 8; Tables 1 and 2.

regional outcome identified in the corresponding row in those Tables.¹⁸⁸ The LARP gives local government bodies five years from its coming into effect to submit the mandatory statutory declaration of compliance to the Land-Use Secretariat.¹⁸⁹

A significant observation from the LARP is Alberta's willingness to shift to a more efficient regulatory system that considers the cumulative effects of all activities and improves integration across the economic, environmental and social pillars. The system seeks to adapt to place-based challenges and opportunities.¹⁹⁰ Cumulative effects management, a systematic and holistic way of looking at the impacts of development, focuses on achievement of outcomes, understanding the effects of multiple development pressures (new and existing), assessment of risk, collaborative work with shared responsibility for action, and improved integration of economic, environmental and social considerations.¹⁹¹ It entails a real balancing of economic development opportunities and social and environmental considerations. Accordingly, to achieve its desired regional outcome of maintaining the landscape, ecosystem function, biodiversity, air and water quality, the LARP established limits as clear boundaries not to be exceeded and triggers as warning signals to allow for evaluation and adjustment.

Decision-makers will make choices about activities on the landscape based on these limits and triggers. If ambient environmental conditions are approaching or exceeding environmental limits at specified regional monitoring locations, there will be management actions either restricting further development or enabling changes to current management in a way that keeps the

¹⁸⁸ *Ibid.*, Regulatory Details Plan, Part 8 s. 48.

¹⁸⁹ *Ibid.*, Regulatory Details Plan Part 1, s. 10.

¹⁹⁰ LARP, *ibid.* at 3.

¹⁹¹ *Ibid.* at 3 and 23.

condition below limits. In that regard, the designated minister has the power to determine whether a trigger or limit has been exceeded, and the decision is binding on the Crown, the decision-maker and all other persons subject to the right of variance.¹⁹² Based on the same limit and trigger principle, the newly created conservation areas will be managed to prevent new land disturbance associated with exploration, development and extraction of *in situ* and mineable oil sands, metallic and industrial minerals, and coal. These are considered incompatible with the management intent of the conservation areas.¹⁹³ Similarly, the new recreation areas will be managed to minimize industrial land disturbance so that new petroleum and natural gas or oil sands tenure sold in this area will include a restriction that prohibits surface access.¹⁹⁴

While the cumulative effects approach by the LARP is highly commendable, the LARP does not appear to have set similar enforceable limits, triggers, and restrictions with respect to availability of hard and soft infrastructure and services which decision-makers can actually apply to individual projects to ensure that regional outcome 5 (infrastructure development that supports economic and population growth) and its objectives are met by the responsible governments. Instead, these socio-economic considerations are left to general monitoring, evaluation and reporting of indicators and strategies with the effect that where unforeseen gaps are identified in the context of a project approval, decision-makers such as the AER will probably adopt the same position held by the predecessor regulatory Boards (EUB and ERCB) in the oil sands approval decisions discussed above. Section 7(3) of the LARP's Regulatory Details Plan ensures that the

¹⁹² *Ibid.*, Regulatory Details Plan, Parts 4 and 5, ss. 23-26 and 30-33.

¹⁹³ See LARP, *ibid.* at 30 and Regulatory Details Plan, Parts 2 and 3; Alberta Energy Information Letter, IL 2012-30: *Lower Athabasca Regional Plan: Surface and Subsurface Commitments related to Crown mineral development in Conservation Areas and Provincial Recreation Areas* (24 August 2012); and Alberta Energy Information Letter, IL 2003-25: *Honouring Existing Mineral Commitments in Legislated Provincial Protected Areas* (10 September 2003).

¹⁹⁴ LARP, *ibid.*, Regulatory Details Plan, Part 7.

AER cannot adjourn, refuse or deny a project approval simply because government has not performed the commitment it made under the LARP policy statements to provide basic public infrastructure and services to support development.¹⁹⁵

Similarly, section 16 of the *Mines and Minerals Act*¹⁹⁶ that authorizes disposition of mineral rights is subject only to “express provision in any applicable ALSA Regional Plan limiting mineral development within a geographic area.” In the case of the LARP, the Minister of Energy can only be restricted in the conservation areas. There is no enforceable restriction on the minister from selling mineral rights in geographic area that may not have caught up with infrastructure and services upgrade, and the government cannot be compelled under the LARP to upgrade that geographic area. Another observation is that while the LARP emphasizes the need for improved regulatory processes and enhanced co-ordination and integration, recognizing the nature of oil sands development and the unique challenges it presents, the LARP’s integration or co-ordination appears to be limited within provincial departments and agencies,¹⁹⁷ or with the federal, other provincial, territorial and aboriginal governments.¹⁹⁸

5.6 Effect of Municipal and Provincial Governmental Efforts

As discussed above, the RMWB fought tooth-and-nail to engage the provincial government in the provision of infrastructure and services needed in the region to support the oil sands industry. The regulatory Board, through its oil sands approval decision reports, also sent strong warnings

¹⁹⁵ A further confirmation of this view is set out in ERCB Bulletin 2012-22: *Application Procedures and Requirements for Approval of Activities Located In or Near the Boundaries of the Lower Athabasca Regional Plan* (17 October 2012).

¹⁹⁶ R.S.A. 2000, c. M-17.

¹⁹⁷ The Regulatory Enhancement Project intends the consolidation of regulatory functions into a single regulator to achieve an integrated, streamlined process. See LARP, *supra* note 174 at 24.

¹⁹⁸ *Ibid.* at 6 and 63.

to the province. Since then, the provincial government has collaborated with the RMWB in various ways to resolve immediate and medium-term infrastructure and services challenges in the region. Beginning in 2007, after the RMWB's EUB interventions, the provincial government started to respond in earnest to the Radke Report.¹⁹⁹ The provincial government has invested heavily in public infrastructure, services and regulatory enhancement.²⁰⁰ According to the Mayor of the RMWB, "overall, I would say that it was triggered by the intervention and the relations have become a lot more collaborative."²⁰¹ There is no doubt that a lot has been accomplished by such collaboration since 2006.

The RMWB continues to seek engagement with the provincial government in a timely intergovernmental reconciliation of needs with capabilities, forecasting population growth, monitoring infrastructure and services as well as the cumulative socio-economic impacts of the oil sands development and expansion. The intergovernmental collaboration is to better prepare the region in advance of further growth. Some of the provincial policies, such as the 20 year Strategic Capital Plan, the CRISP, and the UDSR, which tend to have adopted a coordinative approach to resolving socio-economic challenges have tremendously improved provincial-municipal relations on oil sands development issues that the Mayor of the RMWB had to say:

Other Ministers are following the Premier's lead and working more cooperatively with my Office - and the Municipality as a whole - than they have since I joined Regional Council in 1998. I can say, with confidence, that Wood Buffalo's relationship with the Province today is stronger than it has been since the '90s began. I am equally confident the Province is genuinely committed to working

¹⁹⁹ "State of the Region Address 2009," *supra* note 26 at 7; Alberta, News Release, "Managing growth pressures, Funding for Fort McMurray helps meet urgent needs brought on by oil sands growth" (26 February 2007); Alberta, News Release, "Government of Alberta fulfills Radke Report infrastructure recommendations for the Regional Municipality of Wood Buffalo" (31 January 2008).

²⁰⁰ See "State of the Region Address 2009," *ibid.* at 8; "State of the Region Address 2011," *supra* note 33 at 4-5.

²⁰¹ Interview with Mayor Melissa Blake, *supra* note 39.

with us to ensure sustainable development preserves both the economic potential of the oil sands and enhances the quality-of-life of residents of Wood Buffalo.²⁰²

5.7 Lessons from the Case Study

My quest in chapters 4 and 5 was to determine whether there was a forum in the regulatory process where socio-economic challenges of development projects are considered and resolved prior to, or at the time of, issuing project approvals. From the analysis in chapters 4 and 5, it is reasonable to conclude that:

- The connection between oil sands development and the growth, infrastructure and services pressures in the RMWB is clear.
- While they have jurisdiction over planning and development, the ability of municipal authorities to regulate socio-economic impacts of oil and gas development as it affects the host municipality is highly circumscribed. They have no legal authority to regulate aspects of development projects already approved by the AER. They have no veto power over these projects on socio-economic or any grounds as long as the project is consistent with AER approval, neither do they have the wherewithal to resolve socio-economic challenges arising from such approved projects. Therefore socio-economic issues are not resolved at the municipal approval stage where that stage is applicable.
- There is no other forum in the regulatory process where socio-economic impacts of a project are addressed except at the AER if there is a public hearing.
- The Board or Regulator considers socio-economic impacts and benefits as one factor among others within its public interest determination but says that it does not have the mandate to “resolve” socio-economic issues. Instead the Board refers these socio-

²⁰² “State of the Region Address 2009,” *supra* note 26 at 10.

economic challenges back to the planes of government that have the mandate to resolve them.

- Neither the Board or Regulator nor the municipality resolves socio-economic challenges of energy development projects as it affects host municipalities and industry prior to or at the time of project approvals. This gaping hole in the process appears to have caused the socio-economic crisis in Fort McMurray between 2002 and 2007.
- Recent intergovernmental collaboration and coordination between the province and the affected municipality in initiatives like the 20 year Capital Plan, the CRISP, and the UDSR is *ad hoc* and reactive to resolve already overwhelming socio-economic problems.
- Although the LARP adopts the CRISP as one of its Table 2 strategies to be monitored, evaluated and reported on, CRISP and other plans are unenforceable policies outside the oil and gas regulatory framework.²⁰³ The only institutionalized provincial effort having full legal force and which has become part of the energy regulatory framework is the ALSA and its Regional Plans. Unfortunately, while the ALSA has an objective to coordinate decision-making regarding land use and development, its only coordinative requirement is mandating compliance with Regional Plans by all decision-makers.
- While the LARP sets legally enforceable limits and triggers to be applied by all decision-makers on environmental factors, it leaves socio-economic factors to be generally monitored and evaluated by unenforceable policy indicators and strategies. The only legal requirement is to establish and maintain monitoring and evaluating programs for socio-economic indicators. Although decision-makers are required by the LARP to consider the broad policy objectives therein (Strategic Plan and Implementation Plan), there is no

²⁰³ LARP are based on these plans.

threshold in the Regulatory Details Plan for decision-makers to apply in their decisions with respect to adequacy of public infrastructure and services to support a certain number of development projects. The effect is that there is little or no useful guidance on how growth should be reconciled with infrastructure shortages and pressures by decision-makers such as the AER. The absence of legally enforceable thresholds²⁰⁴ against which to measure socio-economic effects makes it difficult to evaluate and determine whether and what level of incremental impacts from new development should trigger government response.²⁰⁵ It is most likely that socio-economic challenges will continue to be referred back to the provincial and municipal governments for resolution by decision-makers after project approvals.

- Despite current policy and legislative reforms there is still no stage within the oil and gas development regulatory framework where socio-economic factors are measured of themselves, like environmental factors, and checked off as either resolved, acceptable, or management response required where limit (if any) is about to be exceeded.
- The last nail on the coffin for socio-economic challenges is the legal requirement mandating decision-makers to consider government policy statements in the LARP, but they must not adjourn, refuse or deny a project application simply because government has not performed its commitment under the LARP policy statements. This means that if government has not fulfilled its commitment under plans like the CRISP, projects can go on without a corresponding duty on the government to provide immediate solutions.

²⁰⁴ A threshold is defined as a limit of tolerance of a valued ecosystem components (“VEC”) to an effect that if exceeded results in an adverse response by that VEC. See G. Hegmann et al., *Cumulative Effects Assessment Practitioners Guide* (Canada: the Canadian Environmental Assessment Agency, 1999) cited in *Cumulative Effects Assessment in Environmental Impact Assessment Reports Required under the Alberta Environmental Protection and Enhancement Act*, *supra* note 105 at n 4.

²⁰⁵ S. Kennett & M. Wenig, “Alberta’s Oil and Gas Boom Fuels Land-Use Conflicts — But Should the EUB Be Taking the Heat?” (2005) 91 Resources 4.

At a glance it may appear that the provincial government has “got this” with what looks like ironclad long-term plans for public infrastructure and services, such as the 20 year Strategic Capital Plan, the CRISP, and the UDSR. However, a harder look may reveal that such plans are only starting points. With the uncertain nature of technological advancement, markets and private capital investment, one should not be fooled that forecasts and proposals alone, which details are left to government’s ongoing budget process and individual ministry business plans, would be adequate to handle unforeseen, development-induced infrastructure and services problems. To ensure that socio-economic gaps and the unforeseen are caught and addressed proactively, what may be required is a collaborative mechanism, among the governments with mandates to resolve such issue, built right into the regulatory framework.

The need for non-centralized collaboration between provincial and municipal governments in regulation of land use and development challenges cannot be over-emphasized. Command for compliance and a crack of the whip for non-compliance may not move the province any closer to its goal of energy leadership. The EUB and Joint Panels found a lack of intergovernmental cooperation in the current framework and strongly recommended it. The MSC and the Radke Reports commissioned by the province found the same deficiency and advised the government to adopt it. There is evidence that the provincial government has started to “think federal” and implement the advice, albeit on an *ad hoc* and reactive basis, and it has worked to a good extent. Can such non-centralized intergovernmental collaboration with respect to socio-economic challenges of energy development be institutionalized and how? These are discussed in chapter 6.

Chapter Six

Making Federalism through Law in Alberta's Oil and Gas Regulatory Framework

This chapter recaps the problems identified in Alberta's energy regulatory framework in chapters 4 and 5 to show why the socio-economic stress in the Regional Municipality of Wood Buffalo ("RMWB") between 2002 and 2006 occurred and why it may occur again or elsewhere in Alberta if the source of the problem is not effectively addressed. To close the identified gap, the thesis recommends applying the federal model of governance to the problem and suggests provincial-municipal intergovernmental mechanisms that could be used to adapt the federal principle to the regulatory framework. Underlying the suggested solution is the role of law in institutionalizing and securing the adopted form of intergovernmental relations. The chapter illustrates with two Canadian provinces that have secured their provincial-municipal intergovernmental relations in their municipal statutes. The chapter then applies two options of provincial-municipal intergovernmental mechanisms to Alberta's energy development legislative framework, and concludes with the recommendation that a weather-proof energy development regulatory framework with federal built-in failsafe mechanisms is key to Alberta's energy future.

6.1 How We Got There - Alberta's Oil and Gas Development Regulatory Framework Revisited

Alberta's energy development regulatory framework has evolved since the first oil boom in Turner Valley and the giant Leduc discovery in 1947 that made Alberta the centre of the Canadian oil industry.¹ The regulatory framework, beginning with the creation of the Turner Valley Conservation Board in 1932, has worked well up until the later part of the last century.

¹ See online: Center For Energy Homepage <<http://www.centreforenergy.com/AboutEnergy/ONG/Oil/History.asp>>. For more on the evolution of the oil and gas regulatory framework see online: ERCB Homepage <<http://www.ercb.ca/about-us/what-we-do/current-projects/urf/development-timeline>>

The indicator is the success in combining extensive resource development with the preservation of quality of life and natural environment.² However, just as cracks were noted in the policy approach to land management which led to the development of Land-Use Framework (the “LUF”), the *Alberta Land Stewardship Act* (“ALSA”)³ and Regional Plans, conspicuous gaps have appeared in the legal and policy approach to socio-economic challenges of resource development of which recent provincial legal and policy initiatives have not been able to close. The regulatory framework has to be responsive to changes in time, age, technology, the market, availability of resources, and a catalog of other foreseen and unforeseen factors.

Beginning in or about 1997, a number of events, including the rising oil prices, the insatiable global energy demand, the huge private capital investment in resource development, the provincial royalty, and the federal tax adjustments, seemed to have occurred at the same time repositioning Alberta in the global energy market and changing Alberta’s outlook to energy development. A gaping hole in the development regulatory framework appeared within a couple of years. This gap is evidenced by the stress felt in the host municipalities some of which attempted to regulate these impacts by themselves, and the costly measures adopted by industry to cope with labour shortages.⁴ Alberta’s unplanned rapid economic and population growth came with the price of increased pressure on its land base, the environment, public infrastructure and social services designed for the regular residents of these host areas at a normal growth rate

² R. Gibbins and B. Worbets, *Managing Prosperity Developing a Land Use Framework for Alberta* (Calgary: Canada West Foundation, September 2005) at 2 [hereinafter *Managing Prosperity*]. See also Alberta, *Enhancing Assurance: Report and Recommendations of the Regulatory Enhancement Task Force to the Minister of Energy* (Edmonton: Regulatory Enhancement Task Force, December 2010), message from the Chair, Regulatory Enhancement Task Force at 2-3, online: Alberta Energy Homepage <<http://www.energy.alberta.ca/Org/pdfs/FinalEnhancingAssuranceReportREP.pdf>> [hereinafter *Enhancing Assurance*].

³ S.A. 2009, c. A-26.8.

⁴ See chapters 4 and 5 above.

scenario.⁵ The pressure highlighted the problems of incremental and cumulative impacts of increased development activities. As the pressure mounted and quality of life in these regions deteriorated, the municipal authorities at the front lines statutorily mandated to provide some of these infrastructure and services found themselves in the hot seat. Industry and huge private investments already committed risked being stranded as the required infrastructure and skilled labour to support development were not available in the host regions. The cost of doing business escalated and projects had the option of either being delayed or abandoned.

The first of the problems was that although Alberta had what was considered a comprehensive case-by-case regulatory regime for resource development, there was insufficient time, policies and capacity to measure and plan for incremental and cumulative effects of multiple projects.⁶ Second, as discussed in chapters 4 and 5 above, the municipal government is responsible for specific planning and regulation of development within a municipal boundary in accordance with broader provincial guidelines. It is also responsible for providing some of the crucial infrastructure and services to support development. As such, it should be the repository of knowledge and information about the demographic, social and economic circumstances of the locality which hosts a proposed development. Yet municipal authorities are not involved early enough or at all in the regulatory process in order to consider and timely put in place the infrastructure and services required to support development.

⁵ J.L. Hierlmeier, *Roadmap For Reforming "The Public Interest" For the ERCB and NRCB* (Environmental Law Center, 2008) at 4 and 6 [hereinafter *Roadmap for Public Interest*], online: Environmental Law Center homepage <http://www.elc.ab.ca/Content_Files/Files/BriefsAndSubmissions/RoadmapforReformingThePublicInterest.pdf>. See also "The Public Interest: What Could It Mean for the ERCB and NRCB?" (2008) Vol. 23, No. 1 Environmental Law Centre News Brief [hereinafter "The Public Interest"].

⁶ *Managing Prosperity*, *supra* note 2 at 3.

Municipal power over energy development within municipal boundaries is highly circumscribed and outstanding municipal concerns cannot be resolved at the municipal approval stage if at all applicable. Apart from small site-specific details of the project which they may condition, where municipal approvals are required, municipalities have the simple function of “implementing” provincially-approved energy development projects. Third, given the restrictions, presumably to streamline functions, one expects to find at some stage in the regulatory framework a certain degree of coordination with municipal authorities to ensure that legitimate challenges such as socio-economic issues that may arise from energy developments are caught and resolved at the provincial stages of the approval process. Unfortunately, this appears not to be the case. The only stage and forum that attempts an assessment of socio-economic factors of projects is the public hearing, if conducted, by the regulatory Board, now the Alberta Energy Regulator (the “AER” or Regulator).

