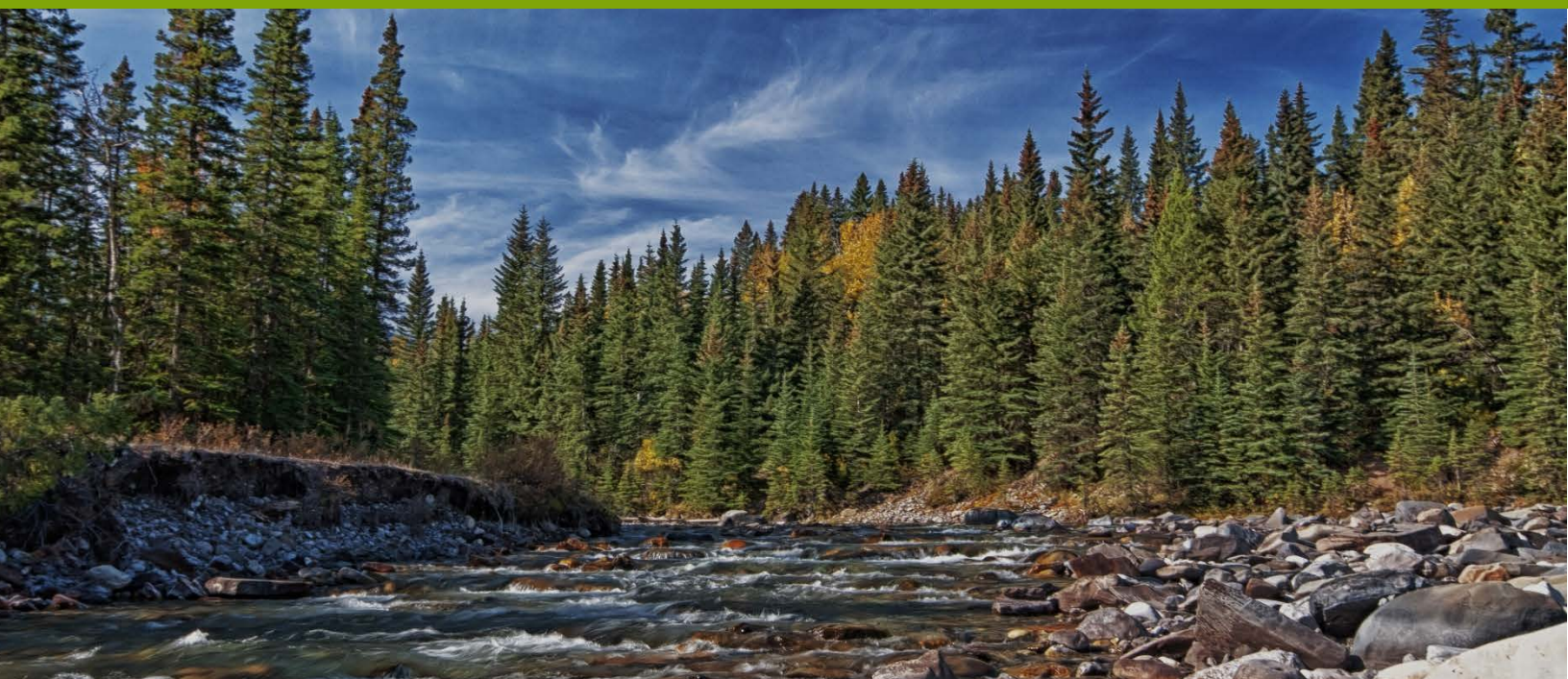


Buying a Better Environment?

Market-Based Instruments & the *Alberta Land Stewardship Act*

Volume 1: An Introduction to Market-Based Instruments & the Alberta Land Stewardship Act



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The Environmental Law Centre (ELC) believes that law is the most powerful tool to protect the environment. Since it was founded in 1982, the ELC has been and continues to be Alberta's only registered charity dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment.

