

## **Regulatory chill, weak regional plans, and lots of jobs for lawyers: the proposed amendments to the Alberta Land Stewardship Act**

**By Nigel Bankes**

### **Legislation commented on:**

[Bill 10](#), the *Alberta Land Stewardship Amendment Act, 2011*

In an earlier [blog](#), I commented on one aspect of the on-going debate in Alberta on the *Alberta Land Stewardship Act*, SA 2009, c.A-26.8 (*ALSA*). On March 1, 2011 the government introduced Bill 10, the *Alberta Land Stewardship Amendment Act, 2011*. The Bill contains 12 pages of amendments to the Act. I think that the Bill will encourage the adoption of timid plans that will not achieve the noble purpose of the legislation. I also think that the amendments will create significant uncertainty and encourage litigation. The big winners from this Bill will be lawyers; the environment will be the loser. And if the environment loses then we all lose; whether we happen to be landowners or not.

### **Why did the government introduce *ALSA*?**

In considering the proposed *ALSA* amendments it is important to remember why the government introduced the legislation in the first place. The background document to the legislation (the [Land Use Framework](#), 2008, at 6) stated that:

Over the past 10 years, the province has enjoyed record prosperity. But this prosperity has brought new challenges and responsibilities. Today's rapid growth in population and economic activity is placing unprecedented pressure on Alberta's landscapes. Oil and gas, forestry and mining, agriculture and recreation, housing and infrastructure are all in competition to use the land—often the same parcel of land. There are more and more people doing more and more activities on the same piece of land. This increases the number of conflicts between competing user groups and often stresses the land itself. Our land, air and water are not unlimited. They can be exhausted or degraded by overuse.

We need to ensure this land—and all the activities it sustains—is managed responsibly for those who come after us. This means developing and implementing a land-use system that will effectively balance competing economic, environmental and social demands. Our current land management system, which served us well historically, risks being overwhelmed by the scope and pace of activity.

What worked for us when our population was only one or two million will not get the job done with four, and soon five million. We have reached a tipping point,

where sticking with the old rules will not produce the quality of life we have come to expect. If we want our children to enjoy the same quality of life that current generations have, we need a new plan.

The reasons for the legislation have not changed. It is important therefore to assess whether the proposed amendments will make it easier or more difficult to address the problems that the legislation was designed to solve.

### **What do the amendments do?**

I think that the amendments propose six main changes to *ALSA*: (1) the addition of a qualifying section to the purposes clause of the Act; (2) a clarification to the definition of the term “statutory consent”, (3) a new provision that allows a title holder to apply for a variance in the application of a regional plan, (4) a new provision that creates an additional opportunity for a person to claim compensation on the grounds that the operation of the plan has impaired that person’s property rights, (5) a new provision that allows a person directly affected to request a review of a regional plan, and (6) a provision that allows the Minister to issue binding directives to the secretariat and stewardship commissioner.

I will say a few words more about each of these. I have provided my overall assessment of these changes above. No doubt there are other issues that merit a comment but I will leave those to others.

#### **(1) The addition of a qualifying section to the purposes clause of the Act**

The Bill will amend the purposes section of the Act (section 1) to add a provision dealing with respect for property rights which will read as follows:

In carrying out the purposes of this Act ..... the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest.

The choice of the words “respect” and “infringe” is interesting. Section 1 of the *Canadian Bill of Rights*, SC 1960, c. 44 recognizes “the right of the individual to ... the enjoyment of property, and the right not be *deprived* thereof except by due process of law” (emphasis added). The language adopted here seems to offer a greater degree of protection than that offered by the *Bill of Rights*. The new clause is *not* one of the purposes of the *Act* and to some extent it serves almost a preambular and interpretive function, but it must be more than that since it is part of the operative text and is presumably intended to be justiciable. If it is justiciable then it would seem to open the door to a party who thinks that her property right has been infringed to commence an application alleging that the infringement was more than was necessary to achieve the public interest goal of the plan.

#### **(2) Clarification of the definition of the term “statutory consent”**

As noted in my earlier blog, some commentators had argued that s.11 of *ALSA*, combined with the definition of statutory consent, gave a regional plan the authority to extinguish a certificate of title. I argued in the blog that that was a mistaken interpretation. The Bill, “for greater

clarification” makes it clear that all sorts of interests are not statutory consents, including a certificate of title (section 3 of Bill 10 adding a new subsection 2(2)).