For either of the predecessor regulatory Boards, (the Alberta Energy and Utilities Board (“EUB”) or the Energy and Resources Conservation Board (“ERCB”)), while its public interest mandate obliged it to consider the land use impacts of the proposed project on neighboring lands, the Board was neither bound nor constrained by the municipal planning regime in making its decisions. Further, while the Board considered socio-economic factors among others in its public interest determination, it did not have the mandate to “resolve” socio-economic challenges of proposed development projects. It expressly stated that the responsibility rests with the appropriate government bodies that are in a position to provide direct assistance, determine appropriate funding mechanisms and possible contributors to socio-economic issues. It is not expected that the situation will change with the AER with a similar mandate as its predecessors.

As discussed below, while the public interest test was not adopted in the new *Responsible Energy Development Act* (“REDA”) and its regulations, the public interest factors are retained.⁷ Further, some of the legislation to be administered by the AER still requires public interest considerations.

Fourth, the result is that there is no forum in the regulatory framework to “resolve” cumulative socio-economic challenges of multiple large scale development affecting both the host communities and industry before or at the time of issuing approvals. Fifth, while recent government legal and policy initiatives such as the LUF, the ALSA and Regional Plans, have gone a great length in moving towards the cumulative effects approach as well as setting measurable limits and triggers for environmental protection, these initiatives have failed to adequately address or guide regulatory decision-makers on how to resolve incremental or cumulative socio-economic challenges of large scale energy development. The failure to adopt clear thresholds against which to measure cumulative socio-economic effects makes it difficult to evaluate or determine whether or what level of incremental impacts from each new project can be accommodated or should trigger government response action. The people-worth of a project and the support resources, in terms of infrastructure and services, required to sustain it are measurable.⁸ The Athabasca Oil Sands Area CRISP is able to project what infrastructure may be needed based on incremental population growth and oil sands production levels to a maximum of six million barrels per day (the estimated amount that potentially could be reached by the year

⁷ S.A. 2012, c. R-17.3; and *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013 as amended.

⁸ For example, if an \$8 billion project would bring in 1000 permanent positions, that spin off to 3000 other jobs created in the region. The 4000 people for these job positions will likely put on another 2000 people accompanying them. Therefore the project is worth about 7000 to 8000 people. The municipality needs to have houses for the new 7000 to 8000 people and will require land to offset that opportunity as well as businesses and services. This analogy was given by the Mayor of the RMWB in an interview. Interview with Melissa Blake, Mayor Regional Municipality of Wood Buffalo (27 May 2009) [hereinafter Interview with Melissa Blake].

2045). Further, as custodians and providers of some of these infrastructure and services, municipalities can provide information on what each locality has, can afford, the size of population it can accommodate with that, and recommend the necessary management action if these limits must be exceeded.

There remains no mechanism in the development regulatory framework by which socio-economic factors are measured of themselves, like environmental factors, and checked off as either “acceptable,” “resolved,” or “management response required.” While decision-makers are required by the recent LARP to consider broad socio-economic policy objectives in the Regional Plan (Strategic Plan and Implementation Plan), there is no enforceable socio-economic policy in the Regulatory Details Plan for decision-makers to apply in their decisions with respect to adequacy of public infrastructure and services or a corresponding management response by government. Instead, the LARP mandates decision-makers not to adjourn, refuse or deny a project application simply because government has not performed its commitment in the LARP policy statements. This means that projects must proceed without a corresponding duty on the government to fulfil its commitment under CRISP and other provincial policies incorporated into the Regional Plan. It is most likely that decision-makers like the AER will continue to toss socio-economic challenges back to the provincial and municipal governments for resolution. Ultimately, recent institutional reforms do not appear to have provided the much needed coordination and cooperation for a holistic regulation of oil and gas development.

Sixth, Alberta’s development regulatory framework has a top-down, command-and-control approach with little contact among some categories of the provincial regulatory bodies, and

between the provincial bodies and municipalities. One of Alberta's regulatory review reports noted that the framework limits the ability to address holistically competing demands from resource development.⁹ It also stated that due to unclear, conflicting or missing policies in the framework, regulators are often faced with policy issues at project-specific assessments, hearings or appeals, which are the only forum for all stakeholders to voice their concerns about resource development.¹⁰ While the establishment of AER and the Policy Management Office ("PMO") may improve coordination at the provincial plane, nothing has been done to improve non-centralized intergovernmental cooperation and coordination. The governance framework may still be described as unitary.

Times have changed since the beginning of the 21st century. As noted in the LUF, we have reached a tipping point where sticking with the old rules will not produce the quality of life we have come to expect.¹¹ According to the more recent Enhancing Assurance Report, Alberta's landscape has seen much more oil and gas development, new technologies and new knowledge concerning the complex relationships between development, the environment and society. Therefore successfully developing Alberta's energy resources in a responsible manner now requires a higher degree of coordination, integration, planning and management than in the past.¹² Alberta cannot afford to maintain the *status quo* if the province wishes to achieve the

⁹ See Alberta, *A Proposal for Regulating Resource Development* (Edmonton: Library of Legislative Assembly, December 2002) at 11, archived online: <<http://www.assembly.ab.ca/lao/library/egovdocs/aleo/2002/149168.pdf>> [hereinafter *A Proposal for Regulating Resource Development*]. See also *Enhancing Assurance*, *supra* note 2 at 10.

¹⁰ *A Proposal for Regulating Resource Development*, *ibid*.

¹¹ Alberta, *Land-Use Framework* (Edmonton: Land-Use Secretariat, December 2008) at 6, online: Land-Use Secretariat Homepage <https://www.landuse.alberta.ca/Documents/LUF_Land-use_Framework_Report-2008-12.pdf> [hereinafter *LUF*].

¹² *Enhancing Assurance*, *supra* note 2 at 6. The Report adds that given today's busier and more complex landscape, it is essential that policies and policy outcomes must reflect a balance of perspectives and work together effectively, without gaps or conflicts, at 13.

desired social, economic and environmental outcomes.”¹³ With the ambition of being the world’s energy leader and the best place to live, work and play, the stakes are high for Alberta.¹⁴

Population growth is expected to be fueled by economic activities in response to enhanced recovery, unconventional resources like oil sands, shale gas, coal bed methane, and increased value-added processing and related infrastructure.¹⁵ Unconventional oil and natural gas, particularly shale gas, has been called the future of gas supply in North America. While its development is in the very early stages in Alberta, it has tremendous economic potential with an expected increase of interest.¹⁶ The Bakken Shale play is already creating serious infrastructure needs in North Dakota, United States of America.¹⁷ The Canadian Association of Petroleum Producers (“CAPP”) is still examining ways to deal with workforce challenges and to build a workforce for the energy future.¹⁸ While the economic and other uncertainties may not allow firm planning for support infrastructure and services in the host regions, is there any institutional mechanism to catch and address such eventuality? Is Alberta going to allow the situation to sneak up on it like the oil sands?

A potential repeat of Fort McMurray, perhaps not in the same magnitude or duration, may be the socio-economic impacts of TransCanada’s Keystone XL pipeline project on the Town of

¹³ *Ibid.* at 21.

¹⁴ *Managing Prosperity*, *supra* note 2 at 4.

¹⁵ *Ibid.* at 3.

¹⁶ Energy Resources Conservation Board, “What is Unconventional Oil and Gas?” online: <http://www.ercb.ca/about-us/what-we-do/current-projects/urf/urf_what-is> [hereinafter “What is Unconventional Oil and Gas?”]

¹⁷ See D. Boyd, “Oil Boom Creates Infrastructure Needs” *The American Oil and Gas Reporter* (February 2011); J. Oldham, “North Dakota’s Oil Boom Strains Its Infrastructure” *Bloomberg Businessweek*, (February 2, 2012) online: *Bloomberg Homepage* <<http://www.businessweek.com/magazine/north-dakotas-oil-boom-strains-its-infrastructure-02022012.html>>

¹⁸ Canadian Association of Petroleum Producers, “Building a Workforce for the future” in *Context: Energy Examined* (Spring 2013) at 16. CAPP homepage < www.capp.ca/context>

Hardisty, within the proposed North Saskatchewan Regional Plan, and other communities along the pipeline route. Keystone XL was proposed to carry 1.1 million barrels of Alberta oil per day to the United States Gulf Coast. At the peak of its construction, it was estimated that Keystone XL would bring hundreds of workers to Hardisty. In an interview with CBC's Carolyn Dunn,¹⁹ the Mayor of the Town of Hardisty, Kevin O'Grady, admitted that the project would bring huge benefits to the Town but at the same time will be very hard on the Town's infrastructure and services designed only for its small population. In the case of Fort McMurray it was stated that the provincial and municipal governments were caught unawares by the growth triggers - the global demand and commodity pricing - which all happened at the same time.²⁰ However, earlier EUB decisions showed that the pressures on public infrastructure and services were identified and forecast by project proponents in the late 1990s but the Board found at that time that there was, or could be, sufficient infrastructure provided in the region to support proposed developments. It is not clear how the Board measured that. The foreseen growth pressures were not resolved by the Board and no serious action was taken by the responsible governments until the region became overwhelmed. Keystone XL and similar projects would not be a surprise to the responsible governments in Alberta.

¹⁹ CBC, "On the XL pipeline path - The CBC's Carolyn Dunn reports on the potential impact of TransCanada's Keystone XL pipeline to the communities along its potential route" (The National 27 October 2012), online: CBC Homepage <<http://www.cbc.ca/player/Shows/Shows/The+National/Canada/ID/2297541596/>>

²⁰ Interview with Melissa Blake, *supra* note 8.

6.2 How Not to Get There Again - The Federal Principle Applied

6.2.1 Financial or Regulatory Problem?

There is a view that the growth pressures and socio-economic problems in the RMWB between 2000 and 2006 have more to do with financial rather than regulatory considerations.²¹ The Mayor of the RMWB stated that there is a short window of time between project announcements and actual labour demands. As the impacts happen right at the front end, it is more about how to sufficiently finance what will be required to accommodate growth.²² In the Mayor's view, timing in a way to make sure the municipality is not behind the curve is very crucial, and the region would want any financial contributions made ahead of time. The Mayor noted that if community needs are all being met to expected standards they would not need to be involved in the regulatory process. She noted that they were not involved prior to the socio-economic challenges but had to become involved because there were deficiencies in the process.²³ The Mayor stated that such a timing and financial assessment is ultimately about having holistic community development in concert with the growth and population that is yet to come.

While the Mayor's view highlights the solution to socio-economic challenges, it does not tell us the means to get to this solution. The question still remains: how can we achieve that holistic community development in concert with the growth and population that is yet to come from energy projects? What mechanisms should be in place for the timing and financial assessment to ensure that host communities' needs are being met to expected standards prior to or in concert

²¹ *Ibid.* The Wood Buffalo Business Case 2005 stated that "the problem is one of the inadequate funding formulas plus cash flow amounts and timing... Addressing this current infrastructure shortfall and the future growth challenge is basically a cash flow and timing issue." See Regional Municipality of Wood Buffalo et al., *Wood Buffalo Business Case 2005: A Business Case for Government Investment in the Wood Buffalo Region's Infrastructure*, (Alta.: Athabasca Regional Issues Working Group, 2005) at 36, 38 and 6 [hereinafter *Wood Buffalo Business Case 2005*].

²² Interview with Melissa Blake, *supra* note 8.

²³ *Ibid.*

with project approvals? If host community needs happen to be behind the curve, what should the regulator like the AER do to ensure that supporting infrastructure and services are available for proposed projects at the time of issuing approvals? For the reasons that follow the thesis argues that the assessment of timing and availability of financial and other resources to support proposed development projects, prior to or in concert with approvals, is a regulatory issue and should be adequately resolved within the development regulatory framework.

In addition to broad policy arrangements currently in place to monitor growth and communities' needs for infrastructure and services, a stage in the regulatory framework to resolve socio-economic issues is necessary to backstop any failures in general non-binding government policies.²⁴ The connection between oil sands development and the growth, infrastructure and service pressures in the RMWB was discussed in chapter 5 above.²⁵ It is important to emphasize the source of these socio-economic challenges because a distinction has been made by the Alberta Court of Appeal between problems created by the oil and gas projects and those which pre-exist. The court noted that pre-existing social problems of Albertans cannot be solved in the course of approving or disapproving individual oil sands projects, and those cannot be within the

²⁴ An academic opinion agrees that there are situations where energy project reviews can fill gaps in broader policies and/or initiate evolution at a broader level to accommodate changing values. See S. Fluker, "The Jurisdiction of Alberta's Energy and Utilities Board to Consider Broad Socio-Ecological Concerns Associated with Energy Projects" (2005) 42 Alta. L. Rev. 1085 at 1088.

²⁵ A pictorial view of the historical relationship between oil sands resource development and demand for public infrastructure is depicted in the *Wood Buffalo Business Case 2005*, *supra* note 21 at 11. In summary, private investment causes increase in local jobs which drives population increase creating a demand for new housing units, developable land from the GOA, planning, design, and engineering services from the RMWB and related municipal services, such as water and sewage treatment. The population increase will also drive a need for additional educational, social, cultural, health and recreational services and related infrastructure. In addition, provincial and municipal roads and bridges in the region must be improved and expanded to accommodate the increased population and the level of construction activity. Other non-capital infrastructure issues include operating issues such as high demand and a low supply of human resources and high wage costs. *Ibid.* at 5.

scope of the regulatory framework.²⁶ Laycraft J.A. particularly noted that the applicants' proposed \$4 billion (in 1978 currency) Alsands project, to produce 140,000 barrels of synthetic oil per day until December 31, 2010, would bring several thousand workers for the construction of the plant and many hundreds of people thereafter permanently for its operation. The judge also noted that to enable such proposal a new town would be built, many support facilities and businesses both public and private would be required to be established, and of necessity, there would be a great impact on the surrounding area and a profound change in the life style of the people living there.²⁷

This thesis focuses on such projected-related socio-economic challenges noted by the Court of Appeal. They are largely place-based affecting the host municipalities in that magnitude if improperly planned. These challenges are over and above the general infrastructure deficits experienced by all municipalities in the province.²⁸ This is why independent reports advised that Fort McMurray is unique and the Industrial Heartland needs specific attention.²⁹ Currently, it appears that what Alberta has are policies to monitor and evaluate growth pressures through indicators. These policies, such as the 20-year Strategic Capital Plan and CRISP, are based on forecast models largely driven by a range of factors including a highly volatile market.³⁰

²⁶ *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1980] 5 W.W.R. 165, 22 A.R. 541 at paras. 19-20 (Alta. C.A.) aff'd by [1981] 1 S.C.R. 699.

²⁷ *Ibid.* at para. 17.

²⁸ See R. Gibbins, L. Berdahl, and C. Vander Ploeg, *Foundations for Prosperity: Creating a Sustainable Municipal-Provincial Partnership to Meet the Infrastructure Challenge of Alberta's 2nd Century*, (Calgary: Canada West Foundation, 2004) [hereinafter *Foundations for Prosperity*].

²⁹ Alberta Energy, *Investing in our Future: Responding to the Rapid Growth of Oil Sands Development Final Report* by D. Radke, (Edmonton: Department of Energy, 29 December 2006) at 8, online: Alberta Energy homepage <<http://www.energy.alberta.ca/pdf/OSSRadkeReportInvesting2006.pdf>> [hereinafter *Investing in our Future*].

³⁰ The RIWG Urban Population Model used for the Wood Buffalo Business Case 2005 is driven by the timing and size of individual oil sands projects, regional multipliers and in-migration patterns. The EUB recognizing the potential risk to the municipality associated with pre-building infrastructure for new forecast populations recommended that infrastructure investment decisions must be based on strong market information and proactive planning. See *Re Suncor Energy Inc., Application for Expansion of an Oil Sands Mine (North Steepbank Mine*

Experience has shown that announced projects case scenario results in a different population projection than the forecast case; and forecasts are understated compared with actual census results.³¹ For example, the urban population by the RMWB forecast case was 80,000 by 2010 and was estimated to reach up to 97,000 under the announced projects scenario. However, actual Municipal census in 2010 confirmed a population of 104,338. Actual population increases therefore continually exceeded past projections.³² Further, it may be difficult for forecasts to catch the surprises of technological advancement. As new technologies are introduced, oil and gas developers are able to produce unconventional resources that were previously impossible to obtain.³³

The unforeseen effect of SAGD, which turned around the oil sands industry, contributed to the rushed development in the RMWB in the early 2000s. More recently, a variant of the SAGD method has made possible recovery from Alberta's carbonate reservoirs.³⁴ Similarly, Hydraulic Fracture Stimulation technology has brought United States oil production almost at par with Saudi Arabia and is opening up development of unconventional shale gas in Canada.³⁵ Can we

Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area (14 November 2006), Decision 2006-112 (E.U.B.) at 12 [hereinafter EUB Decision 2006-112]; *Re Albion Sands Energy Inc., Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine Fort McMurray, Joint Panel Report* (17 December 2006), Decision 2006-128 at 15 (E.U.B) [hereinafter EUB Decision 2006-128].

³¹ Private investment e.g. by purchase of leases is the first indication of development that may occur. However, purchase of leases does not guarantee its development as companies may relinquish them after a period of time for various reasons. Project announcement appears more certain of the development to come.

³² See *Wood Buffalo Business Case 2005*, *supra* note 21 at 20-21. The RIWG urban population forecast for the Business Case 2002 was understated by 10% compared to the actual population from the 2004 census.

³³ "What is Unconventional Oil and Gas?," *supra* note 16.

³⁴ Laricina Energy Ltd. is recognized as an industry pioneer in the use of improved variants of steam-assisted gravity drainage (solvent-based steam-assisted gravity drainage (SC-SAGD)) to recover oil from Alberta's Grosmont carbonates. Laricina's new patented-heat harvesting technique known as passive heat assisted recovery methods (PHARM) is currently being tested. See online: Laricina Homepage <<http://www.laricinaenergy.com/operations/saleski.html>>

³⁵ The recent rebound in US oil and gas production is driven by upstream technologies that are unlocking light tight oil and shale gas resources. By 2020 the United States is projected to become the largest global oil producer overtaking Saudi Arabia until the mid-2020s. The global energy map is being redrawn by a number of unforeseen

predict where these may occur in Alberta and forecast what may be needed to prepare the host communities for industry investment in advance? Is available information enough for government to make such investments? These uncertainties show the loopholes in relying only on general policies and volatile forecasts. A weather-proof development regulatory framework with built-in failsafe mechanisms that enables development projects while preserving the wellbeing of host-communities is necessary to achieve Alberta's ambitious goals.