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The ELC is publishing a series of four volumes concerning Market-Based Instruments & the *Alberta Land Stewardship Act*. This work is to encourage the use of MBIs in a way that benefits the environment and to identify what regulations or other legal changes are necessary to do so.

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Buying a Better Environment?

Market-Based Instruments & the *Alberta Land Stewardship Act*

Volume 1: An Introduction to Market-Based Instruments & the Alberta Land Stewardship Act

Executive Summary

The Environmental Law Centre (ELC) has undertaken this project to review the market based instruments (MBIs) that are enabled by the *Alberta Land Stewardship Act (ALSA)*. Our goal in this project is to encourage the use of MBIs in a way that benefits the environment and to identify what regulations or other legal changes are necessary to do so.

The results of this project are published as a report in four volumes:

- Volume 1: An Introduction to Market-Based Instruments & the *Alberta Land Stewardship Act*
- Volume 2: Transfer of Development Credits under the *Alberta Land Stewardship Act*
- Volume 3: Conservation Offsets under the *Alberta Land Stewardship Act*
- Volume 4: Stewardship Units & the Exchange under the *Alberta Land Stewardship Act*

This particular volume provides an introduction to *ALSA* and its MBIs. It also proposes and describes criteria for assessing MBIs under *ALSA*.

This report defines MBIs as a form of regulation albeit different from conventional command and control regulation. As generally believed, *ALSA* has significant potential to advance use of MBIs. In *ALSA*, MBIs are placed within a comprehensive suite of conservation tools that include options for voluntary or coerced conservation and which make tools available for public and private lands. Because these conservation tools have similar purposes, this should allow them to work together such that the protective tools secure the conservation outcomes of the MBIs.

While *ALSA* provides a broad mandate to develop MBIs, this report focuses on those MBIs that are specifically provided for by *ALSA*. These are:

- **Transfer of Development Credits (TDCs)**, a tool used primarily by municipalities to redirect future development.

- **Conservation Offsets** which involve actions to compensate for the ecological impacts of development.
- **Stewardship Units and the Exchange** which could be understood as credits and the trading platform that could help facilitate TDCs and offsets.

All of these specific *ALSA* tools can be considered true “market” instruments in that all involve buying, selling or trading between private parties rather than simply the provision of financial incentives for environmentally beneficial behaviour.

This report proposes and applies three major criteria for the assessment of MBIs under *ALSA*. These criteria are the need for:

- guiding environmental principles;
- sufficient resolution of property law issues; and
- a strong regulatory framework.

These criteria are applied both to the general scheme of *ALSA* and to the specific MBIs contemplated by *ALSA*. Upon analyzing the general scheme of *ALSA* in light of these criteria, several conclusions can be made:

- *ALSA* is significant for recognizing principles of sustainable development and cumulative effects management that are lacking in other provincial land and resource legislation.
- *ALSA*'s potential adverse effect on property rights is likely overstated. *ALSA* largely provides purpose for use of pre-existing regulatory authority and it may have some impact on the existing property rights regime by offering compensation for regulatory action and incentives for voluntary private conservation.
- *ALSA* provides multiple options to strengthen the regulatory framework for MBIs through regional plans or regulations of general application. Regional plans have more ability to overcome systemic barriers to MBI use created by the larger framework for regulation of land and natural resources, while regulations of general application are more suited where the need is for principles and rules of general application.

However, in other ways, *ALSA* is an imperfect platform for MBIs:

- *ALSA* does not ensure a principled approach to MBIs. Sustainable development and cumulative effects have proven hard to operationalize through regulatory decisions without more specific sub-principles. *ALSA* leaves need to rely on other legislation for principles of pollution prevention and polluter pay, and it continues trends of restrictive public participation and no precautionary principle under provincial legislation.
- *ALSA* does not provide a private conservation tool for public lands or recognize property interests that could protect private conservation against minerals activity. *ALSA* also leaves uncertainty around compensation for regulatory restrictions on property interests or property values.