### **(3) A new provision that allows a title holder to apply for a variance in the application of a regional plan**

A new section 15.1 of *ALSA* will allow a title holder to apply to the Minister for variation in a regional plan as it affects that title holder. The Minister may grant the variance if the proposal is: (1) consistent with the purposes of the Act, (2) not likely to diminish the spirit and intent of the plan, and (3) refusal would result in an unreasonable hardship to the applicant without an offsetting public interest.

While the procedures for any such applications are to be prescribed by regulation it is easy to imagine the Minister being flooded with applications

### **(4) A new provision that creates an additional opportunity for a person to claim compensation on the grounds that the operation of the plan has impaired that person’s property rights**

The current version of the Act (ss. 36-44) provides a right to compensation where a regional plan through means of a conservation directive which seeks to “permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values by means of a conservation directive expressly declared in the regional plan.” (section 37). This was, in my view, a generous provision insofar as there was a credible argument that the common law rules on regulatory takings (see *British Columbia v Tener*, [1985] 1 SCR 533) would *not* have required the payment of compensation in all cases covered by section 37. For example, a provision in a plan which prevents an owner from draining an existing wetland would not, I think, create a right to compensation as a matter of common law. And there is good reason for that. After all, in this sort of case the owner purchased the land knowing that it contained a wetland and that that wetland provided certain valuable ecosystem functions for society. There is no “right” to drain a wetland and deprive society of the positive externalities associated with a wetland. But such an owner might well have a good claim under section 37. That, as I say, seems to me to be generous.

Bill 10 however goes beyond this in several ways. First the Bill takes a negatively framed provision (the current section 19), “No person has a right to compensation” except in the following circumstances and turns it on its head in the new section 19.1: “A person has a right to compensation ....”. While the difference in approach may not change the legal position that much, it is clearly an important political statement. Second, section 19.1 creates something called “a compensable taking”. The Bill defines a compensable taking as “the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity” (section 14 of the Bill proposing a new s.19.1). There is a confusing element of circularity to this definition (i.e. you have right to compensation when an existing rule of law or equity gives you a right to compensation – and perhaps not unless) which may yet save the treasury from having to pay compensation for every perceived diminution in a person’s property, but two things seem clear. First, the threshold of “diminution” is very low on a linguistic spectrum that includes such words as “deprive” or “infringe”. Second, I think that we can pretty much guarantee that this provision will create tremendous legal uncertainty and will lead to much costly litigation. The uncertainty (and the potential risk to the treasury) will also cause those drafting the plan to err on the side of interfering with the status quo as little as possible – the problem of regulatory chill much

discussed in the context of investment treaty arbitrations. After all, given this provision, it is likely that the Treasury Board will be asking that a “compensation impact assessment” or some similar document be presented to cabinet along with an application for approval of any regional plan. That will be a difficult document to prepare.

As I say above, the circular definition of a compensable taking does perhaps suggest that the government was merely intending to confirm that the legislation was not intending to interfere with the common law rules on regulatory taking. If that is the case then I think a much simply provision could have been drafted.

**(5) A new provision that allows a person directly affected to request a review of a regional plan**

A new section 19.2 will allow a person who is “directly and adversely affected by a regional plan” to request a review of the plan. Upon receiving such a request the Minister must establish a panel and charge it with the responsibility of reviewing the plan. Bill 10 envisages that the review procedure will be elaborated through regulations but the Bill is surprisingly silent on the results of a review. A review must be presented to the Minister and to cabinet but what then? Furthermore the amendment has nothing to say about the purpose of a review or a threshold for triggering a review. Once again therefore it is perhaps not unreasonable to expect the Minister to be flooded with requests for reviews, especially if such a request entails little or no cost to an applicant. This too may prompt those developing the plan to err on the side of timidity and affirming the status quo.

Finally, it is perhaps worth emphasising that there is no similar right of review for a public interest organization which wants to argue that a regional plan has been insufficiently attentive to establishing thresholds and indicators in order to address the central problem of cumulative impacts.

**(6) A provision that allows the Minister to issue binding directives to the secretariat and stewardship commissioner.**

A new section 57.1 combined with an amendment to section 57 allows the Minister to issue Directives to the stewardship commissioner and his or her staff. While perhaps this is less significant than the other measures discussed above, when read together with those other measures it will allow the Minister to assert a greater degree of political control in the development and implementation of regional plans.