6.2.2 Alberta's Model of Governance and Underlying Principle

The major problem identified and consistently repeated by the former EUB in the oil sands approval decision reports was the apparent lack of coordination and insufficient communication among the various orders of government, departments and regulatory bodies each of which has a role to play in the approval of oil sands development and expansion projects.³⁶ The Board recommended coordination and cooperation among all planes of governments necessary to enhance the planning, communication, and response on socio-economic issues associated with resource development.³⁷ The Board agreed that a framework which would bring both the provincial government and the municipality together to confidently plan for and provide infrastructure and services in a manner that is predictable, manageable, and appropriately resourced³⁸ is crucial for energy resource development and expansion in Alberta.

The main cause of lack of coordination in Alberta's oil and gas regulatory framework seems to lie in its model of governance and the underlying principles. Alberta's governance model can

factors and could be further reshaped by continued rapid growth in the use of wind and solar technologies and by the global spread of unconventional gas production. See International Energy Agency, *World Energy Outlook 2012* (OECD/IEA, November 2012) at 1, online: IEA Homepage <www.worldenergyoutlook.org>

³⁶ EUB Decision 2006-112, *supra* note 30 at 12.

³⁷ *Ibid.* at 16.

³⁸ *Ibid.* at 12-16.

generally be described as a combination of the hierarchical pyramid and the center-periphery model with unitary principles as described in chapter 1 above. The framework has the provincial Cabinet at the apex of the pyramid or at the center of governance. The provincial Categories A and B bodies are in the middle of the pyramid or within the inner circumference of the center. The municipal authorities are at the bottom of the pyramid or at the periphery of the center. In terms of principle and values, the regulatory framework can best be described as unitary. It is a centralized, top-down, command-and-control approach. Municipal authorities, supposedly one of the regulatory bodies, implement policies and decisions of the provincial government and other regulatory bodies made with little or no local perspective.

What may be required is a reform of the model of governance and underlying principles. As have been variously suggested by regulatory panels and independent reports, a collaborative mechanism among the governments that have the mandates to resolve socio-economic issues needs to be built into the regulatory framework. This is where the federal model of governance and its underlying principle may be helpful. A willingness to take risks, to question the status quo, to demand a level of cooperation and collaboration beyond that experienced to date is necessary for Alberta to seize the opportunity to be the global energy leader indeed, and to maximize the benefits of its extensive resources.³⁹ Experience has shown that *ad hoc* and reactive coordination and cooperation to resolve already accumulated challenges from energy development is ineffective and inefficient in the long term and will not achieve the desired objectives and outcomes.

³⁹ Alberta, *Responsible Actions: A plan for Alberta's Oils Sands* (Edmonton: Department of Energy, February 2009) at 43, online: Alberta Energy Homepage <http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions_web.pdf> [hereinafter *Responsible Actions*].

As explained in chapter 1 above, the organizational expression of federalism is the non-centralized matrix which has no single center but rather multiple centers framed by a shared fundamental law, appropriate institutions, and communication networks. In a matrix there are only larger or smaller arenas. The federal matrix model does not prefix importance because every arena may be of importance for some particular purpose. Each is an arena for decision-making in and of itself as well as part of the overall arena. While the matrix is composed of multiple centers these centers are not separated unto themselves. The smaller arenas are linked to and are parts of larger ones through an appropriately developed communications network based on the principles of negotiated cooperation.⁴⁰ The largest arena frames the whole and they are all bound together within a network of distributed powers with lines of communication and decision-making that forces them to interact.⁴¹

The form and character of the interaction, which is sharing through bargaining or negotiated cooperation, is uniquely the property of the matrix arrangement.⁴² The components of the matrix work together towards common policies and programs of mutual interest, with the primary actors in each policy area being most involved in the details of problem definition, planning, programming, budgeting, implementation, and evaluation.⁴³ For example, in the area of socio-

⁴⁰ D.J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987) at 37 [hereinafter *Exploring Federalism*]. The matrix of decision-making centers is linked through formal lines of authority with both formal and informal lines of communication crisscrossing it. It is viewed as a matrix of overlapping, interlocking units, powers, and relationships. *Ibid.* at 225. If there is no negotiated cooperation, it becomes coercive or antagonistic. Negotiated cooperation has two dimensions: sharing and bargaining. See D.J. Elazar, *Federalism: An Overview* (Pretoria: HSRC Publishers, 1995) at 14 and 41 [hereinafter *Federalism: An Overview*]. Federalism is the only system that makes bargaining an integral and required part of the system, subject only to the requirement that it be generally open and accessible. A major part of the politics of federal systems is to maintain the openness of bargaining both in terms of the bargaining itself and access to the bargaining table.

⁴¹ D.J. Elazar, "Federalism vs. Decentralization: The Drift from Authenticity" (1976) 6 *Publius* 9 at 15 [hereinafter "Federalism vs. Decentralization"].

⁴² *Ibid.* at 15.

⁴³ *Ibid.* at 15-16 citing D.J. Elazar, *The American Partnership* (Chicago: University of Chicago Press, 1962); M. Grodzins, *The American System* (Chicago: Rand-McNally, 1966). M. Diamond, "On the Relationship of Federalism

economic impacts of resource development, the provincial Cabinet and the host municipality with the mandate to resolve such issues should be the primary actors most closely working together for these details with input and feedback from other departments and regulatory bodies. The principle or value underlying the matrix structure and process of governance is federalism - institutionalized self-rule/shared-rule relationships;⁴⁴ shared-rule in a common government for specified shared purposes, and self-rule for purposes of maintaining the distinctive interests.⁴⁵ The federal principle is founded on “partnership,” “negotiation,” and “sharing.” The principle denotes cooperative relationships that make the partnership real and underscores negotiation among the partners as the basis for sharing power.⁴⁶

Sharing, broadly conceived, includes common involvement in policy making, financing, and administration of government activities. The contractual sharing of public responsibilities by all governments in the system is a central characteristic of federalism. In contemporary federal systems, sharing is characterized by extensive intergovernmental collaboration. It emphasizes the primacy of bargaining and negotiated cooperation among several power centers, stresses the virtues of dispersed power centers as a means for safeguarding individual and local liberties, manifests mutual forbearance and self-restraint in the pursuit of goals, and considers substantive

and Decentralization,” in D. J. Elazar, *et al.* eds., *Cooperation and Conflict: Readings in American Federalism*, (Itasca, Illinois: F. E. Peacock Publishers, 1969).

⁴⁴ D.J. Elazar, “The Political Theory of Covenant: Biblical Origins and Modern Developments” (1980) 10 *Publius* 3 at 10 [hereinafter “The Political Theory of Covenant”].

⁴⁵ A. Trochev, “The Proceedings” in P.H. Solomon Jr. ed., *Making Federalism Through Law: Canadian Experience and Russian Reform Under Putin* (Toronto: Center for Russian and East European Studies University of Toronto, 2003) at 23-24; R.L. Watts, “Law and the Division of Responsibilities: Canadian Experience in Comparative Context” in Solomon Jr. ed., *ibid.* at 75 and 80.

⁴⁶ It is based on a commitment to open bargaining between all parties to an issue in such a way as to strive for consensus or, failing that, an accommodation that protects the fundamental integrity of all the partners. *Exploring Federalism*, *supra* note 40 at 67.

consequences of individual actions.⁴⁷ The federal principle is very relevant in this context because of the interdependencies and interconnectedness of issues, impacts and regulatory functions. The socio-economic challenges plaguing the RMWB and delaying oil sands projects also affect provincial income from taxes and royalties as well as municipal income from property taxes.

Partnership is a priced character of federalism. While it is acknowledged that municipal governments and provincial governments are not equals it is notable that in the federal theory, which is largely informed by the covenantal political theory, the emerging partners do not have to be originally equals. As discussed in chapter 1 above, the relationship between God and the human covenanting party was not one of equals but one of equal partnership in a common task of redeeming the world. Both parties preserved their respective integrities while committing themselves to a relationship of mutual responsibility. According to the biblical account, God graciously limited himself so that humans may become his free partners. Canada is included in the examples of federal systems that are non-centralized simple matrices.⁴⁸ It should not be difficult to conceive municipal governments as equal partners with the provincial government in the common task of building a weather-proof energy development regulatory framework with built-in failsafe mechanisms that maximizes the benefits of Alberta's extensive resources while preserving the wellness of host communities. In fact, the provincial government has severally admitted the need to partner with municipalities. Alberta's 20 year strategic plan, *Today's Opportunities, Tomorrow's Promise* identifies working with municipal governments to support

⁴⁷ *Ibid.* at 154; *Federalism: An Overview*, *supra* note 40 at 2.

⁴⁸ So are the United States and Switzerland.

strong, viable, safe and secure communities as one of its key strategies.⁴⁹ The plan envisions that “Alberta in 2025 will be a place where municipalities and the provincial government work in fair partnership to serve their constituents.”⁵⁰ It is time to walk this talk. The matrix model of governance for the regulatory framework based on the federal principle may be a viable alternative to achieving this goal.

6.3 Adapting the Federal Principle to Alberta’s Oil and Gas Development Regulatory Framework

As discussed in chapters 1 and 2, the matrix model and its underlying federal principle is easily adaptable in various political climates provided the requisite conditions exist. Canada is a positive example of the evolution from a unitary system to a paternalistic or quasi-unitary federation and eventually to a genuine full-fledged federal nation.⁵¹ Canada now has strong federalist values which captures and accommodates deeply rooted social sentiments in a way that federalism has become an innate and inalienable feature of the Canadian society.⁵² Communications, bargaining, resulting compacts and agreements have become central to the Canadian political tradition.⁵³ Canada’s practice of federalism today allows bargaining between

⁴⁹ Library of Legislative Assembly, *Today's Advantage, Tomorrow's Promise: Alberta's Vision for the Future; Today's Opportunities, Tomorrow's Promise: A Strategic Plan for the Government of Alberta* (Budget 2005 Document) (Edmonton, AB: Library of Legislative Assembly, 2003-2004) at 1-2 and 12. <<http://www.assembly.ab.ca/lao/library/egovdocs/alpm/2004/143704.pdf>>.

⁵⁰ *Ibid.* at 3-4.

⁵¹ Watts, *supra* note 45 at 76-7. Prior to 1867 Ontario and Quebec were created out of a previously single and unitary Province of Canada. Given the nature of this devolution the 1867 Constitution has a number of quasi-unitary elements enabling the central government to exercise considerable paternalism. However, responding to the realities, the central government by convention gradually abandoned the exercise of its constitutional powers to reserve or disallow provincial legislation and declaratory power over public works. See Trochev, *supra* note 45 at 24; L. Polishchuk, “Should the Legal Foundations of a Federal State be Flexible or Rigid? Canadian Experience and Russian Dilemmas” in Solomon Jr. ed., *supra* note 45 at 46.

⁵² Trochev, *ibid.* at 12.

⁵³ Polishchuk, *supra* note 51 at 47.

governments, emphasis on tolerance, accommodation and compromise, and deviations from rigid constitutional entitlements.⁵⁴

There is evidence that Alberta has favorable conditions to adapt the federal matrix principles. As noted above, the government of Alberta has publicly declared its interest in working with municipal governments in fair partnership to serve Albertans. It was noted that this picture captures the values that have shaped the province and its unique place in Canada over the previous century.⁵⁵ Further, the analysis in this thesis shows that the provincial government has adopted, albeit on an *ad hoc* and reactive basis, a coordinative and collaborative approach with municipalities to resolve different issues at different times, including the RMWB socio-economic challenges. This collaborative approach has improved provincial-municipal relations on energy development issues in the RMWB. It must be mentioned at this point that using the federal principle does not necessarily mean establishing a federal system in the conventional sense of a modern federal state. The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants.

Consequently, federalism is a phenomenon that provides many options for the distribution of authority and power. As long as the proper relations are created, a wide variety of structures can be developed that are consistent with federal principles.⁵⁶ Every region and situation is unique, and will have to develop its own unique legal-political inventions that meet contemporary

⁵⁴ Trochev, *supra* note 45 at 8, 10 and 25.

⁵⁵ *Today's Opportunities, Tomorrow's Promise*, *supra* note 49 at 1-2, 3-4 and 12.

⁵⁶ See *Exploring Federalism*, *supra* note 40 at 11-12.

democratic standards.⁵⁷ The question then is what is the appropriate mechanism by which to institutionalize this model to make it sustainable and durable? In the Canadian federal-provincial context, a complex panoply of mechanisms and forms of intergovernmental processes have been used including bilateral and multilateral intergovernmental agreements (whether or not supplemented by delegation), mirror legislation, special agencies set by both orders of governments, financial adjustments and transfers, and bilateral constitutional amendments.⁵⁸ However, these are only precedents. As Elazar stated, we can do no more than learn from precedents where we cannot transplant them. Focusing specifically on adopting the federal principle in Alberta's oil and gas development regulatory framework to resolve socio-economic challenges from energy resource development, the following sections consider some workable options in terms of which regulatory bodies and at which stage of decision-making should socio-economic challenges be assessed and resolved? Other practical questions include which municipalities should be at the table and whether or not through organized bodies?⁵⁹

6.3.1 Executive Federalism in the Oil and Gas Development Regulatory Framework

As noted in chapter 2 a distinctive feature of Canadian federalism is the emphasis on executive federalism, a pattern of interaction in which much of the bargaining of interests takes place directly between the executive branch of the orders of government.⁶⁰ Executive federalism remains the core vehicle of intergovernmental relations in Canada.⁶¹ The institutions of executive

⁵⁷ D.J. Elazar, ed., *Self rule/Shared Rule Federal Solutions to the Middle East Conflict* (Ramat Gan: Turtle Dove Publishing, 1979) at 11 [hereinafter *Self rule/Shared Rule*].

⁵⁸ Watts, *supra* note 45 at 79. A spectrum of operational versions of the Constitution has been achieved through court rulings, cost sharing, and intergovernmental agreements. Polishchuk, *supra* note 51 at 46-47.

⁵⁹ R. Moyes, *Provincial-Municipal Relations Highlights of the Current Changes Across Canada* (October 2002), online: <http://www.chba.ca/uploads/policy%20archive/2005/2002-10-01_09.pdf>

⁶⁰ H. Bakvis, G. Baier, and D. Brown, *Contested Federalism Certainty and Ambiguity in the Canadian Federation* (Oxford: Oxford University Press, 2009) at xii [hereinafter *Contested Federalism*].

⁶¹ *Ibid.* at 14.

federalism include regular meetings of the executives of each order of government to coordinate their actions, and to consult and inform one another of legislative or other initiatives they intend to take.⁶² The importance of executive federalism stemmed not so much from the frequency of intergovernmental meetings but from the substantive decisions made by executives in these forums. While executive federalism has been criticized for not having adequate citizen participation and restricts majority rule at all levels, this mechanism has ensured sufficient alignment of policy decisions with the needs and preferences of the society.⁶³

Multilateralism is the institutionalized format of intergovernmental dialogue with all provinces and territories in Canada at the federal level, as it allows systemic problems of national significance to be addressed and benefits all provinces.⁶⁴ However, the number of constituent units involved in the bargaining has implications for conducting multilateral intergovernmental relations.⁶⁵ Bilateral arrangements are reserved to deal with problems of particular significance for individual provinces or with a few immediately affected sub-national units.⁶⁶ Since we are dealing with specific socio-economic problems affecting one or a limited number of municipalities at a time, bilateral executive federalism will likely be ideal for resolving Alberta's socio-economic resource development issues and will fit well into the oil and gas regulatory framework.

⁶² J.P. Meekison, H. Telford & H. Lazar, eds., *Canada: the State of the Federation 2002: Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004) at 6 [hereinafter *Reconsidering the Institutions of Canadian Federalism*].

⁶³ Polishchuk, *supra* note 51 at 52.

⁶⁴ *Ibid.* at 55-6.

⁶⁵ Watts, *supra* note 45 at 81.

⁶⁶ *Ibid.* at 54.

The interaction and collaborative arrangements described above would be between the executive branch of the provincial government which is the Cabinet, and the affected municipal Council,⁶⁷ and statutorily endorsed by the legislature in one of the statutes that make up the regulatory regime for energy development as discussed in Part 6.6 below. Where Council has more than 3 members,⁶⁸ a Council Committee (such as the RMWB's Resource Development Review Committee) may be established for bilateral meetings with Cabinet on the specific issue of socio-economic challenges of resource development.⁶⁹ Such committee must be given full authority to bind Council.⁷⁰ Alternatively, a committee of Cabinet officials and municipal Council officials may be established for "resolving" the specific issue of socio-economic challenges of resource development.⁷¹ This committee will have the authority to bind Cabinet and the affected municipal Council.

⁶⁷ The basic structure of municipal government is simpler than that of the provincial and federal governments in that there are no separate executive and legislative branches at the municipal order. All executive and legislative powers and responsibilities are concentrated in the elected council which represent the local community and act on its behalf. See C.R Tindal & S.N. Tindal, *Local government in Canada* (Toronto: Nelson, 2004) at 259; Municipal Government Act ("MGA") R.S.A. 2000, c. M-26, ss.153 and 201-203. Although every council must establish by bylaw a position of chief administrative officer and may designate other officers. See MGA, *ibid.*, s. 205-210. Some functions are carried out by appointed staff organized in a number of functionally specialized departments such as planning and development, taxing and assessments, etc.

⁶⁸ No Council can have less than 3 members and one of the members must be the chief elected official (such as Mayor or Reeve). The chief elected official has no super powers more than other councillors apart from presiding at meetings and being involved in committees. See MGA, *ibid.*, ss.143, 154-155.

⁶⁹ A council may pass bylaws for the establishment and functions of council committees and other bodies consisting of entirely of councillors, non-councillors, or of a combination of councillors and other persons. MGA, *ibid.*, ss.145 and 146.

⁷⁰ A council may by bylaw delegate any of its powers, duties or functions under this or any other enactment or a bylaw to a council committee except certain powers or duties to pass bylaws, adopt budgets, with respect to taxes or make, suspend or revoke the appointment of chief administrative officer. MGA, *ibid.*, s. 203.

⁷¹ Provincial-Municipal committees or councils are not new in Alberta. See chapter 3, part 3.4.1 above. Further, Alberta has had a Standing Policy Committee on Energy and Sustainable Development. RMWB's Business Case 2002 was reviewed by a committee of Alberta Deputy Ministers convened by the Deputy Minister of Executive Council. The Business Case 2005 resulted in a new policy movement through a cross-ministerial committee mandated by the Premier Klein, and led by then Energy Minister, specifically to address the infrastructure issues of the RMWB. According to the Mayor of RMWB, such intergovernmental forum was a vital and necessary step in ensuring that the RMWB had the focused attention of the provincial government on the Business Case recommendations and rationale. See chapter 5 above.

Cabinet officials may include the Premier and the Ministers of Energy, Municipal Affairs, Environment and Sustainable Development, Treasury Board & Finance, and Infrastructure. Municipal Council officials may include the Mayor and one councillor of the affected host municipality. Membership may also include one or more officials of the municipal association to which the host municipality belongs (the Alberta Association of Municipal Districts and Counties (“AAMD&C”) or the Alberta Urban Municipalities Association (“AUMA”). The frequency of the meetings per project may be as needed, the most important thing is the substantive decisions made in these forums. To be efficient and fruitful the meeting will involve consideration of the project descriptions, preparation or review of data and business cases on what may be required in the local community to accommodate each new project compared with the benefits of the project. This will be followed by round table negotiations on the details of planning and timing, funding contributors, budgeting, implementation and subsequent evaluation of the required infrastructure and public services. Information or input may be required from various provincial departments and regulatory bodies administering provincial policies such as 20-year Strategic Capital Plan and the CRISP.