In addition, while designed to implement the *Land Use Framework (LUF)*, *ALSA* does not fully address all the policy gaps identified in the *LUF* nor does it fully implement all the strategies proposed by the *LUF*. *ALSA* also fails to directly fill the policy gaps which with MBIs might help.

There are some universal considerations respecting the regulatory framework for MBIs under *ALSA*:

- The legal effect of *ALSA* depends almost entirely on future regulations or regional plans for which *ALSA* provides Cabinet with broad discretion and little substantive guidance.
- *ALSA* is not a platform for development approvals that would be conditional on conservation, so there is ongoing need for the other land and resource legislation.
- *ALSA* was not necessarily needed for the MBIs in question, as authority to establish simple TDCs likely existed under the MGA and authority to require offsets on regulatory approvals exists under multiple other provincial statutes. The main need from *ALSA* was (and remains) guidance for use of these tools.
- *ALSA* does not clearly require legal securement of conservation activities related to TDCs, offsets or the recognition of Stewardship Units.

To date, *ALSA* has been primarily used for its regional planning provisions. Several needs can be identified from that experience: clear objectives, regulatory limits on the impact of activities, coordination of multiple uses, stronger direction to regulators, legal protection of identified conservation areas, and more attention to administrative functions. These motherhood issues with *ALSA* may become even more important if *ALSA* is to regulate the implementation of MBIs in Alberta.

General Recommendations

1. Adopt the precautionary principle in any policies, regional plans or regulations that could provide direction on the use of MBIs, especially the biodiversity frameworks.
2. Formalize public and stakeholder participation in the development and implementation of MBIs.
3. Protect private conservation activity carried out in pursuit of public policy objectives from the impacts of minerals activity, beginning with Conservation Easements.
4. Clarify and require legal securement tools for all conservation activities related to MBIs.
5. Explore direct use of regional plans and Conservation Directives as means to designate and protect conservation areas associated with MBIs.

More specific issues with TDCs and Conservation Offsets are sufficiently different to warrant very different regulatory responses under *ALSA*.

TDC Recommendations

Applying our three criteria for assessment of MBIs, it can be seen that TDCs align fairly well with established environmental principles and that the specific principles of TDCs are fairly settled. As well, TDCs raise relatively few property law issues. This favorable context results from the clarity of private land ownership, voluntary participation, the availability of securement tools and the established regulatory powers of municipalities.

However, the main barrier to advancement of TDCs is a regulatory framework involving provincial and municipal authorities. TDCs can only be established under *ALSA*, must have specific components, require Cabinet approval in the absence of a clear process, and still need to be implemented through valid municipal bylaws. Although *ALSA* contemplates regulations that set requirements for TDCs, these regulations do not yet exist. Nonetheless, TDCs are still legally permissible without these regulations (although the existence of regulations would likely increase their accessibility or appeal to municipalities).

Accordingly, we recommend:

1. Make TDC regulations of general application that affirm municipal authority over TDCs.
2. Regulations should clarify credit matters including:

- a. Municipal authority to create development credits separate from *ALSA* Stewardship Units.
 - b. Required securement of conservation area parcels through title restrictions and approval of the securement tool by the TDC Authority prior to the use of credits for development approvals.
 - c. Responsibilities for a credit registry or tracking system.
3. Establish a public participation process for municipal TDC plans and bylaws that goes beyond the baseline *MGA* requirements.
 4. Provide a formal application process for provincial approval of TDCs that includes a function for the Land Use Secretariat, produces a decision prior to final municipal bylaw decisions, and does not prejudice the validity of municipal bylaws for other purposes.
 5. Regulations and municipal bylaws should require that TDC conservation area parcels that receive credits be secured by Conservation Easements, Conservation Directives or historic resource designations registered on title and that the proposed securement is subject to approval by the TDC authority.
 6. Municipal bylaws should:
 - a. Clearly require use of credits for beyond baseline development approvals.
 - b. Provide for timing of securement relative to credit creation and sale, and should require securement prior to use of credits by developers.