This type of bilateral provincial-municipal interaction potentially can be accommodated at two stages of the oil and gas regulatory framework: (a) the mineral rights disposition stage; and (b) the preliminary disclosure stage. As discussed in chapter 4 above, Alberta Energy, prior to offering mineral rights, refers all requests for Crown mineral rights to the Crown Mineral Disposition Review Committee (“CMDRC”) for a general assessment to identify major surface or environmental concerns that can affect surface access for exploration and development of

minerals.⁷² Alberta Energy can be statutorily mandated, in the *Mines and Minerals Act*⁷³ or any other statute that make up the development regulatory regime, to make a parallel referral to a meeting of Cabinet and affected municipal authorities for a general, high level assessment of available infrastructure and services to accommodate a major proposed development in the area. The advantage of having such evaluation at this stage is that the decision on whether or not to sell mineral rights in that area is fully informed.⁷⁴ If it is identified that the local community does not have enough facilities to accommodate project-related growth an addendum, similar to that for surface restrictions, may be attached to the sale identifying the lacking amenities which the project proponent may decide to provide or contribute to. At least companies will get a better sense of the cost of doing business in that area and determine whether to bid on the parcel based on the notation or adjust their bid accordingly. It also puts the responsible governments on notice ahead of proposed developments in the area in order to kick-start the process of providing what will be required to support incremental development that may occur.

The potential disadvantage of having this evaluation at this stage is that it may be too premature to assume that the proposed developments will occur when compared with the level of investment that may be required. Companies may relinquish leases without development and any government anticipatory capital investment in infrastructure and services in the area may turn out unprofitable.⁷⁵ Such government investments must be based on valid information that the

⁷² CMDRC is continued pursuant to *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 s. 10(2).

⁷³ R.S.A. 2000, c. M-17.

⁷⁴ It has been argued that the sale of mineral rights are a key determinant of the future of Alberta's landscapes and they tilt the playing field decisively in all subsequent discussions of where, when and at what pace oil and gas development should occur. S. Kennett & M. Wenig, "Alberta's Oil and Gas Boom Fuels Land-Use Conflicts — But Should the EUB Be Taking the Heat?" (2005) 91 *Resources* at 5-6.

⁷⁵ Contrastingly, academic opinion and stakeholders view the sale of mineral rights as a critical first step in the development process. While there is no guarantee that development will ultimately occur, the tenure process is a critical decision point in terms of directing the timing, location and intensity of development. Thus the rate at which

proposed development will occur. Further, the sheer frequency of the process may bog down these governments that the option may become impracticable. Public offerings of mineral rights are held every two weeks totaling an average of 24 land auctions annually.⁷⁶ A way around the frequency may be to narrow the referral down to particular types of agreements which may be categorized as high growth or large scale agreements, such as oil sands leases.

Furthermore, there may be very little or no information at this stage about proposed projects for any meaningful socio-economic assessment. However, it is notable that in British Columbia and the Yukon territory, postings of Crown oil and gas rights are subject to a review process in which local governments, First Nations, government agencies, and the public may make submissions in respect of environmental, socio-economic, and surface access concerns. Based on the submissions from the review, the responsible Ministry makes a determination as to whether to make available the proposed lands for the public bidding process and if so, under what conditions. At times, comments received in the review process are included as part of the tenure document.⁷⁷

oil sands rights are sold inevitably drives the pace at which exploration and development will take place. See N. Vlavianos, *The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis* (Canadian Institute of Resources Law Occasional Paper #21 August 2007) at 11 and the literature cited therein [hereinafter *Regulatory Framework for Oil Sands*].

⁷⁶ Approximately 8,000 petroleum and natural gas agreements are issued annually. See online: Alberta Energy Homepage <<http://www.energy.gov.ab.ca/News/tenure.asp>>

⁷⁷ See details in A. Harvie & T. Mercier, "The Alberta Land Stewardship Act and its Impact on Alberta's Oil and Gas Industry" (2010-2011) 48 Alta. L. Rev. 295 at 326; J. L. Fingarson and R.R. Shouldice, "The Oil and Gas Industry and Land Use Issues in British Columbia" (1994) 32 Alta. L. Rev. 203; Community Relations Branch & Resource Development Geosciences Branch of Ministry of Energy, Mines and Petroleum Resources British Columbia, "Pre-Tenure Community Engagement and Referral Process for P&NG Rights in the Telkwa Coalfield" (May 2006); S. Morii (Director Resource Development, Ministry of Energy, Mines and Petroleum Resources British Columbia), "Management of Crown Petroleum and Natural Gas Rights" (*Oil and Gas 101*, Fort St. John, 15 February 2006).

By contrast, the preliminary disclosure stage as discussed in chapter 4 above, is a notice to the provincial government of a proposed development and initiates a review of the project and approval (or denial) in principle, in terms of the form, timing, location, or any other essential feature of the proposal.⁷⁸ If endorsed by Cabinet, the proponent can proceed to the stage 2 detailed scheme approval and licensing process. The difference is that development is assured by the company making the disclosure, so that any private or public investment will go to that benefit, and at this stage an outline of the project and its requirement is provided to the government by the company. However, it is observed that in the oil and gas context, the requirement for the preliminary disclosure stage is currently contained in an ERCB policy and required only for oil sands development.⁷⁹ In fact, a draft Directive 023 proposes to remove this stage from the oil sands approval process.⁸⁰

The preliminary disclosure stage of the regulatory process can be statutorily mandated as discussed in Part 6.6 below. To be all round and effective, the preliminary disclosure stage should be required for all oil and gas projects categorized as high growth or large scale that may have overwhelming socio-economic challenges on the host communities. A threshold population may be established by Regulations to determine which types of projects will require preliminary

⁷⁸ As stated in chapter 4 above, this stage also allows the proponent to (a) introduce and outline a project to the regulatory agencies thereby identifying the most serious concerns that will have to be addressed subsequently, (b) gain Cabinet “decision in principle,” and (c) help minimize costs for the proponent in cases where the proposal is rejected. Alberta, *Alberta Tourism Recreational Leasing (ATRL) Process* (Edmonton: January 1999) at 5 [hereinafter *ATRL Process*].

⁷⁹ Energy Resources Conservation Board, Directive 023 - *Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project* (01 September 1991) at 3 [hereinafter Directive 023]. However, it appears it is also used in recreational leasing. See *ATRL Process*, *ibid*.

⁸⁰ Draft Directive 023: *Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project*, May 28, 2013 released with Bulletin 2013-20: Invitation for Feedback – Draft Directive 023: Oil Sands Project Applications, May 28, 2013. Online: AER Homepage <http://www.aer.ca/documents/directives/DraftDirective023_20130528.pdf>

disclosure.⁸¹ The process should require the disclosure to be made to the provincial-municipal council or committee described above. The disclosure should include a full Socio-Economic Impact Assessment (showing the population-worth of the project, timing, duration and the public infrastructure and services that may be required to support the project, proposed mitigative measures or pledged capital contributions if necessary) and a Business case establishing the reason why government should make capital investment in support of the project. The provincial-municipal council or committee will review the applicant's disclosure documents and compare with data and input from government departments showing the available infrastructure in the proposed region and how many more projects that could be accommodated based on the assessed cumulative impacts of existing projects.

If the project will occasion substantial infrastructure and services deficit, resolution through planning, funding contributions, timing, and monitoring will be settled among the responsible governments at the time of issuing the in-principle approval. The provincial-municipal council or committee may attach conditions to the in-principle approval such as allocation of a part of infrastructure cost to the project proponent or a deferral of the project timing to allow infrastructure upgrade to accommodate the development. If there will not be infrastructure and services deficit, in-principle approval is issued and socio-economic considerations are checked off as resolved and the project moves on to scheme approval or licensing. Embedding executive federalism in a statutorily mandated preliminary disclosure stage ensures that socio-economic factors are considered, resolved, and checked off by the responsible governments prior to other

⁸¹ As noted above, the people-worth of a project and the support resources, in terms of infrastructure and services, required to sustain it are measurable. As illustrated, if an \$8 billion project would bring in 1000 permanent positions, that spins off to 3000 other jobs created in the region. The 4000 people for these job positions will likely put on another 2000 people accompanying them. Therefore the project is worth about 7000 to 8000 people. Interview with Melissa Blake, *supra* note 8.

project approvals. It is a forced intergovernmental cooperation and coordination which ensures that the host community will be prepared for the development and industry will be assured of availability of infrastructure and public services to support the development and its required workforce.

One potential disadvantage of executive federalism at the preliminary disclosure stage is the delay it may cause to projects. In a worst case scenario, projects waiting to be assessed in-principle may be backlogged. To avoid such scenario, it is suggested that a specific timeline for the provincial-municipal council or committee review be included in one of the energy statutes that will enable this process. A supporting secretariat may also be required to facilitate the review process. Input from other regulatory bodies and departments and using existing provincial policies such as the 20-year Capital Plan may be useful to overcome delays, in that, the review will be easier if the region or community under consideration is already highlighted in these plans. Arguably, a small amount of delay at this initial stage to ensure availability of necessary infrastructure and services to support the proposed development would be tolerable compared to significant delays after project start-up due to lack of supporting infrastructure and inability to attract and retain required labour.

Another potential disadvantage is the time and cost burden on the company in preparing a full SEIA and Business Case at this early stage of the project. Arguably, such projects in any event will require a full Environmental Impact Assessment (“EIA” comprising SEIA) and to show “need for the project” in its application for scheme approval and licenses. From the above analysis statutorily-mandated executive federalism at the mineral rights stage or the preliminary

disclosure stage of the energy development regulatory framework is a viable failsafe mechanism, in addition to general provincial policies, to resolving socio-economic challenges of energy projects on host municipalities.

6.3.2 Federalism and the Municipal Association or a Liaison Secretariat/Department

This section examines the option of applying the federal principle of coordination and partnership between the provincial government and the affected municipality through an established municipal association or a provincial secretariat, office or department. The underlying goal is to fit this mechanism into the energy regulatory framework.

Municipal Associations

As discussed in chapter 3 above, Alberta's two principal municipal associations are the AAMD&C and the AUMA. Municipal association affords municipalities, that share common interests, the power of collective action over a provincial policy or legislative bill affecting them or municipal interests generally. It is a very useful lobbying agency due to its recognized status by the province and its constant interaction and regular meetings with ministers, deputy ministers, MLAs and senior provincial officials. A senior director of the AUMA confirmed that the AUMA most times gets copies of draft provincial reports and policies for comments as well as invitations to sit on various stakeholder working groups and advisory committees in relation to provincial policies.⁸² In some cases where there are high impacts, the AUMA will establish a working protocol with the appropriate ministry.⁸³ The AUMA also participates in provincial

⁸² Interview with Brian Jackowich, Sr. Director Energy Services AUMA, (22 May 2009) [hereinafter Interview with Brian Jackowich].

⁸³ An example is the Climate Change Initiative. The protocol is a very high level non-prescriptive document stating that the AUMA will work together with the government through various means like quarterly updates. *Ibid.*

public consultations and if there is need for more information, it will go back to member municipalities and obtain their input. The feedback will then be consolidated and submitted under the umbrella of the AUMA speaking on behalf of all its members.⁸⁴

However, municipal associations become less effective when it comes to issues that are unique or specific to a single or few municipalities, and worsens in the event of divergent views among members. The mandate of the AUMA is simply too broad and varied to adequately represent an individual member municipality's unique interest.⁸⁵ According to the AUMA official, the AUMA's role would be more of a facilitator writing from the two sides of the story. Given that socio-economic challenges from energy development are not general but affect only a few municipalities, municipal associations have proven not to be an appropriate intergovernmental mechanism to resolve such unique issues. Besides, due to the time-sensitive nature of the project approval process, it may be difficult to fit the Association's middle-man process into the regulatory framework.

Provincial Department and Liaison Secretariat

As also noted in chapter 3, municipal-provincial relations for most municipal activities typically occur through the responsible provincial department, in this case, Municipal Affairs. However, other specialized provincial institutions established for energy specific issues are relevant in this analysis. Currently operational are the Oil Sands Secretariat and the Land-Use Secretariat ("LUS") each of which is discussed in chapter 5 above. Still in the making is the PMO under the

⁸⁴ *Ibid.*

⁸⁵ According to the Mayor of the RMWB, because the AUMA has such a broad-based membership from one end of Alberta to the other, it will be difficult for it to have much of an impact on one municipality's unique interest and because RMWB is such an anomaly it will not make sense to use it as a measuring stick for all the municipalities. Interview with Melissa Blake, *supra* note 8.

Regulatory Enhancement Project (“REP”) discussed in detail below. To a certain degree, the establishment of these provincial bodies shows that Alberta is beginning to “think federal”⁸⁶ to the extent their objectives are coordination and collaboration among various regulatory bodies on the various issues within their mandate.⁸⁷ The discussion here focuses on the extent of their mandate, interaction with municipal government, and their ability to resolve project-related socio-economic challenges. The Department of Municipal Affairs ordinarily should be in the best position to find solutions to all manner of municipal issues but that appears not to be the case in the energy development context.

Municipal Affairs has a large mandate with a fixed allocation of funds to oversee all municipalities in Alberta, bearing in mind that the cause of this type of socio-economic challenges is not a core municipal function.⁸⁸ Naturally, Municipal Affairs would not see why it should concentrate its allocation on one municipality and ignore the needs of the rest. As indicated by the Mayor of the RMWB, because Municipal Affairs constantly hears concerns from all over Alberta about growth, aging infrastructure and cost of maintenance and replacement, it is more difficult for the Department put into perspective why the RMWB is such

⁸⁶ That is, approaching the problem of organizing relationships from a federalist rather than a monist or centralist perspective. See *Exploring Federalism*, *supra* note 40 at 12.

⁸⁷ The Oil Sands Secretariat collaborates with ministries, industry, communities and stakeholders to address the social, infrastructure, environmental and economic impacts of oil sands development. It acts as a main point of contact for inquiries from the public, industry and stakeholders on the government’s plan for managing growth in the oil sands. After Regional Plans are in place, the Land-Use Secretariat, among other duties, communicates with local planning bodies to clarify and interpret Regional Plans, collects information to support land-use planning and decision-making, and creates an integrated information system to ensure decision-makers have access to relevant information.

⁸⁸ It has been noted that many of the issues facing municipalities have their roots in other policy areas not the historical core function of municipalities. Yet their effects flow over and run down municipal streets, impacting all municipal core functions and activities including policing, public safety and protection, fire service and ambulance, community social services, and even recreational and facility planning. See C. Vander Ploeg, *Rationale for Renewal: The Imperatives Behind a New Big City-Provincial Partnership* (Calgary, AB: Canada West Foundation, 2005) at 17 [hereinafter *Rationale for Renewal*].

a unique situation and why it needs the greatest priority focus.⁸⁹ Arguably, resolving energy-related socio-economic challenges is not within the mandate of Municipal Affairs. Therefore additionally taking on the resolution of this unique issue may cripple the department's other functions and would require allocation of special funding and other resources to the department. Besides, Municipal Affairs is not part of the energy regulatory framework (except through the Special Areas Board when applicable) therefore finding a stage in the framework to fit in coordination with the department for regulatory approvals would likely not be practicable.

The Oil Sands Secretariat was established, initially as an arm of the provincial Treasury Board, as a reactive response to the challenges that had already accumulated and an avenue of communication between the RMWB and the province. Its mandate is only oil sands and no other energy resource, and may not include allocating funds for infrastructure investment. It may not be practicable to use this body in its current form for the resolution of socio-economic challenges from other types of high growth or large scale energy development. Further, as the secretariat is not part of the regulatory framework it may also be difficult to import it into the approval process.

The LUS forms part of the policy-making bodies that may affect energy development. Its mandate includes developing Regional Plans for Cabinet approval, ensuring implementation of those plans, clarifying and interpreting Regional Plans and collecting information. Since Regional Plans bind all decision-makers, it can be said that they are at the apex of the regulatory pyramid or at the center of regulatory circumference. Arguably, the Secretariat could recommend for Cabinet approval legally-binding socio-economic thresholds, triggers and limits for each

⁸⁹ Interview with Mayor Melissa Blake, *supra* note 8.

region in a Regional Plan through intensive coordination and cooperation with the municipalities in each region in addition to RACs. The thresholds, triggers and limits will then be monitored and updated like those for air and water. With set thresholds applicable at all stages of the regulatory framework, the decision to sell mineral rights in an area where socio-economic limits will be exceeded will likely trigger legally mandated management response from provincial and municipal governments in the form of executive federalism discussed above. For the LUS to be a viable mechanism, the big question is whether the province will be willing to include legally-binding socio-economic thresholds, triggers and limits for each region in Regional Plans? The legal framework in the ALSA may be adjusted to legally mandate coordination and cooperation between the LUS and the municipalities in each region in recommending and establishing socio-economic thresholds, triggers and limits for each region as discussed in Part 6.6 below. Each Regional Plan will have to legally require management response from a legally mandated provincial-municipal council or committee as described above where the set limits are about to be exceeded.

6.3.3 Federalism and the Quasi-Judicial Regulator

As discussed in chapters 4 and 5 above, the AER is the successor of the ERCB effective June 17, 2013. The ERCB was a quasi-judicial tribunal of the provincial government and the primary regulator charged with the responsibility of approving (or denying) and monitoring oil and gas projects throughout their lifecycle. Although a Category A regulatory body, the ERCB's mandate began only at stage 2 of the regulatory framework, that is, after mineral rights have been sold to companies and the provincial Cabinet has approved the project in principle (in the case of oil sands). It is expected that the same will be the fate of the AER unless the provincial Cabinet approval in principle stage is removed as proposed in the draft Directive 023 mentioned above.

It has been argued that leaving such complex, time sensitive and resource implicated socio-economic issues, for the stage 2 process is late. The predecessor Boards have stated that they did not have the mandate to “resolve” socio-economic challenges of energy projects. Similarly, academic opinions have queried whether the regulatory Board is the right forum to resolve resources development conflicts.⁹⁰ They concluded that indeed the Board lacks the adequate legal mandate and institutional capacity to resolve many of such underlying issues.⁹¹ As background context to the role of the primary regulator in the energy regulatory framework, the discussions below look at the predecessor Board’s mandate (ERCB) and whether the recent alteration of the regulator’s legal mandate and institutional capacity has made any difference. The pros and cons of applying executive federalism at stage 2 of the regulatory framework are also analyzed.