Conservation Offsets Recommendations

A starting point for discussion of Conservation Offsets under *ALSA* is that the concept is ill-defined in the legislation and the provisions for regulations allow practically anything. Much interest in the tool concerns offsetting large industry impacts on biodiversity and species at risk, which receives variable support within the conservation community.

Use of Conservation Offsets in Alberta raises numerous unsettled issues of law and policy. The principles of Conservation Offsets are very specialized compared to the established principles of environmental law and are subject to debate over their practical applicability in Alberta. Conservation Offsets in Alberta also face systemic challenges flowing from the nature of property interests in public lands and resources. Minerals activity can undermine conservation

outcomes on public or private land. On public lands there are no tools directly available to private parties seeking to conduct and secure conservation activities. Provincial regulatory involvement is necessary either under *ALSA* or other legislation, and this does not preclude need for reform to the natural resource tenure regime.

The above issues were identified before *ALSA* and warrant resolution before moving to a regulated offset system under *ALSA*. The province of Alberta has recently developed a non-legislated conservation offset framework. This is significant for endorsing regulated use of offsets and it could provide the basis for *ALSA* regulations, however, it defers settling most of the issues to future specific offset programs. The offset framework also incorporates multiple elements of the provincial carbon regime and wetlands regimes that appear more aimed at the mechanics of offsetting than at conservation outcomes. Administration of offset systems is a known need that has received less attention in the policy groundwork.

At this point regional plans may be the better vehicle for regulated offsets under *ALSA*. Regional plans have more potential to assist with specific program objectives, to link offsets to cumulative effects management if desired and to help overcome the systemic challenges to Conservation Offsets. Regional plans can also do most things that *ALSA* contemplates for offset regulations such as: defining offsets, identifying impacts requiring offsets, and directing regulators to impose offset conditions on approvals.

Accordingly, we recommend:

1. Any policies, regulations or regional plans concerning offsets should prescribe the mitigation hierarchy and how it should be applied, limits on what can be offset, goals of at least net neutral outcomes, and a duration of offsets that meets or exceeds the duration of impacts.
2. Any allowance for fees in lieu of offsets should attempt to match the fee to the cost of real offsets and require the fund to prioritize activities that provide direct ecosystem benefits like those of real offsets.
3. Develop tools to allow access to public lands and securement of offsets against incompatible uses prior to encoding any policy into regulations that would give credit for offsets on public lands.
4. Pursue missing offset pilot projects including conservation of White Area public lands (primarily agricultural), and administration of offset systems (including enforcement).

Stewardship Units and the Exchange Recommendations

Stewardship Units and the Exchange are the only *ALSA* tools that would definitely require new regulations to enable. These are also the tools more aimed at market enablement than specific conservation purposes. As with Conservation Offsets, the authority to recognize Stewardship Units and assign functions to the Exchange through regulations is broad and unguided. The mere concept of a stewardship unit as a form of tradeable credit should not raise many issues as *ALSA* clearly attempts to separate Stewardship Units from interests in land. The main challenges vary with the type of MBI. For TDCs there is merit in keeping development credits out of the stewardship unit scheme at the early stages given their local purposes. For Conservation Offsets the threshold issue is credit recognition. This is an area where the carbon system has more precedential value and is already being followed by development of offset protocols in the wetlands system. Conservation Offsets also involve more demand for the regulated system to enable credit banking. However, there are conflicting views on desirable market complexity and the breadth of functions of the Exchange.

Accordingly, we recommend:

1. Recognition of Stewardship Units should begin with separate types for specific conservation offset programs and not for TDCs.
2. Any offset protocols intended to recognize Stewardship Units should be adopted into the regulations, and if the offset is simple then consider having regulations simply prescribe where Stewardship Units are recognized.
3. Functions of the Exchange should begin with a simple credit registry and tracking system that serves transparency and accountability purposes.

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Buying a Better Environment?

Market-Based Instruments & the *Alberta Land Stewardship Act*

Volume 1: An Introduction to Market-Based Instruments & the Alberta Land Stewardship Act

Introduction

In 2008, the Alberta government published the *Land Use Framework (LUF)*, a non-legislated policy aimed at managing growth while providing social, environmental and economic outcomes.¹ The *LUF* espoused the use of formal regional-level planning with coordination between the provincial government and municipalities. Regional plans are meant to:²

- 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.

As part of the *LUF*, the need for policy instruments to encourage stewardship and conservation of both public and private lands was acknowledged. Market-based instruments (MBIs) – including transfer of development credits and Conservation Offsets – are expressly identified as a potential stewardship and conservation tools on private and public lands. In addition, the *LUF* identified specific policy gaps in areas of provincial interest including coordination of surface and subsurface uses, agricultural land fragmentation, and under-representation of ecoregions in the parks and protected areas system.

¹ Government of Alberta Land Use Framework (2008) available online: <https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%202008-12.pdf>

² *Land Use Framework*, Pub. 1/321 (Edmonton, AB: 2008, Government of Alberta) at p.3.

MARKET BASED INSTRUMENTS OF ALSA

Transfer of Development Credits (TDCs): redirect land development from less suitable areas into more suitable areas.

Conservation Offsets : “counterbalancing” the effects of activities through a potentially broad range of conservation, restoration or environmental management practices.

Stewardship Units : tradeable credits recognized under *ALSA* regulations and which are separate from interests in land.

An Exchange: an authority with a range of credit-related and market facilitation functions that is designated by regulations under *ALSA*.

Legislative mandate for the policy direction envisioned in the *LUF* is provided by the *Alberta Land Stewardship Act (ALSA)*³ which came into force in 2009. The key features of *ALSA* are the enablement of regional planning, a suite of conservation and stewardship tools, and the creation of a quasi-independent administrative agency called the Land Use Secretariat under the oversight of a Stewardship Commissioner and the Stewardship Minister.

The suite of conservation and stewardship tools provided for by *ALSA* includes several specific tools that can be considered MBIs including:

- **Transfer of Development Credits (TDCs)** a tool most commonly used at the municipal level to redirect land development from less suitable areas into more suitable areas.
- **Conservation Offsets** which under *ALSA* means “counterbalancing” the effects of activities through a potentially broad range of conservation, restoration or environmental management practices.
- **Stewardship Units** which can be understood as tradeable credits recognized under *ALSA* regulations and which are separate from interests in land.
- An **Exchange** that could be considered as an authority with a range of credit-related and market facilitation functions that is designated by regulations under *ALSA*.

Other types of conservation and stewardship tools are enabled by *ALSA* for the direct protection of lands for agricultural, environmental, natural scenic or aesthetic values. These tools could foreseeably be used in concert with MBIs under *ALSA*.

Although *ALSA* has been in force for over 5 years, its implications are still not well understood and the use of MBIs under *ALSA* has not advanced significantly. Much of the practical and legal effect has been left to future regional plans, regulations and programs to be developed pursuant to the Act. Meanwhile several MBI initiatives, prototypes, pilot projects and policies are advancing in Alberta outside of *ALSA*.

This goal of this report is to advance the use of MBIs contemplated by *ALSA* in a way that benefits the environment. The ELC proposes several criteria be used to assess *ALSA* and its MBIs, namely:

- guidance from environmental principles,
- sufficient resolution of property law issues, and

³ *Alberta Land Stewardship Act*, SA 2009, ch. A-26.8.

- a strong regulatory framework.

This report applies these criteria to the general scheme of *ALSA* and its MBIs. It also provides a synthesis of findings indicating similarities and differences between the issues concerning the different types of MBIs under *ALSA*. It concludes with recommendations for regulations and other legal changes needed to get *ALSA* MBIs working for the benefit of the environment.