The Energy Resources Conservation Board’s Role and Mandate

The ERCB answered directly to the Cabinet, through the Minister of Energy, but made its formal decisions independently in accordance with the statutes it administered.⁹² The goal of “regulation of energy development” was separated into two core businesses: (a) adjudication and regulation;

⁹⁰ A senior executive of the former EUB was quoted to have told workshop participants that the Board was at the “centre of a storm” of conflicting demands from industry, government departments, landowners and other stakeholders and yet “[w]e as a regulatory body are not in a position to decide if development is (inherently) good and whether or not we should defer development.” See Kennett and Wenig, *supra* note 74 at 2 and 5 quoting Michael Bruni, “Land-Use Conflicts Escalating, Solutions Urgently Needed” (April 1 – May 17, 2005) 16:4 *EnviroLine* at 2. Elsewhere, an EUB spokesperson was also quoted as saying that the EUB’s role is “to ensure that orderly and responsible development occurs, not if development should occur — very big distinction there.” See *Regulatory Framework for Oil Sands*, *supra* note 75 at 32.

⁹¹ Kennett & Wenig, *ibid.* at 1. The authors noted that certain factors limit the Board’s ability to resolve many of the resource development issues thrust upon it including the lack of policy and planning guidance on key issues and the influence of mineral rights issuance on subsequent decision-making.

⁹² ERCB, “EnerFAQs 01- What is the Energy Resources Conservation Board?” at 1 in *Frequently Asked Questions on the Development of Alberta’s Energy Resources* (September 2011).

and (b) information, knowledge, and advice.⁹³ In its adjudicatory and regulatory role, the Board reviewed all oil and gas related applications and ensured that existing projects are compliant with provincial requirements throughout their lifecycle.⁹⁴ Unresolved conflicts among industry competitors or between companies and landowners were settled in a balanced and fair manner through appropriate dispute resolution or the ERCB hearing process.⁹⁵ These appear to be the type of conflicts the ERCB interpreted its mandate to include.

The Board's regulatory responsibilities and core objectives focused on public safety, environmental protection, resource conservation, and regulatory compliance.⁹⁶ In essence, the Board was more of a technical expert tribunal, said to be guided by the "resource ethic" (the maximum recovery of resources with minimal waste).⁹⁷ This description fit the Board's legal mandate as deciphered from the purposes of the various pieces of legislation it administered: (a) to conserve resources and prevent waste; (b) to ensure safe and efficient practices by oil and gas developers in their operations; (c) to ensure economic, orderly and efficient development of the oil and gas resources in the public interest; (d) to ensure equity among mineral rights holders; (e) to serve as the information bank; (f) to protect the environment against pollution; and (f) to appraise the resources and their productive capacity.⁹⁸ In carrying out these purposes, the Board

⁹³ Energy Resources Conservation Board, *Business Plan 2010-2013* at 4, online: ERCB Homepage <http://www.ercb.ca/projects/URF/URF_ERCBRole.pdf> [hereinafter ERCB Business Plan].

⁹⁴ See online: ERCB Homepage <<http://www.ercb.ca/about-us/what-we-do>>; "EnerFAQs10- Public Health and Safety: Roles and Responsibilities of Agencies that Regulate Upstream Oil and Gas," *supra* note 88 at 2.

⁹⁵ In 2011, the ERCB received over 39,500 applications relating to energy facilities and resources, and held 10 hearings. Online: ERCB Homepage <<http://www.ercb.ca/applications/hearings/HearingSummary.pdf>> See online: ERCB Homepage <http://www.ercb.ca/about-us/what-we-do/current-projects/urf/urf_howdoes>

⁹⁶ ERCB Business Plan, *supra* note 93 at 3.

⁹⁷ For more on the resource ethic, see Fluker, *supra* note 24 from 1089.

⁹⁸ *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, s. 4; *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, s. 3; and *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 2.

was authorized to conduct a hearing, inquiry or other investigation.⁹⁹ Whenever the Board was charged with the conduct of such hearing, inquiry or other investigation in respect of an energy resource project, the Board was required to (in addition to any other matters it may or must consider) “give consideration to whether the project is in the public interest.”

For this public interest consideration, the Board must have regard to the “social and economic effects of the project and the effects of the project on the environment.”¹⁰⁰ The legal debate as to the content of the Board’s public interest mandate remains elusive.¹⁰¹ The Board struggled with interpreting and applying its public interest mandate. In Compton’s case¹⁰² the Board stated:

It is difficult to define concretely what is meant by the public interest and how the Board will apply consideration of this interest in any given situation...Concepts as fluid as social, economic, and environmental impact are not easily resolved through the application of fixed principles. The Board must identify the elements of each applied-for energy development that would provide benefit not exclusively to the applicant and those directly connected to the development, but to Albertans in general. The Board must also weigh those benefits against the risk factors that are present, given the nature of the development, the location proposed, and other factors associated with the specific situation.

A finding by the Board that the approval of a development would be in the public interest does not imply that there will be no site-specific impacts. The challenge for the Board is to ensure that any site-specific or local impacts are mitigated to an appropriate and acceptable level.

If the Board finds that risk, among other potential negative consequences, cannot be sufficiently mitigated, thereby finding that the risk exceeds the potential benefit, the project could not be said to be in the public interest and would therefore not be approved by the Board. Alternatively, a project may be found to

⁹⁹ ERCA, *ibid.*, s. 29.

¹⁰⁰ ERCA, *ibid.*, s. 3 originally enacted as s. 2.1 in 1993. See Fluker, *supra* note 24 at 1087. On the public interest mandate see also OGCA, *supra* note 98, ss. 4(c), 41(1) and 106(1)(b) and OSCA, *supra* note 98, ss. 3(b) and (g), 10(3)(a), and 11(3)(a).

¹⁰¹ See generally Fluker, *ibid.* and literature cited therein; Kennett & Wenig, *supra* note 74 at 3-4; *Roadmap for Public Interest*, *supra* note 5 at 4 and 6 citing M. Feintuck, *The Public Interest in Regulation* (Oxford: Oxford University Press, 2004). For a summary of various approaches to defining the “public interest” including academic theories, Courts and tribunals, and legislation, see p. 3. See also “The Public Interest” *supra* note 5.

¹⁰² *Compton Petroleum Corporation Applications for Licences to Drill Six Critical Sour Natural Gas Wells, Reduced Emergency Planning Zone, Special Well Spacing, and Production Facilities Okotoks Field (Southeast Calgary Area)* (22 June 2005) Decision 2005-060 at 11-13 (E.U.B.).

be consistent with the public interest where the Board finds that the benefits of the project outweigh the potential for negative consequences and that appropriate mitigative measures can be applied to reduce or eliminate any negative aspects of the project.

An academic opinion argued that the Board gave its public interest mandate a cost/benefit interpretation which excluded or discounted factors not readily quantifiable.¹⁰³ It was also argued that determinations of acceptable level of impacts, as well as setting measurable thresholds, involve high-level, cross-cutting policy-making for which regulatory tribunals are poorly situated to make.¹⁰⁴ These issues are political in nature, requiring intergovernmental negotiation and coordination.¹⁰⁵ The notion that broad policy-making is the role of government and the legislature, whereas policy implementation is the role of regulatory tribunals, has recently been endorsed by the government of Alberta in the REDA discussed below.¹⁰⁶ It is clear from the Board's statement in Compton's case, which remains valid for socio-economic impacts, that the absence of thresholds against which to measure effects made it difficult for the Board to evaluate whether incremental impacts from new development would be acceptable and what measures might be adopted "to reduce the cumulative effects to suitable levels."¹⁰⁷ Therefore placing the responsibility entirely on the Board is misguided as the balancing exercise will remain difficult

¹⁰³ Fluker, *supra* note 24 at 1094-5; *Regulatory Framework for Oil Sands*, *supra* note 75 at 40. For more on the debate over the merits and demerits of the cost/benefit analysis as a decision-making tool see Fluker, *ibid.* at 1094 note 51 and accompanying text.

¹⁰⁴ Kennett & Wenig, *supra* note 74 at 4-5. The Authors argue that absent clear, over-arching guidance from the Legislature or Cabinet, it is functionally difficult for the Board to make broad policy calls that would inevitably set direction for other provincial regulators and other decision-makers.

¹⁰⁵ *Ibid.* at 4; *Regulatory Framework for Oil Sands*, *supra* note 75 at 31.

¹⁰⁶ The Minister of Environment and Sustainable Resource Development during the legislative debate stated: "[t]he important piece of this is that government will make policy. That is the job of government, to work with Albertans and to create policy. The policy will then be given to the regulator to implement." See Alberta, Legislative Assembly, *Hansard Debates* (7 November 2012) at 652. *Enhancing Assurance*, *supra* note 2 at 11 also states that in Alberta, elected officials are responsible for setting policy, primarily through acts of the legislature.

¹⁰⁷ *Regulatory Framework for Oil Sands*, *supra* note 75 at 6 quoting *Re Shell Canada Ltd. Application to Drill Four Critical Sour Gas Wells and Construct and Operate Related Pipeline and Facilities - Castle River Area* (8 March 2000), Decision 2000-17 at 10 (E.U.B.).

in the policy vacuum.¹⁰⁸ Similarly, it was argued that the Board simply approved applications based on the contents, not feelings, provided the proponent has met all regulatory requirements and was in line with existing policies.¹⁰⁹ Thus, at the licensing stage of the framework, the time had passed for making decisions as to whether there infrastructure was sufficient in the region to support the project's needs.¹¹⁰

As discussed in chapter 5 above, the Board could not resolve the identified socio-economic challenges of the oil sands projects and could only make recommendations to the responsible governments. The lesson learned for our purpose is that a forum which can only “recommend” possible solutions to responsible authorities, without more, may not be the appropriate forum to “resolve” complex socio-economic challenges of large-scale energy development on industry and host communities. The provincial Cabinet and the affected municipal governments are the responsible authorities. Further, there was an absence of thresholds against which the Board could measure socio-economic effects and a lack of authority to mandate government response. Alberta's primary regulatory Board has once again undergone a reform. How does the current reform address the socio-economic assessment and resolution gap identified in this thesis?

The Alberta Energy Regulator's Role and Mandate

Alberta's oil and gas primary regulator has been evolving since 1932. Chapter 4 above notes that before the enactment of section 619 of the MGA in 1995, a rejected proposal was that significant development project review should have a “one window” approach overseen by a superagency. The superagency would preempt the jurisdiction of the other public authorities and ensure that

¹⁰⁸ *Roadmap for Public Interest*, *supra* note 5 at 5; “The Public Interest,” *supra* note 5 at 4.

¹⁰⁹ Interview with Brian Jackowich, *supra* note 82.

¹¹⁰ *Roadmap for Public Interest*, *supra* note 5 at 5; “The Public Interest,” *supra* note 5 at 4.

the interests of all the public authorities concerned are reflected in the decision. In 2002 the Resource Development Regulatory Review was established as a cross-ministry initiative led by Alberta Energy, the Alberta Energy and Utilities Board and the Ministries of Environment and Sustainable Resource Development. The Report entitled, “*A Proposal For Regulating Resource Development*,”¹¹¹ recommended changing the regulatory delivery approach to that which assigns end-to-end responsibility for regulating energy development to a single regulator. The goal was more streamlined, efficient and effective regulatory process, and transparency and accountability.¹¹² The Report recommended one review, one comprehensive approval and one appeal process. The objective was to improve delivery of regulations, Alberta’s business climate, reduce the cost of regulatory requirements over time and maintain Alberta’s high environmental standards.

It seems nothing was done with this report until March 2010 when the Regulatory Enhancement Task Force¹¹³ was established to conduct a comprehensive upstream oil and gas regulatory review and recommend system level reforms to ensure Alberta has a competitive regulatory system (the REP).¹¹⁴ The Task Force delivered its final report in December 2010¹¹⁵ which

¹¹¹ *Supra* note 9. The Scope of the review in 2002 included the regulatory and administrative processes delivered by Alberta Energy and the management of air, water, timber, grazing, oil, oil sands, gas, coal, mineral and public land.

¹¹² *Ibid.* at 11.

¹¹³ Sponsored by Alberta Energy, the REP was undertaken by a team of government representatives from Alberta Energy, Alberta Environment, Alberta Sustainable Resource Development, the Energy Resources Conservation Board and Alberta Justice and Attorney General.

¹¹⁴ In March 2010, the government reported to Albertans in *Energizing Investment: A Framework to Improve Alberta’s Natural Gas and Conventional Oil Competitiveness* outlining a series of actions and initiatives to position Alberta as one of the most competitive jurisdictions in North America for upstream oil and gas development, which resulted in the establishment of REP. See *Enhancing Assurance*, *supra* note 2 at 5. The task force was instructed to make recommendations in the following areas: Policy Integration Framework – to resolve any gaps, overlaps, inconsistencies and duplications in Alberta’s strategic provincial policies around the oil, gas and oil sands sectors, and potentially other resource sectors; Policy Assurance System – for an enhanced policy assurance (regulatory delivery) system with performance measures and benchmarks; and Implementation Strategies – on the critical issues relating to implementation of an enhanced system.

¹¹⁵ *Enhancing Assurance*, *ibid.*

recommended an enhanced Policy Development and Policy Assurance system for Alberta's energy sector comprising two key functions: (a) policy development performed by the Government of Alberta; and (b) policy assurance performed by a single regulator for the energy sector. The Policy Development component involves the development of consistent and integrated natural resource policies of the provincial departments of Energy and ESRD¹¹⁶ which balance social, economic and environmental objectives in relation to air, water, and land management with conservation, extraction, processing and transportation of resources.

The Policy Assurance component supports implementation of the policy outcomes set by government, through regulatory functions such as project review and authorization, compliance monitoring, enforcement, facilities abandonment and site reclamation/remediation. These regulatory functions performed by ESRD and the ERCB in respect of oil, natural gas, oil sands and coal, are consolidated and integrated in a new single regulator to provide greater consistency, clarity and accountability.¹¹⁷ For both components the Task Force recommended a new PMO and a Single Regulator. The PMO also has stewardship and oversight role by providing an interface between policy development and policy implementation, and providing clear government policy guidance to regulators.¹¹⁸

¹¹⁶ The SREM (Alberta's Commitment to Sustainable Resource and Environmental Management, 1999) ministries. The PMO is also tasked with creating an effective process to engage Albertans in the policy-making process earlier, and with developing performance measures. Work is said to be underway within the Departments of Energy and ESRD to assess the functions and staffing required for the new PMO. For other recommendations of the Task Force see Alberta, *Enhancing Assurance: Developing an integrated energy resource regulator, A Discussion Document* (May 2011) at 4-5 [hereinafter *Developing an integrated energy resource regulator*].

¹¹⁷ *Ibid.* at 3.

¹¹⁸ *Enhancing Assurance*, *supra* note 2 at 13.

The Government of Alberta accepted all the recommendations of the Task Force in January 2011¹¹⁹ and a discussion document on how to implement them was published in May 2011.¹²⁰ Subsurface tenure acquisition process was not within the scope of REP, and the single regulator will neither assume responsibility for mineral tenure nor the functions of the Surface Rights Board.¹²¹ The main objective of REP is for Alberta to have an efficient and effective regulatory system to enhance its business competitiveness.¹²² These Reports confirm that Alberta's current regulatory system provides "assurance" (implementation) in three key areas:

- Environment - ensuring Alberta's vital environmental resources, air, water, land and biodiversity, are managed appropriately;
- Public safety - ensuring development does not compromise the health and safety of the general public; and
- Resource conservation - preventing waste of Alberta's resources from inappropriate practices (e.g., unnecessary flaring of natural gas) and providing for orderly development of oil and gas reservoirs in ways that ensure optimum recovery and equity.¹²³

Socio-economic well-being and required public infrastructure and services seem not to be within these key regulatory areas. Further, the setting of policy thresholds, targets, or standards for environmental, economic, social, or other factors was expressly said not to be within the scope of REP.¹²⁴ It is uncertain whether the PMO, in its integration and alignment work, will be setting socio-economic thresholds, triggers, targets, or standards. The proposed enhanced system

¹¹⁹ Alberta, News release, "Alberta to better integrate oil and gas policy and regulatory system - Regulatory Enhancement Task Force delivers report to government" (28 January 2011).

¹²⁰ *Developing an integrated energy resource regulator*, *supra* note 116.

¹²¹ *Ibid.* at 9; *Enhancing Assurance*, *supra* note 2 at 27.

¹²² The REP principles are effectiveness, efficiency, adaptability, predictability, fairness and transparency. See *Developing an integrated energy resource regulator*, *ibid.* at 2 and 6; Alberta, the *Lower Athabasca Regional Plan*, O.C. 268/2012 (*Alberta Land Stewardship Act*) at 24-25 and 37 [hereinafter LARP].

¹²³ *Enhancing Assurance*, *supra* note 2 at 10.

¹²⁴ *Ibid.* at 27.

required legislative changes, especially the consolidation of regulatory functions in a new single regulator. In this regard, the REDA¹²⁵ was enacted and established the AER or Regulator as a non-Crown corporation.

The AER is said to be a ‘modern governance model’ under the direction of a Board of Directors appointed by the Lieutenant Governor in Council (a minimum of 3 Directors), and a Chief Executive Officer appointed by the Board of Directors with the approval of the Minister.¹²⁶ Hearing of applications, regulatory appeals and reconsiderations are conducted by a panel of one or more hearing commissioners including a chief hearing commissioner, from a roster established by the Lieutenant Governor in Council. The hearing commissioners’ decisions shall be that of the Regulator.¹²⁷ The legislative mandate of the AER is to: (a) provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta; and (b) regulate the disposition and management of public lands, the protection of the environment, and the conservation, management, allocation and use of water. The powers, duties and functions

¹²⁵ *Supra* note 7.

¹²⁶ REDA, *ibid.*, ss. 3-7. The Lieutenant Governor in Council also determines the remuneration of the Directors. The Board is responsible for the general management of the business and affairs of the Regulator while the CEO is responsible for the day-to-day operation of the business and affairs of the Regulator. There is a separation in the governance function of the Board of Directors, the management responsibilities of the CEO, and the conduct of hearings by hearing commissioners. See Introduction of Bill 2 at the Committee of the Whole in Alberta, Legislative Assembly, *Hansard Debates*, (6 November 2012) at 564 (Minister of Energy).