As with anything, *ALSA* does not exist in a vacuum and, as such, this report also considers the larger law and policy framework around MBIs in Alberta. While the focus of this report is on the possibilities and limitations of *ALSA*, the report flags provincial reform needs where possible. This report focuses on the core of the law - statutes, regulations and other legislative instruments, court cases and administrative decisions – but the ELC acknowledges the importance of non-legislated policy to the development of MBIs. These include instruments ranging from the *LUF* and other high level endorsements down to departmental guidance documents and technical standards. Similarly, the ELC acknowledges the multi-disciplinary nature of MBIs and the central importance of economics and other technical fields which lie beyond the scope of this report. Finally, in developing and implementing MBIs under *ALSA*, guidance should be taken from experiences under other legislation and from other jurisdictions. Although this report does not provide direct jurisdictional comparison or review of other MBIs, it does consider past comparisons and flag some examples that are relevant to the development of regulated MBIs under *ALSA*.

Market-based Instruments (MBIs)

What are Market-based Instruments (MBIs)?

Despite providing a mandate for the development and use of MBIs, there is no statutory definition of MBIs within *ALSA*. However, the Alberta *LUF* defines MBIs as follows:⁴

Market-based instruments provide financial incentives and disincentives to guide behavior towards conservation and stewardship and mitigate undesirable activities in an effort to lessen adverse effect on the environment. Market forces play a key role, facilitated through regulation, in creating a price mechanism to motivate behavior.

⁴ *Land Use Framework*, Pub. 1/321 (Edmonton, AB: 2008, Government of Alberta) at page 52.

There is a significant body of academic commentary on the definition, design and use of MBIs. For example, Stavins defines MBIs as:⁵

... regulations that encourage behavior through market signals rather than through explicit directives regarding pollution control levels or methods. These policy instruments, such as tradable permits or pollution charges, are often described as "harnessing market forces" because if they are well designed and implemented, they encourage firms (and/or individuals) to undertake pollution control efforts that are in their own interests and that collectively meet policy goals. [references omitted]

Others have defined MBIs as "policy tools that use financial incentives to maintain and enhance natural capital"⁶ or as "a broad class of policy tools that are intended to motivate voluntary environmentally-beneficial behaviour through the use of price signals".⁷ In other words, MBIs are designed to *incent* environmentally-beneficial behaviours using economic triggers (as opposed to traditional command and control policy approaches which *require* environmentally-beneficial behaviours).

As expressed by Whitten et al.:⁸

The focus in applying MBIs is on achieving outcomes through the self-interest of the firms and individuals. While the key interest in MBI application is achieving policy targets at reduced cost, other interests such as risk may also be targeted (Pannell 2001). MBIs have two potential cost advantages over more traditional instruments.

First, MBIs allow different firms to make different adjustments in response to their unique business structures and opportunities. Second, incentives to discover cheaper ways to achieve outcomes provide dynamic ways of reducing the future costs of achieving targets.

As Poulton explains,⁹ the fundamental concept underlying MBIs is **externalities** which may arise in a transaction between two parties. Externalities are effects that are beyond the parties and are external to the consideration of the parties because they bear no responsibility for the effects. As a result, typically there is no motivation to minimize negative effects or enhance

⁵ Robert Stavins, Experience with market-based environmental policy instruments (2002) Nota di Lavoro, Fondazione Eni Enrico AMttei, No. 52.2002 available at <http://hdl.handle.net/10419/119660> at page 1.

⁶ Jay Anderson et al., Ecosystem Service Valuation, Market-Based Instruments, and Sustainable Forest Management: A Primer (Edmonton, AB: 2010, Sustainable Forest Management Network) at page 5.

⁷ David W. Poulton, Biodiversity Offsets: A Primer for Canada (Ottawa, ON: 2014, Sustainable Prosperity and the Institute of the Environment) at page 10.

⁸ Stuart Whitten, Martin van Bueren and Drew Collins, *An Overview of Market-Based Instruments and Environmental Policy in Australia* (based on presentation at 2003 AARES Symposium) at p.2.