¹²⁷ REDA, *ibid.*, ss. 11-13. The Lieutenant Governor in Council also determines the remuneration of the hearing commissioners. The proceedings of the hearing commissioners are part of the day-to-day operations of the Regulator, and the hearing commissioners are entitled to receive professional, technical, administrative and operational support from the Regulator in the conduct of hearings and inquiries. Concerns have been expressed about the perceived independence of the Regulator (the Board of Directors and the hearing commissioners) by academic and other commentators and by opposing Members of the Legislative Assembly (“MLA”). It was argued that there is no legislative direction on how to appoint and who will be appointed to the Board or as a hearing commissioner, neither is there any requirement for representation of a variety of background, expertise and interests. See N. Vlavianos, “An Overview of Bill 2: Responsible Energy Development Act — What are the changes and What are the issues?” (15 November 2012) 4-5 at The University of Calgary Faculty of Law Blog on Development in Alberta Law [hereinafter ABLawg] [hereinafter “An Overview of Bill 2”]; S. Fluker, “Bill 2 Responsible Energy Development Act: Setting the stage for the next 50 years of effective and efficient energy resource regulation and development in Alberta” (8 November 2012) 2-3 at ABLawg [hereinafter “Setting the stage for the next 50 years”]; Alberta, Legislative Assembly, *Hansard Debates*, (31 October 2012) at 426; and (1 November 2012) at 926-927 (Honorable Leader of the Official Opposition).

of the Regulator are those existing under energy resource enactments¹²⁸ and specified enactments;¹²⁹ and pursuant to the REDA, the following: (i) review and decide applications in respect of energy resource activities;¹³⁰ (ii) monitor and enforce safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of energy resources; (iii) oversee the abandonment and closure and regulate the remediation and reclamation of energy resource activities at the end of their life cycle; and (iv) monitor site conditions and the effects of energy resource activities on the environment and enforce compliance.¹³¹

The mandate of the Regulator has been described as overtly resource development focused with specific qualifiers around “safety” and “environmental” responsibility.¹³² The socio-economic perspective seems to be omitted in the enabling statute. As a one-stop shop, the AER will assume the regulatory powers, duties and functions of officials, departments, the Government or the Crown in respect of energy resource activities in the specified enactments.¹³³ On the factors to be considered in an application, regulatory review, reconsideration or inquiry, the term “public interest” has been dropped. The Regulator shall consider, in addition to any other factor it may or must consider, any factor prescribed by regulations, including the interests of landowners.¹³⁴ The

¹²⁸ “Energy resource enactment” means the *Coal Conservation Act*, the *Gas Resources Preservation Act*, the *Oil and Gas Conservation Act*, the *Oil Sands Conservation Act*, the *Pipeline Act*, the *Turner Valley Unit Operations Act*, a regulation or rule under them, and any enactment prescribed by those regulations. See REDA, *supra* note 7, s. 1(1)(j).

¹²⁹ “Specified enactment” means the *Environmental Protection and Enhancement Act*, the *Public Lands Act*, the *Water Act*, Part 8 of the *Mines and Minerals Act*, their regulations, and any enactment prescribed by those regulations. See REDA, *ibid.*, s.1(1)(s).

¹³⁰ Specifically pipelines, wells, processing plants, mines, other facilities and operations for the recovery and processing of energy resources; use of public land; environmental approvals; water approvals; and exploration for energy resources.

¹³¹ REDA, *supra* note 7, s. 2.

¹³² A. Driedzic, “Single Regulator or Franken-Child?” (2012) Vol. 27 No. 3 Environmental Law Center News Brief; “Setting the stage for the next 50 years,” *supra* note 127 at 1; “An Overview of Bill 2,” *supra* note 127 at 2.

¹³³ REDA, *supra* note 7, s. 24. Except for Crown consultation with aboriginal peoples and instances listed in s. 25.

¹³⁴ REDA, *ibid.*, s.15. Another novel feature of the REDA is the provision for enforcement of private surface agreements in Part 3 (ss. 62-66).

Regulator must also act in accordance with any applicable ALSA Regional Plan.¹³⁵ It has been suggested that the omission of the term “public interest” is deliberate due to lack of clarity in the definition of the term as expressed during stakeholder engagement sessions.¹³⁶ The Minister of Energy, defending the omission of ‘public interest’ in REDA stated in the legislative debate:

What we are witnessing here is an evolution of an understanding of what the term “public interest” really is. In fact, I would challenge the hon. member to define public interest. I think we all know what it is conceptually, but it’s exceedingly difficult to actually define it in a way that has meaning and that gives strength to the public interest that one might be trying to accomplish. It was a term that was used quite widely, perhaps, when the ERCB legislation was put in place, and it really over time has effectively lost its meaning. So we need to be much more specific. This act is seeking to be much more specific...The concept of public interest is a concept that is ill-defined just by practice over the last few years. What we’re trying to do is move away from an ill-defined, mushy, well-intended concept to something that’s quite specific every time we’re drafting legislation.¹³⁷

It has been suggested that the intention is for the Regulator to follow government policy as specified in the regulations, which also happens to be subject to change very easily.¹³⁸ The Minister of Energy assures that the public interest remains a factor that the Regulator must take into account, and will continue to be a factor guiding energy resource development. The public interest provision is included and will remain in the other statutes still administered by the

¹³⁵ REDA, *ibid.*, s. 20(1).

¹³⁶ Driedzic, *supra* note 132. See also Alberta, Legislative Assembly, *Hansard Debates* (19 November 2012) at 743-744 (Minister of Energy) stating: “We heard from a lot of stakeholders. Our colleague here, who did a couple of years of consultations with Albertans, found that Albertans really wanted greater clarity as to what specifically public interest means. That’s why the bill actually makes provisions of explicit factors that the regulator is required to take into consideration. Those will be set out in the regulations as well after even more consultation with stakeholders...in addition to the public interest provisions that exist in the energy statutes, the regs will provide more specific factors that the regulator must take into consideration when making decisions. These factors will be informed by public engagement. That is my commitment to this House and to the people of Alberta.” The province hosted public sessions in February and March, 2013 seeking feedback on regulations.

¹³⁷ Alberta, Legislative Assembly, *Hansard Debates* (7 November 2012) at 646 and 647 (Minister of Energy).

¹³⁸ Driedzic, *supra* note 132; “An Overview of Bill 2,” *supra* note 127 at 3-4; Fluker argues that persons who conduct hearings on energy project applications or who review energy project decisions may be obligated to implement the will of Cabinet or the Minister should either of them choose to direct the Regulator on what factors to consider or otherwise how to decide a particular hearing. See “Setting the stage for the next 50 years,” *supra* note 127 at 3.

AER.¹³⁹ While this may be so for applications and decisions made under “energy resource enactments,” it may not be that straightforward for applications and decisions made under “specified enactments.” Although the Regulator is required to act in accordance with specified enactment in carrying out its functions thereunder, where an application or decision is made under a specified enactment, the Regulator must consider, hear or review it in accordance with the REDA and its rules and regulations “instead of” in accordance with the specified enactment. This is the position unless the REDA regulations say otherwise.¹⁴⁰ Therefore section 25 of the REDA is paramount to any public interest provision in specified enactments.

The *Responsible Energy Development Act General Regulation* (“REDA General Regulation”)¹⁴¹ was released on May 29, 2013 and came into force upon the proclamation of section 3 of the REDA on June 17, 2013. Section 3 of the REDA General Regulation provides that where the Regulator is to consider an application or to conduct a regulatory appeal, reconsideration or inquiry in respect of an energy resource activity under an energy resource enactment, the Regulator shall consider: (a) the social and economic effects of the energy resource activity, (b) the effects of the energy resource activity on the environment, and (c) the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located. It appears that the public interest factors are retained, the only new addition being land use impacts on landowners. However, these factors appear to be confined to activities under an

¹³⁹ These are the 6 Acts termed ‘energy resource enactments’ in REDA, *supra* note 7, s. 1(1)(j) and the four Acts termed ‘specified enactments’ in s. 1(1)(s). According to the Minister, “far from it being gotten rid of, we’re simply reflecting upon the historical usage that has been defined and clarified in law in this province of this term, “public interest.” We’re seeking greater clarity in this act, Bill 2, so we’re not including it in this act... For those who are so deeply attached to this concept, the concept remains there in the legislative construct that the regulator will be using.” See Alberta, Legislative Assembly, *Hansard Debates* (19 November 2012) at 743; (20 November 2012) at 778 (Minister of Energy).

¹⁴⁰ REDA, *ibid.*, s. 25.

¹⁴¹ *Supra* note 7, ss. sections 60, 77 and 78.

“energy resource enactment.” The REDA General Regulation is silent on those activities under a specified enactment. This may be because where an application or decision is made under a specified enactment, the Regulator must consider, hear or review it in accordance with the REDA and its rules and regulations “instead of” in accordance with the specified enactment.¹⁴² It also appears the AER still performs the public interest analysis when applying an energy resource enactment. The Regulator recently held:

Findings concerning the public interest have been included in this decision because section 3 of the Oil Sands Conservation Act (OSCA) and section 4 of the OGCA both state that one of the purposes of the statute is to provide for the economic, orderly and efficient development in the public interest of the oil sands and oil and gas resources of Alberta. The panel is aware of its responsibilities under section 15 of REDA and section 3 of the Responsible Energy Development Act General Regulation, which requires the AER to consider the economic, social, and environmental effects of energy resource activities when considering an application. The panel is satisfied that throughout the proceeding and in its decision it has considered the purposes and factors identified in those sections.¹⁴³

Regardless of the factors prescribed or to be prescribed by the Regulations, the Regulator must also comply with the ALSA Regional Plans. In this regard section 7(3) of the LARP (which seems to ensure that the Crown’s non-performance of its commitments in the LARP Strategic Plan and Implementation Plan is disregarded by decision-makers) likely makes section 3(a) of the REDA General Regulation consideration (the social and economic effects of the energy resource activity) redundant.

Section 18 of the REDA authorizes the Regulator to engage in cooperative proceedings. The Regulator may, on its own initiative, and must, if requested by the Lieutenant Governor in Council, “consider an application or conduct a regulatory appeal, reconsideration or inquiry or

¹⁴² REDA, *supra* note 7, s. 25.

¹⁴³ *Teck Resources Limited, Application for Oil Sands Evaluation Well Licences* (October 21, 2013), 2013 ABAER 017 (A.E.R.) at para. 4 [hereinafter AER Decision 2013-017].

participate in other proceedings,” jointly or in conjunction with any agency, board, commission or other body constituted in Alberta or with a government department. “Other body constituted in Alberta” will likely include municipalities. A version of this provision exists in the ERCA but was never used by the ERCB to conduct any proceeding jointly with any municipality.¹⁴⁴ The difference, however, is that unlike the ERCA provision, the REDA does not limit cooperation only to hearing, inquiry or investigation. Therefore the Regulator may if it wills, or must if requested by Cabinet, review an application jointly with municipal authorities. The cooperation and coordination of processes is not legally mandated. There has to be the will to cooperate with affected municipality on the part of the Regulator or Cabinet.

In respect of stakeholder engagement the Regulator is required to provide, in accordance with the rules, public notice of applications. Any person who believes that he or she may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules.¹⁴⁵ While this new public notice feature may attract municipal comments at the application stage, the process is likely too general to have any substantial impact. However, a slight improvement may be the REDA General Regulation provision which states that if the Regulator receives a statement of concern containing information that in its opinion is pertinent to policy development of the Government, the Regulator may furnish a copy of the statement of concern to the Minister.¹⁴⁶ The usefulness of this provision is yet to be determined.

¹⁴⁴ ERCA, *supra* note 98, s. 22(1): If the Board is of the opinion that it would be expedient or in the public interest to do so, the Board may conduct a hearing, inquiry or investigation under this Act or participate in other proceedings in respect of matters relating to the purposes of this Act jointly or in conjunction with another board, commission or other body constituted in Alberta.

¹⁴⁵ REDA, *supra* note 7, ss. 31 and 32.

¹⁴⁶ REDA General Regulation, *supra* note 7, s.7.

The Regulator will use statements of concern to decide whether or not to conduct a hearing. The Regulator is permitted to make a decision on an application with or without conducting a hearing except where the Regulator is required to conduct a hearing pursuant to an energy resource enactment, the rules, or the REDA regulations. Routine applications not worthy of a hearing are decided not by hearing commissioners but by officers of the Regulator.¹⁴⁷ An academic opinion has argued that the REDA has altered the statutory right of a hearing, for persons with confirmed standing, as existed under section 26(2) of the ERCA, as well as the less stringent test of “directly affected” for standing under EPEA.¹⁴⁸ The compulsory hearing circumstance under the REDA General Regulation is where it appears to the Regulator that the concerns of the eligible person requesting the regulatory appeal have not been addressed through any alternative dispute resolution process the Regulator has used under section 46 of the Act, or have not otherwise been resolved by the parties.¹⁴⁹

The REDA provides two levels of appeal. The first is a regulatory appeal to the same Regulator, and appealable decisions under this category are those that would have attracted a notice of appeal under EPEA, WA, or PLA, or decisions made by the Regulator under an energy resource enactment without a hearing, as well as other classes of decisions to be prescribed in the REDA regulations. The regulatory appeal process replaces the review and variance process under the repealed ERCA. The second level of appeal is to the Court of Appeal with leave and only on

¹⁴⁷ See generally REDA, *ibid.*, ss. 33 and 34. The Regulator is also permitted to conduct a regulatory appeal with or without conducting a hearing. See REDA, *ibid.*, s. 40.

¹⁴⁸ “An Overview of Bill 2,” *supra* note 127 at 6-7; S. Fluker, “Bill 2 and its implications for landowner participation in energy project decision-making” (13 November 2012) at ABlawg [hereinafter “Bill 2 and its implications”]. The same is said of intervener cost provision in section 28 of ERCA which is replaced by section 61(r) REDA which permits the Regulator to make rules governing costs in respect of a hearing on an application, regulatory appeal or reconsideration.

¹⁴⁹ REDA General Regulation, *supra* note 7, s.4.

questions of law or jurisdiction.¹⁵⁰ The Regulator's decisions are protected from judicial review by a strong privative clause.¹⁵¹ The Regulator is also permitted, in its sole discretion, to reconsider its decisions and may employ alternative dispute resolution for resolving issues in dispute before it.¹⁵²

Overall the REDA is skeletal with much of the detail left to regulations and other subordinate legislation.¹⁵³ It is said to create greater flexibility to ensure that the Regulator is able to respond to the ever evolving dynamics and technologies of the oil and gas industry.¹⁵⁴ The main complaint about the REDA by commentators¹⁵⁵ and some MLAs is its centralization of power and control in the Lieutenant Governor in Council and the Minister.¹⁵⁶ Examples of the REDA's centralizing features include the Cabinet's broad regulation-making powers in relation to the details of the REDA (including regulations to fill deficiencies or gaps in the Act) as well as rule-making powers that are paramount to the Regulator's rule-making power.¹⁵⁷ The Minister also may by order give directions to the Regulator to ensure that the work of the Regulator is

¹⁵⁰ REDA, *supra* note 7, ss. 36 and 45. According to the Minister of Energy, the regulatory appeal mechanism is in addition to appeal to the Court of Appeal. Thus if there is still disagreement about the Regulator's decision, Albertans still have access to the Court of Appeal. See Alberta, Legislative Assembly, *Hansard Debates* (6 November 2012) at 564.

¹⁵¹ REDA, *ibid.*, s. 56.

¹⁵² REDA, *ibid.*, ss. 37 and 46.

¹⁵³ Driedzic, *supra* note 132.

¹⁵⁴ Alberta, Legislative Assembly, *Hansard Debates* (7 November 2012) at 658-659 (Minister of Energy).

¹⁵⁵ "An Overview of Bill 2," *supra* note 127; "Setting the stage for the next 50 years," *supra* note 127; Driedzic, *supra* note 132; and "Bill 2 and its implications," *supra* note 148.

¹⁵⁶ References were particularly made to three similar centralized statutes some of which have come back to the legislature for amendment. One of them is the *Alberta Land Stewardship Act*. See Alberta, Legislative Assembly, *Hansard Debates* (31 October 2012) at 428 and 448; (5 November 2012) at 536 and 540; and (21 November 2012) at 928.

¹⁵⁷ REDA, *supra* note 7, ss. 26, 60, 69(3), 68, 77-79, and 83(8); "Setting the stage for the next 50 years," *supra* note 127 at 2.

consistent with the programs, policies and work of the Government in respect of energy resource development, public land management, environmental management and water management.¹⁵⁸

Further, the Regulator is mandated to disclose information (report, record or other information, including personal information) to the Minister upon the written request of the Minister within the time specified therein.¹⁵⁹ The Regulator must also give the Minister at least 120 days' written notice before making rules.¹⁶⁰ It is notable that, unlike the ERCB, the Regulator is not given the power to make regulations. According to the Minister of ESRD:

We will not see the cases that have happened before where the regulator under the ERCB once in a while - and people were busy - created directives which were in fact policy, which was the role of government. This will be the role of government, to ensure that we develop the policies, and the new regulator will implement those policies.¹⁶¹

In summary, the REP objectives are quite laudable to the extent REP has coordination and cooperation in its agenda. However, the question is what it coordinates. How far has the merger of the regulatory functions of three departments in relation to energy resource activities gone to fix the socio-economic policy vacuum that exists in the framework? An academic opinion has argued, and this thesis agrees, that the REP reforms are mostly procedural while there are a host of substantive challenges facing the regulatory system which do not appear to be on the table in the current reform proposal.¹⁶² The current mood of regulatory reform provides an opportunity for government to make substantive changes that will dramatically enhance Alberta's framework

¹⁵⁸ REDA, *ibid.*, s. 67.

¹⁵⁹ REDA, *ibid.*, s.16. However, such disclosure does not waive or negate any confidential status attached to the information. S. 16 applies notwithstanding s. 50 of the *Mines and Minerals Act* and any rule made by the Regulator.

¹⁶⁰ REDA, *ibid.*, s. 22.

¹⁶¹ Alberta, Legislative Assembly, *Hansard Debates* (7 November 2012) at 652.

¹⁶² N. Vlavianos, "A Single Regulator for Oil and Gas Development in Alberta? A Critical Assessment of the Current Proposal" (2012) 113 *Resources* at 2 [hereinafter "A Single Regulator"] at 1 and 4.

for energy development.¹⁶³ To date Alberta's attempts to achieve regulatory efficiency have focused on merging and separating Alberta's primary regulator. The government assumes the merger and separation approach (called marriage and divorce by some academic opinions)¹⁶⁴ to be a panacea for the institutional problems of uncoordinated decision-making.

Has the current reform addressed the socio-economic assessment and resolution gap identified in this thesis? The short answer is no. The Regulator, whether in the form of the ERCB or the AER, and whether married or divorced, appears not to be the appropriate forum to resolve socio-economic challenges of energy resource development. The REP has not delivered on socio-economic issues because it focuses "assurance" only in the three areas of resource conservation, environmental protection and public safety. It excludes setting of thresholds, targets, or standards for socio-economic factors from policy development. Accordingly, there is nothing in the REDA that improves upon the legal mandate or institutional capacity of the Regulator to enable it to resolve socio-economic challenges of energy development. The AER will be in no better position than its predecessors to resolve socio-economic challenges of energy development. If the resolution of socio-economic challenges of energy development must be left to the Regulator, three things are required: (a) clear legally-binding measurable socio-economic thresholds for decision-makers to apply in individual project reviews as done in the environmental context for air, water and land; (b) legally-binding management response from the provincial/municipal

¹⁶³It was noted that the only critical substantive enhancement mentioned in the 2011 Discussion Document is cumulative effects management. See *ibid.*

¹⁶⁴ It has been noted that government has been trying to address problems with the current regulatory system for some time now. In 2008, the Alberta Energy and Utilities Board was divided into the ERCB (for energy projects) and the Alberta Utilities Commission (for utility regulation), a move that was said to be necessary to enhance efficiency and transparency. "A Single Regulator," *ibid.* at 2. Prior to 2008, a regional application process for energy project including oil sands was even contemplated whereby operators could be required to submit comprehensive development plans for a region. See *Regulatory Framework for Oil Sands*, *supra* note 75 at 51 citing EUB, "Future Could See Regional Hearings: Outgoing EUB Chairman Neil McCrank Foresees Changes in the Way Alberta's Energy Industry is Regulated" (March 2007) *Across the Board*.

governments as described above where the limits are about to be exceeded; and (c) the ability of the decision-maker to trigger the legislated provincial-municipal management response where the limits are about to be exceeded. These are currently absent in the current framework. Why does the thesis say legally binding and legally-mandated? The next part has the details.

6.4 The Role of Law in Making and Sustaining Federalism in Alberta's Energy Development Regulatory Framework

As discussed above, Alberta's partnership efforts with affected municipalities have been reactive and *ad hoc*. The essence of federalism is in the "institutionalization" of particular relationships among the participants;¹⁶⁵ hence the recommendation here for institutionalizing, within the regulatory framework, the chosen option of partnership between the provincial and municipal governments for resolving socio-economic challenges of energy development. The federal idea of partnership and sharing is not random but patterned, and the way to achieve proper pattern of sharing is by design.¹⁶⁶ In the federal theory, rights and obligations of the parties to the compact or covenant are secured, in ancient times by God as witness, and in modern times by a fundamental law (technically termed Constitution). Therefore, like other stages in the regulatory framework,¹⁶⁷ it is imperative that the adopted intergovernmental mechanism to resolve socio-economic challenges of energy development should be secured within the legislative scheme governing energy development in Alberta for a number of reasons.

¹⁶⁵ *Exploring Federalism*, *supra* note 40 at 12.

¹⁶⁶ *Federalism: An Overview*, *supra* note 40 at 41 and 43.

¹⁶⁷ Various pieces of legislation set the terms and conditions for energy activities including acquiring mineral rights, land uses within protected areas, environmental impact assessment, obtaining approvals and licenses, remediation and reclamation.

First, the federal theory itself requires it. It provides the courts with a good starting point for protecting specific powers against encroachment and enforcing specific obligations. In this regard, the judiciary plays a major role in shaping a federal system.¹⁶⁸ Second, while there is a limit to what can be accomplished through law alone, law establishes entitlements or initial positions for players to bargain from and achieve mutually preferred cooperative outcomes.¹⁶⁹ Third, law represents a constraint on the exercise of power as perceived in the concept of the “rule of law.”¹⁷⁰ It curbs contrary arbitrary provincial actions.¹⁷¹ A review of the federal experience reveals that the most important factor, apart from a supportive political culture, is the rule of law.¹⁷²

Fourth, federalism itself is a legal, much as it is a political, phenomenon involving both the structure and the processes of government.¹⁷³ The legal and structural elements of federalism ensure the achievement of the goal of, among others, durable power sharing. By its legal element federalism enables “ambition to counteract ambition” and prevents the consolidation of ambition for the good of the body politic. In short, federalism with its legal element is designed to prevent tyranny without preventing governance.¹⁷⁴ Accordingly, federal non-centralization is made operationally effective by intergovernmental partnerships that are secured in a legal

¹⁶⁸ *Federalism: An Overview*, *supra* note 40 at 53. On the other hand, it has been argued that appeal to the courts is not a normal intergovernmental relationship, although it offers participants a powerful, but risky strategic tool in the struggle to advance one’s intergovernmental interests. See D. Cameron, “The structures of intergovernmental relations” (2001) 53:167 *International Social Science Journal* 121 at 126.

¹⁶⁹ Polishchuk, *supra* note 51 at 47.

¹⁷⁰ N. Bankes, “‘Speaking Truth to Power,’ Some Reflections on the Role of Law” (2007) 97 *Resources* 7 at 8 [hereinafter “‘Speaking Truth to Power’”].

¹⁷¹ Moyes, *supra* note 59 at 38.

¹⁷² Watts, *supra* note 45 at 84.

¹⁷³ See *Self rule/Shared Rule*, *supra* note 57 at 3-4; See *Exploring Federalism*, *supra* note 40 at 69-70.

¹⁷⁴ *Exploring Federalism*, *ibid.* at 29.

framework.¹⁷⁵ The intergovernmental partnership involves the sharing of public responsibilities by all governments in the system. The legal device enables governments responsible to separate politics to engage in joint action while remaining independent entities.¹⁷⁶

Fifth, values embodied in law will likely be enduring and deeply held rather than ephemeral and trivial. Law is after all a central, and in many cases, a defining feature of all complex social systems¹⁷⁷ as well as a powerful and most distinctive instrument or tool by which government shape its environment.¹⁷⁸ Sixth, law is the conscious public declaration of goals and ideals, and as such, can provide a uniquely reliable picture of the fundamental values and norms of institutions, often revealing significant information about those who frame and live by them.¹⁷⁹

Consistent with this perception of the importance of law, academic and other critics in the pre-LUF period demanded a legally-mandated planning processes and legally binding land-use plans. They argued that without legal status, such plans and any limits and thresholds they set, could be modified at the will of government, or simply ignored by regulators when making decisions on individual projects.¹⁸⁰ Responding to these criticisms, the provincial government enacted the ALSA to establish legally-binding Regional Plans, and the REDA to assume the processes of two key provincial regulatory bodies in the framework. From the above, it is essential that any partnership between the province and host municipalities to resolve socio-economic challenges

¹⁷⁵ *Ibid.* at 184. Federal arrangements are anchored in constitutions establishing relatively clear-cut legal frameworks of governmental organization that cannot easily be ignored, hence the current tendency to treat federalism as too legalistic. *Ibid.* at 13 and 15.

¹⁷⁶ Even where government or their agencies cooperate without formally contracting to do so, the spirit of federalism tends to infuse a sense of contractual obligation into the participating parties. See *ibid.* at 185.

¹⁷⁷ N. Bankes, "Exploring the roles of law and hierarchy in resilience: regulating resource harvesting in Nunavut," in *Breaking Ice: Renewable Resource and Ocean Management in the Canadian North*, in F. Berkes *et al.* ed., (Calgary: The University of Calgary Press, 2005) 292.

¹⁷⁸ E. Page, "Laws as an Instrument of Policy: A Study in Central-Local Government Relations" (1985) 5 *Journal of Public Policy* 241-242.

¹⁷⁹ M. Brown, *et al. Not Written in Stone: Jews, Constitutions, and Constitutionalism in Canada* (Ottawa, ON: University of Ottawa Press, 2003) 18-19.

¹⁸⁰ *Regulatory Framework for Oil Sands*, *supra* note 75 at 7, 24 and 52.

of energy development be also given statutory backing. If implemented only at the policy level it may lack legal enforceability and will be subject to change internally by the government as it sees fit.¹⁸¹

It may be argued that statutes do not offer real protection for such federal arrangements as the provincial government has the power to repeal and replace legislation at will. After all, the legislature acting within its sphere of authority cannot be bound in accordance with the doctrine of parliamentary supremacy that no sitting legislature can bind a successor legislature. As such, it was argued that any commitment short of a constitutional guarantee will always be dependent on the good will of the province today and if the political winds begin blowing differently that commitment could fall by the wayside.¹⁸² While there is merit in this argument, hardwiring provincial-municipal partnership into legislation has a better chance of durability than being at the mercy of political winds. Laws made with due process are valid until amended or repealed.

Amendment or repeal of any legislation enabling such partnership will require formal legislative debate and presumably a majority of the Legislature proposing a contrary view. The popularity of that government seeking to repeal such legislation may also be at risk. Therefore while it would be more realistic to constitutionally protect such arrangements, Alberta does not have a written Constitution but is rather governed by constitutional statutes of which the ALSA may be one, given its paramountcy over any other enactment.¹⁸³ Further, strong grassroots adherence to

¹⁸¹ *Ibid.*

¹⁸² *Rationale for Renewal*, *supra* note 88 at 15.

¹⁸³ See F.L. Morton, "Provincial Constitutions in Canada" (Federalism and Sub-national Constitutions: Design and Reform, Center for the Study of State Constitutions Rockefeller Center Bellagio, Italy, 22-26 March 2004), online: <<http://camlaw.rutgers.edu/statecon/subpapers/morton.pdf>> However, see *Constitution of Alberta Amendment Act*, 1990, R.S.A. 2000, c. C-24 in relation to the Metis Settlement Lands; and *Constitutional Referendum Act*, R.S.A. 2000, c. C-25 in relation to ratification of Canadian Constitutional amendment. See also ALSA, *supra* note 3, s. 17.

federal principles guarantees their inviolability and supplements the Constitution by imposing *de facto* constraints on any political actions that threaten to upset the balance of power in a statute.¹⁸⁴

6.5 Legislated Provincial-Municipal Partnership in Other Jurisdictions

Regardless of the debate on the effectiveness of legislating municipal-provincial partnership to resolve socio-economic challenges of energy development in Alberta, there is concrete evidence of legislating provincial-municipal intergovernmental partnership in other Canadian jurisdictions. Two jurisdictions, British Columbia (“BC”) and Ontario, are of particular interest because, like Alberta, BC is also a producer of oil and gas and Ontario experiences as much growth in some of its municipalities. These jurisdictions have legislated the broader provincial-municipal relationship. This was stated to have fostered a new relationship between the municipal sector and the province based on mutual respect, consultation and cooperation.¹⁸⁵

The British Columbia intergovernmental revolution dates back to the Protocol of Recognition between the Union of British Columbia Municipalities (“UBCM”) and the Province of BC (1996) and its Sub-agreement on a New Legislative Foundation for Local Government (1997).¹⁸⁶ The principles in these Agreements are now enshrined in the *Community Charter*,¹⁸⁷ particularly Parts 1 and 9. The Charter recognizes municipalities and their council as a distinct order of government that is democratically elected, autonomous, responsible and accountable to the residents of their communities. The principles of municipal-provincial relations are stated to be:

¹⁸⁴ Polishchuk, *supra* note 51 at 57.

¹⁸⁵ See *infra* notes 186 and 195.

¹⁸⁶ See Union of British Columbia Municipalities (UBCM) Agreements Listed by Subject including energy, oil and gas and environment, online: <<http://www.ubcm.ca/EN/main/about/general-information/mou-protocols/mou-by-subject.html>>

¹⁸⁷ S.B.C. 2003, c. 26.

(a) that the citizens of British Columbia are best served when, in their relationship, municipalities and the provincial government acknowledge and respect the jurisdiction of each, work towards harmonization of provincial and municipal enactments, policies and programs, and foster cooperative approaches to matters of mutual interest; (b) mutual respect of each other's authority; (c) no assignment of responsibilities to municipalities by provincial government unless there is provision for resources required to fulfill the responsibilities; (d) consultation on matters of mutual interest including consultation by the provincial government on proposed changes to local government legislation or to revenue transfers to municipalities and to provincial programs that will have a significant impact in relation to matters that are within municipal authority; (e) the provincial government respects the varying needs and conditions of different municipalities in different areas of British Columbia; (f) consideration of municipal interests when the provincial government participates in interprovincial, national or international discussions on matters that affect municipalities; (g) balance the authority of municipalities with the responsibility of the provincial government to consider the interests of all citizens of British Columbia generally; and (h) the provincial government and municipalities should attempt to resolve conflicts between them by consultation, negotiation, facilitation and other forms of dispute resolution.¹⁸⁸

The Charter also includes commitments by the responsible minister to consult with representatives of the UBCM on specific matters listed. This consultation is not merely procedural but of substance. The minister responsible must provide the representatives with sufficient information and allow them sufficient time to consider the issue and provide their comments to that minister. The minister must consider any comments provided by the

¹⁸⁸ *Community Charter, ibid.*, s. 1-2.

representatives and, upon request, must respond to those comments. The minister may also enter into a memorandum of understanding or other arrangement with UBCM to establish alternatives to the obligations that would otherwise be applicable under the proposal.¹⁸⁹ The minister is permitted to enter into a memorandum of understanding respecting consultations on a variety of other matters including provincial and municipal enactments, policies and programs, interprovincial, national or international issues or agreements, or any other matter that affects local governments or the Province.¹⁹⁰ The Charter specifically prescribed “negotiation” as the approach to relations. Upon request by the other party, the minister and the UBCM must engage in negotiations respecting a consultation arrangement and use all reasonable efforts to reach agreement in negotiating the arrangement. The Act provides for dispute resolution in relation to provincial-municipal dispute by voluntary binding arbitration and further judicial review of an arbitrator’s decision.¹⁹¹

In the case of Ontario, the Association of Municipalities of Ontario (“AMO”) first signed a Memorandum of Understanding (“MOU”)¹⁹² with the Province in 2001 which became the foundation upon which the Province and municipalities have built a strong partnership and collaboration. The principles of consultation, collaboration and respect embodied in the MOU are incorporated into the *Municipal Act, 2001*.¹⁹³ This has fostered a new relationship between the municipal sector and the province based on mutual respect, consultation and cooperation.

¹⁸⁹ *Community Charter, ibid.*, s. 276.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, ss. 285-291.

¹⁹² The parties provide a Joint Annual Memorandum of Understanding Statement to highlight the strong provincial-municipal partnership and record of accomplishments, and to promote how the province and municipal sector have proactively worked together to protect and enhance services. The 2011 Statement acknowledges that a respectful and meaningful partnership achieves results.

¹⁹³ S.O. 2001, c. 25 significantly amended by the *Municipal Statute Law Amendment Act, 2006* (Bill 130) effective January 1, 2007. There is now a separate municipal statute for Toronto, the *City of Toronto Act, 2006*.

The Act recognizes municipalities as responsible and accountable governments while endorsing the principle of ongoing consultation between the province and municipalities in relation to matters of mutual interest.¹⁹⁴ Consistent with this principle, the province must consult with municipalities in accordance with the MOU.¹⁹⁵ It was noted that while the MOU is not a panacea to solve all the problems of municipal-provincial relations, it is a step in the right direction because it recognizes the right of municipalities to be informed of pending changes and ensures that the province is aware of the impact of these changes on the municipal sector.¹⁹⁶

6.6 Proposed Legislated Provincial-Municipal Partnership in Alberta's Energy Development Regulatory Framework

Legislating provincial-municipal intergovernmental partnership in Alberta depends on which of the options suggested in this thesis is chosen. The suggested options and corresponding legislative amendments are discussed below.

¹⁹⁴ *Municipal Act, 2001, ibid.*, s. 3.

¹⁹⁵ Online: Ontario Ministry of Municipal Affairs and Housing Homepage <<http://www.mah.gov.on.ca/Page184.aspx>>. The Memorandum of Understanding commits the Province to prior consultation with municipalities on: proposed provincial changes to legislation and regulations that will have a significant financial impact on the current municipal budget year or planning cycle, and negotiation of agreements with the federal government on specific matters that have a direct municipal impact. The MOU has enhanced the policy development process and discussions that provincial and municipal partners engage in throughout the year by: creating opportunity for information sharing; ensuring the municipal perspective is clearly represented so that provincial government ministries can accurately assess policy proposals; allowing the Province and municipalities to engage in comprehensive analysis of issues, as part of the decision-making process that could have an impact on municipalities; facilitating greater cooperation on public policy for the benefit of all; promoting horizontal working relationships between orders of government on shared issues; and serving as a catalyst for additional discussions.

¹⁹⁶ A. Sancton, and R. A. Young, *Foundations of Governance: Municipal Government in Canada's Provinces* (Toronto, ON: University of Toronto Press, 2009) at 46 and 48 citing the Association of Municipalities of Ontario and Ontario's Memorandum of Understanding, Schedule C, ss. 1.4 and 1.5.

6.6.1 Option 1: Statutorily-mandated Executive Federalism at a Statutorily-mandated Preliminary Disclosure Stage of the Energy Development Regulatory Framework in the REDA and its Regulations

As discussed above, a legally-mandated committee of Cabinet officials and affected municipal Council officials known as the Responsible Energy Development Council (“REDC”) may be established for “resolving” the specific issue of socio-economic challenges of resource development. Further, a legally-mandated Preliminary Disclosure Process should be required for all oil and gas projects categorized as high growth or large scale with a threshold for population and social infrastructure needs to be set by Regulations. The REDA and its regulations, as the most recent enactments dealing directly with the processes of energy project approvals, should be amended to enable this proposal. A new Part 1.1 with two Divisions should be added to the REDA. The Crown must be bound by the REDA. The new Part 1.1 should have an extra definition section. “Approval in Principle” should be given a similar meaning in section 1(1)(b) but with a threshold population requirement as established in the Regulations. “Socio-Economic Impact Assessment” (“SEIA”) should be defined. A conflict clause should make Part 1.1 paramount to any other parts of the REDA, the energy resource enactment and the specified enactment.

Division 1 should establish the REDC with authority to bind the Crown and municipal government. Its mandate should be the resolution of infrastructure, public services and other socio-economic requirements of energy resource development. This mandate should include consideration of the projects for Approval in Principle, preparation or review of information and business cases, planning, timing, allocation of funding contributions, budgeting, implementation and evaluation of the required infrastructure and public services. Membership should include the Premier and the Ministers of Energy, Municipal Affairs, ESRD, Treasury Board & Finance, and

Infrastructure representing the province; and the Mayor and one or more Councillors of the affected municipality. Membership may also include one or more officials of the AAMD&C or the AUMA as the circumstance demands. Bilateral meeting should be as needed for an Approval in Principle of a proposed project upon its Preliminary Disclosure. The approach of operation must be negotiation and sharing. As in the B.C. *Community Charter*, a dispute resolution clause should establish binding arbitration and further judicial review of an arbitrator's decision within strict timelines. A supporting office or secretariat should facilitate the REDC's work including receiving applications and sending notices to applicants.

Division 2 will establish a Preliminary Disclosure Process for any energy project that will meet the threshold for an Approval in Principle of the REDC. A provision must require such projects, prior to submitting any application to the AER, to submit an application to REDC. Information in support should include a summary description of the project, full SEIA (as outlined in Directive 023 showing the population-worth of the project, timing, duration and the public infrastructure and services that may be required to support the project, proposed mitigative measures or pledged capital contributions), a Business Case showing why government should make capital investment to support the project, and other information to be established by Regulations.

The process is in summary form and will not include Information Requests. The REDC should have a strict timeline to make its decision. Factors it should consider include importance of the project to Alberta, timing, location, provincial and municipal budgets for infrastructure, applicant's proposed mitigative measure, provincial policies such as the applicable Regional

Plan, the 20 year Strategic Capital Plan and the CRISP, and any other factors to be established by Regulations. The REDC may approve, condition, defer or deny Approval in Principle and should communicate decision to applicants within set timelines with brief reasons. The Approval in Principle where issued should specify the identified infrastructure challenges, the financial contributors and timelines to meet those challenges, plan for implementation and a named public authority to monitor implementation and enforce if need be. Typically this should be the affected municipal authority.