⁹ David W. Poulton, Biodiversity Offsets: A Primer for Canada (Ottawa, ON: 2014, Sustainable Prosperity and the Institute of the Environment).

positive effects. MBIs are designed to attach a price to the externalities and to attach that price to the activities causing the externalities thereby creating the motivation to minimize negative effects or enhance positive effects.

Different categories of MBIs exist depending on the manner in which the instrument attempts to deal with transactional externalities. According to Stavins, MBIs can be placed into four broad categories:¹⁰

- **Charge Systems** which include effluent charges, deposit-refund systems, user charges, insurance premium taxes, sales taxes, administrative charges and tax differentiation.
- **Government Subsidy Reductions.**
- **Market Friction** such as liability rules and information programs.
- **Tradable Permits** including credit programs and cap-and-trade programs.

Others have placed MBIs into three broad categories of market-based instruments - price based, rights based, and market friction - depending on the levers used.¹¹ Price based MBIs alter the prices of goods and services to reflect their relative impact on ecosystem services. Rights based MBIs can be designed to control the quantity of the environmental good or service to the socially desired level (tradable rights to create a market). Finally, market friction MBIs aim to stimulate a market to produce a desired environmental outcome either by improving existing markets by reducing transaction costs or by improving information flows.

Although it is not so apparent in the academic literature, another method to classify MBIs is as *upstream* or *downstream*. An upstream MBI is designed to ensure the polluting industries pay whereas a downstream MBI has the beneficiaries of the ecosystem goods and services pay. This method resembles the general environmental principles of *polluter pay* and *user pay*. Both the *LUF* and *ALSA* are fairly silent on market players; however, the MBIs in *ALSA* most resemble upstream MBIs because land use sectors pay for land conservation, reclamation or management. Potential downstream MBIs might include water users paying for upstream watershed stewardship or citizens paying into conservation funds with social outcomes.

¹⁰ Robert Stavins, Experience with market-based environmental policy instruments (2002) Nota di Lavoro, Fondazione Eni Enrico AMtei, No. 52.2002 available at <http://hdl.handle.net/10419/119660>.

¹¹ Stuart Whitten, Martin van Bueren and Drew Collins, An Overview of Market-Based Instruments and Environmental Policy in Australia (based on presentation at 2003 AARES Symposium). See also Anthea Coggan and Stuart M Whitten, Market Based Instruments (MBIs) in Australia: What are they, important issues to consider and some applications to date (Canberra: CSIRO Sustainable Ecosystems, June 2005) paper presented at the Desert Knowledge CRC Workshop Alice Springs, 8-10 June 2005. Also Shawna Stirrett, Robbie Rolfe and Stephanie Shewchuk, The Invisible Hand's Green Thumb: Market-Based Instruments for Environmental Protection in Alberta (Calgary, AB: 2012, Canada West Foundation).

Looking back at the definition in the *LUF*, how might MBIs under *ALSA* be classified? If the *LUF* is characterized as remedial policy for the land use regime, then MBIs can be viewed as a response to the failure of conventional markets to serve the environment.

Rather than allowing a mere relinquishment of the environment to the market, MBIs can be seen as a form or result of regulation aimed at environmental objectives. The specific MBIs contemplated by *ALSA* could be considered government interventions. The perception is that these MBIs have or will require legislative activity, and that the *ALSA* model is somewhat top-down and legalistic. Like many sources, the *LUF* discusses MBIs in broad terms of financial drivers for voluntary behaviour as opposed to a narrower vision of markets for sale and trade.¹² However, it is noteworthy that the specific MBIs in *ALSA* all point to a narrower class of market instruments involving buying, selling, trading or transferring between private parties.

A review of the experience with use of MBIs for biodiversity conservation suggests distinctions between providing incentives and reducing disincentives for biodiversity conservation.¹³ The former includes tradable permits, offsets and land banks whereas the latter involves the removal of subsidies that create perverse incentives for economic activities that degrade ecosystems and harm species. The *ALSA* MBIs might be considered attempts to incent rather than require environmentally beneficial behaviours (although in some cases, a TDC or offset may be a compliance obligation under a development permit). However, there remains a need in Alberta to remove disincentives to avoid development in the land use sectors and for public authorities that rely on revenues from lands.