6.6.2 Option 2: Statutorily-mandated Partnerships to set Legally Enforceable Socio-economic Thresholds, Limits and Triggers, and Executive Federalism for Management Response in the ALSA and its Regional Plans

This option may be used if the Preliminary Disclosure stage is not adopted. It will require setting statutorily-mandated socio-economic thresholds and limits. The LUS has a major responsibility and oversight of Regional Plans and their contents. If this option is chosen, section 58 of the ALSA¹⁹⁷ should be amended to mandate substantive cooperation and coordination between the LUS and municipalities with timelines to prepare for Cabinet approval legally-binding socio-economic thresholds, triggers and limits for each region to be set in the Regulatory Details Plan of each Regional Plan. The frequency and procedure for meetings for each region may be established by Regulations. Representation of each municipality in a region should be the Mayor and one Councillor. All data to be considered should be submitted in advance within a set timeline. The same process should also apply to amendments of these socio-economic thresholds, triggers and limits. The Cabinet should still have the final approval of recommended thresholds, triggers and limits in case of disputes.

¹⁹⁷ *Supra* note 3, states: The secretariat has the following mandate with respect to Regional Plans and proposed Regional Plans: (a) to prepare or direct the preparation of Regional Plans and amendments to Regional Plans for consideration by the Lieutenant Governor in Council...

A new section 9(4) should make provision for executive federalism for management response where the set socio-economic limits in Regional Plans will be exceeded. The section should establish a committee of Cabinet officials and affected municipal Council officials known as the Responsible Development Council (“RDC”) with similar mandate, membership, and processes as the REDC in Option 1 above. The only difference should be that the RDC process under the ALSA for Option 2 will only be triggered as a management response under a particular Regional Plan when a decision-maker determines that the set socio-economic limits in that Regional Plan will likely be exceeded by a proposed project under consideration. The mandate of the RDC will also be wider in that it will not be limited to energy projects. The section should mandate a management response from RDC in the event it receives a referral from a decision-maker pursuant to the requirements of a Regional Plan. The LUS should support the work of the RDC.

Each Regional Plan will have in its Regulatory Details Plan, a Part and a Schedule setting out the approved socio-economic threshold, trigger and limits. There should be a provision mandating all decision-makers to consider and apply the set socio-economic threshold for any development application before them. A provision should mandate the decision-maker to trigger and refer the application to RDC, established under a new section 9(4) of the ALSA as discussed above, for management response where there is clear evidence that limits are likely to be exceeded. A provision should also mandate a management response from RDC in the event of a referral from a decision-maker. In the case of the LARP, a new Part 7.1 of the Regulatory Details Plan and Schedule C1 should set out these details and the socio-economic threshold, limits and triggers to

be established. Finally, section 7(3) of the LARP and any similar provision in other Regional Plans should be repealed.¹⁹⁸

6.7 Conclusion

The thesis addresses the questions it sets out above as follows. First, what is the scope of municipal powers under the MGA to regulate socio-economic challenges of large-scale energy development? The thesis argues that the power of municipalities to regulate socio-economic challenges of oil and gas development is severely circumscribed. Second, what is the mechanism and forum for “resolving” socio-economic challenges of large-scale energy development on industry and host communities prior to, or at the time of, project approvals? The thesis argues that there is no forum in the regulatory framework that resolves cumulative socio-economic impacts of oil and gas developments on industry and host communities. Third, to what extent have recent policy and legislative reforms addressed the socio-economic gap in the regulatory framework? The thesis argues that none of the recently adopted initiatives by the province seems to have closed the gap in the regulatory framework on how to proactively resolve cumulative socio-economic challenges of energy developments.

Fourth, how can federalism help? The thesis argues that the gap exists because Alberta’s oil and gas regulatory framework adopts the unitary model of governance. Given the critical role of municipal government and public infrastructure and services in energy resource development, the thesis recommends a reform of Alberta’s legislative and regulatory framework for energy

¹⁹⁸ *Supra* note 122, Regulatory Details Plan, s. 7(3) provides: Notwithstanding subsections (1) and (2), 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 any body of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.

development using federalism and its underlying principle of non-centralization. Finally, what is the role of law in securing any intergovernmental mechanism that may be adopted? The thesis recommends a suite of intergovernmental mechanisms, based on the federal principle of non-centralization, which can conveniently fit into the regulatory framework and secured in the energy legislative scheme. Using legally-mandated non-centralized intergovernmental partnership, Alberta can proactively obviate severe growth pressures, crippling demands on public infrastructure and services, a lower quality of life for residents and workers in the host areas, and greater risk to energy resource development and private investment. A weather-proof regulatory framework with built-in, federal fail-safe mechanisms that enables energy development projects while preserving the wellbeing of host communities is *sine qua non* to achieve Alberta's ambitious global energy goals.

The wide array of infrastructure, services and programs delivered by host municipalities on a timely, effective, efficient, and continuing basis are crucial to the development of Alberta's extensive resources. Alberta cannot remain competitive if projects are delayed for lack of supporting infrastructure, services and labor shortages. Host municipalities are integral to, and may be determinative of, the realization of Alberta's long term vision of global energy leader.¹⁹⁹ Just like public safety, environmental management and resource conservation, socio-economic management needs to be included in the key focus areas of policy development and assurance. The key to overcoming these challenges is a strong and effective provincial-municipal intergovernmental partnership secured in the energy development legal and regulatory framework.

¹⁹⁹ Edmonton, *Municipal Perspectives on Alberta's Future, Discussion Paper*, at 5-6, online: <http://www.edmonton.ca/city_government/documents/InfraPlan/ab_mun_persp.pdf>

Only through a strong partnership between the provincial and municipal orders of government can Albertans continue to enjoy a high standard of living and quality of life while maximizing the benefits of their extensive resources.²⁰⁰ The federal principle and model of governance offers just that. Federal systems offer built-in institutional fail-safe mechanisms which have prevented paralysis when the overreaching institutions within the polity fail.²⁰¹ Federalism is flexible. It can be adapted to Alberta's political environment and any unique structures invented to institutionalize the provincial-municipal relationship for this specific issue. Approaches that fail to address the primary drivers of the problem in a meaningful way provide only short-term relief.²⁰² What is needed is a sustainable approach to resolve the matter in the long term.²⁰³

²⁰⁰ *Ibid.* at 7.

²⁰¹ *Exploring Federalism*, *supra* note 40 at 210-211.

²⁰² C. Vander Ploeg, *No Time to be Timid: Addressing Infrastructure Deficits in the Western Big Six* (Calgary, AB: Canada West Foundation, 2004) 8.

²⁰³ *Ibid.*

SCHEDULE “A”

Municipal Government Act, RSA 2000, c. M-26

Part 1 - Purposes, Powers and Capacity of Municipalities

Municipal purposes

3. The purposes of a municipality are
- (a) to provide good government,
 - (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
 - (c) to develop and maintain safe and viable communities.

Corporation

4. A municipality is a corporation.

Powers, duties and functions

5. A municipality
- (a) has the powers given to it by this and other enactments,
 - (b) has the duties that are imposed on it by this and other enactments and those that the municipality imposes on itself as a matter of policy, and
 - (c) has the functions that are described in this and other enactments.

Natural person powers

6. A municipality has natural person powers, except to the extent that they are limited by this or any other enactment.

Part 2 - Bylaws

Division 1 - General Jurisdiction

General jurisdiction to pass bylaws

7. A council may pass bylaws for municipal purposes respecting the following matters:
- (a) the safety, health and welfare of people and the protection of people and property;
 - (b) people, activities and things in, on or near a public place or place that is open to the public;
 - (c) nuisances, including unsightly property;
 - (d) transport and transportation systems;

- (e) businesses, business activities and persons engaged in business;
- (f) services provided by or on behalf of the municipality;
- (g) public utilities;
- (h) wild and domestic animals and activities in relation to them;
- (i) the enforcement of bylaws made under this or any other enactment, including any or all of the following:
 - (i) the creation of offences;
 - (ii) for each offence, imposing a fine not exceeding \$10 000 or imprisonment for not more than one year, or both;
 - (iii) providing for the imposition of a penalty for an offence that is in addition to a fine or imprisonment so long as the penalty relates to a fee, cost, rate, toll or charge that is associated with the conduct that gives rise to the offence;
 - (iv) providing that a specified penalty prescribed under section 44 of the Provincial Offences Procedure Act is reduced by a specified amount if the penalty is paid within a specified time;
 - (v) providing for imprisonment for not more than one year for non-payment of a fine or penalty;
 - (vi) providing that a person who contravenes a bylaw may pay an amount established by bylaw and if the amount is paid, the person will not be prosecuted for the contravention;
 - (vii) providing for inspections to determine if bylaws are being complied with;
 - (viii) remedying contraventions of bylaws.

Powers under bylaws

8. Without restricting section 7, a council may in a bylaw passed under this Division

- (a) regulate or prohibit;
- (b) deal with any development, activity, industry, business or thing in different ways, divide each of them into classes and deal with each class in different ways;

- (c) provide for a system of licences, permits or approvals, including any or all of the following:
 - (i) establishing fees for licences, permits and approvals, including fees for licences, permits and approvals that may be in the nature of a reasonable tax for the activity authorized or for the purpose of raising revenue
 - (ii) establishing fees for licences, permits and approvals that are higher for persons or businesses who do not reside or maintain a place of business in the municipality;
 - (iii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval has been granted;
 - (iv) providing that terms and conditions may be imposed on any licence, permit or approval, the nature of the terms and conditions and who may impose them;
 - (v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them;
 - (vi) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition or the bylaw or for any other reason specified in the bylaw;
- (c.1) establish and specify the fees, rates, fares, tariffs or charges that may be charged for the hire of taxis or limousines;
- (d) provide for an appeal, the body that is to decide the appeal and related matters.

Guides to interpreting power to pass bylaws

9. The power to pass bylaws under this Division is stated in general terms to

- (a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and
- (b) enhance the ability of councils to respond to present and future issues in their municipalities.

Bylaw passing powers in other enactments

10.(1) In this section, “specific bylaw passing power” means a municipality’s power or duty to pass a bylaw that is set out in an enactment other than this Division, but does not include a municipality’s natural person powers.

- (2) If a bylaw could be passed under this Division and under a specific bylaw passing power, the bylaw passed under this Division is subject to any conditions contained in the specific bylaw passing power.
- (3) If there is an inconsistency between a bylaw passed under this Division and one passed under a specific bylaw passing power, the bylaw passed under this Division is of no effect to the extent that it is inconsistent with the specific bylaw passing power.

Relationship to natural person powers

- 11.(1) Despite section 180(2), a municipality may do something under its natural person powers even if the thing could be done under a bylaw passed under this Division.
- (2) Section 7(i) does not apply to a bylaw passed under a municipality's natural person powers.

Division 2 - Scope of Bylaws

Geographic area of bylaws

- 12. A bylaw of a municipality applies only inside its boundaries unless
 - (a) one municipality agrees with another municipality that a bylaw passed by one municipality has effect inside the boundaries of the other municipality and the council of each municipality passes a bylaw approving the agreement, or
 - (b) this or any other enactment says that the bylaw applies outside the boundaries of the municipality.

Relationship to Provincial law

- 13. If there is an inconsistency between a bylaw and this or another enactment, the bylaw is of no effect to the extent of the inconsistency.

Part 17 - Planning and Development

Purpose of this Part

- 617. The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
 - (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
 - (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
 without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

Non-application of this Part

618.(1) This Part and the regulations and bylaws under this Part do not apply when a development or a subdivision is effected only for the purpose of

- (a) a highway or road;
- (b) a well or battery within the meaning of the Oil and Gas Conservation Act, or
- (c) a pipeline or an installation or structure incidental to the operation of a pipeline.

(2) This Part and the regulations and bylaws under this Part do not apply to

- (a) the geographic area of a Metis settlement, or
- (b) a designated area of Crown land in a municipal district or specialized municipality.

(3) The Minister responsible for the Public Lands Act may make regulations designating one or more areas of Crown land under that Minister's administration for the purposes of subsection (2)(b).

(4) The Lieutenant Governor in Council may, by regulation, exempt an action, person or thing from the application of all of or any provision of this Part or of the regulations or bylaws under this Part.

(5) The Lieutenant Governor in Council may include terms and conditions in a regulation under subsection (4).

Exemption

618.1 This Part and the regulations and bylaws under this Part respecting development permits do not apply to a confined feeding operation or manure storage facility within the meaning of the Agricultural Operation Practices Act if the confined feeding operation or manure storage facility is the subject of an approval, registration or authorization under Part 2 of the Agricultural Operation Practices Act.

Division 1 - Other Authorizations, Compensation

NRCB, ERCB, AEUB or AUC authorizations

619.(1) A licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this Part.

(2) When an application is received by a municipality for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization

under this Part and the application is consistent with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, the municipality must approve the application to the extent that it complies with the licence, permit, approval or other authorization granted under subsection (1).

- (3) An approval of a statutory plan amendment or land use bylaw amendment under subsection (2)
 - (a) must be granted within 90 days after the application or a longer time agreed on by the applicant and the municipality, and
 - (b) is not subject to the requirements of section 692 unless, in the opinion of the municipality, the statutory plan amendment or land use bylaw amendment relates to matters not included in the licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC.
- (4) If a municipality that is considering an application under subsection (2) holds a hearing, the hearing may not address matters already decided by the NRCB, ERCB, AER, AEUB or AUC except as necessary to determine whether an amendment to a statutory plan or land use bylaw is required.
- (5) If a municipality does not approve an application under subsection (2) to amend a statutory plan or land use bylaw or the municipality does not comply with subsection (3), the applicant may appeal to the Municipal Government Board by filing with the Board
 - (a) a notice of appeal, and
 - (b) a statutory declaration stating why mediation was unsuccessful or why the applicant believes that the municipality was unwilling to attempt to use mediation.
- (6) The Municipal Government Board, on receiving a notice of appeal and statutory declaration under subsection (5),
 - (a) must commence a hearing within 60 days after receiving the notice of appeal and statutory declaration and give a written decision within 30 days after concluding the hearing, and
 - (b) is not required to notify or hear from any person other than the applicant and the municipality against whom the appeal is launched.
- (7) The Municipal Government Board, in hearing an appeal under subsection (6), may only hear matters relating to whether the proposed statutory plan or land use bylaw amendment is consistent with the licence, permit, approval or other authorization granted under subsection (1).

- (8) In an appeal under this section, the Municipal Government Board may
- (a) order the municipality to amend the statutory plan or land use bylaw in order to comply with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AER, AEUB or AUC, or
 - (b) dismiss the appeal.
- (9) Section 692 does not apply when the statutory plan or land use bylaw is amended pursuant to a decision of the Municipal Government Board under subsection (8)(a).
- (10) A decision under subsection (8) is final but may be appealed by the applicant or the municipality in accordance with section 688.
- (11) In this section, “NRCB, ERCB, AER, AEUB or AUC” means the Natural Resources Conservation Board, Energy Resources Conservation Board, Alberta Energy Regulator, Alberta Energy and Utilities Board or Alberta Utilities Commission.
- (12) Despite any other provision of this section, every decision referred to or made and every instrument issued under this section must comply with any applicable ALSA regional plan.

Conditions prevail

620. A condition of a licence, permit, approval or other authorization granted pursuant to an enactment by the Lieutenant Governor in Council, a Minister, a Provincial agency or Crown-controlled organization as defined in the Financial Administration Act or a delegated person as defined in Schedule 10 to the Government Organization Act prevails over any condition of a development permit that conflicts with it.

Oil and Gas Conservation Act, RSA 2000, c. O-6

Interpretation

- 1(1) In this Act,
- (eee) “well” means an orifice in the ground completed or being drilled
- (i) for the production of oil or gas,
 - (ii) for injection to an underground formation,
 - (iii) as an evaluation well or test hole, or
 - (iv) to or at a depth of more than 150 metres, for any purpose,

but does not include one to discover or evaluate a solid inorganic mineral and that does not or will not penetrate a stratum capable of containing a pool or oil sands deposit;

- (g) “battery” means a system or arrangement of tanks or other surface equipment receiving the effluents of one or more wells prior to delivery to market or other disposition, and may include equipment or devices for separating the effluents into oil, gas or water and for measurement;
- (pp) “processing plant” means a plant for the extraction from gas of hydrogen sulphide, helium, ethane, natural gas liquids or other substances, but does not include a well head separator, treater or dehydrator;
- (nn) “pipeline” means any pipe or any system or arrangement of pipes wholly within Alberta and whereby oil, gas or synthetic crude oil or water incidental to the drilling for or production of oil, gas or synthetic crude oil is conveyed, and
 - (i) includes all property of any kind used for the purpose of, or in connection with, or incidental to, the operation of a pipeline in the gathering, transporting, handling and delivery of oil, gas, synthetic crude oil or water, but
 - (ii) does not include any pipe or any system or arrangement of pipes that constitutes a distribution system for the distribution within a community of gas to ultimate consumers;
- (t) “evaluation well” means a well that, when being drilled, is expected by the Regulator to penetrate a pool or oil sands deposit and that is drilled for the sole purpose of evaluation.

Oil Sands Conservation Act, RSA 2000, c. O-7

Interpretation

- 1(1) In this Act,
- (h) “in situ operation” means
 - (i) a scheme or operation ordinarily involving the use of well production operations for the recovery of crude bitumen from oil sands, or
 - (ii) a scheme or operation designated by the Regulator as an in situ operation
 but does not include a mining operation;
- (k) “mining operation” means
 - (i) a surface or underground operation for the recovery of oil sands, or
 - (ii) an operation designated by the Regulator as a mining operation;
- (r) “processing plant” means

- (i) a facility for obtaining crude bitumen from oil sands that have been recovered,
- (ii) a facility for obtaining oil sands products from oil sands, crude bitumen, de-asphalted bitumen or synthetic crude oil, or
- (iii) a stand-alone gas fractionating plant for obtaining methane, ethane, propane, butane or other similar light hydrocarbons from oil sands products.

Mines and Minerals Act, RSA 2000, c. M-17

Interpretation

1(1) In this Act,

- (n) “mine” means any opening or excavation in, or working of, the surface or subsurface for the purpose of working, recovering, opening up or proving any mineral or mineral-bearing substance, and includes works and machinery at or below the surface belonging to or used in connection with the mine;
- (gg) “well” means a well within the meaning of the Oil and Gas Conservation Act.

Pipeline Act, RSA 2000, c P-15

Interpretation

1(1) In this Act,

- (t) “pipeline” means a pipe used to convey a substance or combination of substances, including installations associated with the pipe, but does not include
 - (i) a pipe used to convey water other than water used in connection with
 - (A) a facility, scheme or other matter authorized under the Oil and Gas Conservation Act or the Oil Sands Conservation Act, or
 - (B) a coal processing plant or other matter authorized under the Coal Conservation Act,
 - (ii) a pipe used to convey gas, if the pipe is operated at a maximum pressure of 700 kilopascals or less, and is not used to convey gas in connection with a facility, scheme or other matter authorized under the Oil and Gas Conservation Act or the Oil Sands Conservation Act, or
 - (iii) a pipe used to convey sewage;

(u) “processing plant” means a plant for the extraction from gas of hydrogen sulphide, helium, ethane, natural gas liquids or other substances, but does not include a well head separator, treater or dehydrator;

(l) “installation” means

(i) any equipment, apparatus, mechanism, machinery or instrument incidental to the operation of a pipeline, and

(ii) any building or structure that houses or protects anything referred to in subclause (i),

but does not include a refinery, processing plant, marketing plant or manufacturing plant.

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