Relationship of MBIs to Other Policy Tools

Even within the context of *ALSA*, MBIs are only one of several tools that may be used for conservation and stewardship purposes in Alberta. It should be remembered that *ALSA* itself is only one piece of a broader legislative framework that operates to protect Alberta's environment. The need for MBIs to exist within the existing framework of laws, policies and regulations is well supported by the literature.¹⁴

¹² See for example: Robert Stavins, *Experience with market-based environmental policy instruments* (2002) Nota di Lavoro, Fondazione Eni Enrico AMttei, No. 52.2002 available at <http://hdl.handle.net/10419/119660> at page 1; David W. Poulton, *Biodiversity Offsets: A Primer for Canada* (Ottawa, ON: 2014, Sustainable Prosperity and the Institute of the Environment); and Jay Anderson et al., *Ecosystem Service Valuation, Market-Based Instruments, and Sustainable Forest Management: A Primer* (Edmonton, AB: 2010, Sustainable Forest Management Network).

¹³ Alex Kenny, Stewart Elgie and Dave Sawyer, *Advancing the Economics of Ecosystems and Biodiveristy in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity* (Ottawa: Sustainable Prosperity for Environment Canada, June 2011).

¹⁴ Jay Anderson et al., *Ecosystem Service Valuation, MArket-Based Instruments, and Sustainable Forest Management: A Primer* (Edmonton, AB: 2010, Sustainable Forest Management Network).; Anthea Coggan and Stuart M Whitten, *Market Based Instruments (MBIs) in Australia: What are they, important issues to consider and some applications to date* (Canberra:

While it is outside the scope of this report to provide an overview of Alberta's environmental legislative regime, key pieces of legislation most apt to contribute to the framework for MBIs under *ALSA* include:

- The *Environmental Protection and Enhancement Act (EPEA)* which is the platform for provincial environmental assessment, activity approvals, reclamation and remediation.¹⁵
- The *Water Act* is used for managing water resources, issuing licenses for water use, and issuing approvals for activities that impact water bodies.¹⁶
- Legislation used for granting statutory consents concerning public lands and natural resources include the *Mines and Minerals Act*, the *Forests Act*, and the *Public Lands Act*. There are multiple other statutes relating to development in the energy and utilities sectors.¹⁷
- Statutes enabling creation of parks and protected areas within the province include the *Provincial Parks Act*, and the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*.¹⁸
- The *Climate Change and Emissions Management Act (CCEMA)* which provides the provincial carbon emissions regime.¹⁹

DETERMINING WHICH MBI IS THE BEST POLICY INSTRUMENT

In designing conservation and stewardship MBIs under *ALSA*, these considerations must be kept in mind:

- political feasibility,
- community values,
- transaction costs,
- existing legal framework, policies and schemes,
- community capacity, and
- technical capacity and costs to government to administer.

CSIRO Sustainable Ecosystems, June 2005) paper presented at the Desert Knowledge CRC Workshop Alice Springs, 8-10 June 2005 at page 4 (Table 1).; Alex Kenny, Stewart Elgie and Dave Sawyer, *Advancing the Economics of Ecosystems and Biodiversity in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity* (Ottawa: Sustainable Prosperity for Environment Canada, June 2011) .

¹⁵ *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA].

¹⁶ *Water Act*, RSA 2000, c W-3.

¹⁷ *Forests Act*, RSA 2000, c F-22, see also *Forest Reserves Act*, RSA 2000, c F-20; *Public Lands Act*, RSA 2000, c P-40; *Mines and Minerals Act*, RSA 2000, c M-17; *Responsible Energy Development Act*; *Oil and Gas Conservation Act*, RSA 2000, c O-6 SA 2012, c R-17.3; *Oil Sands Conservation Act*, RSA 2000, c O-7; *Coal Conservation Act*, RSA 2000, c C-17; *Pipeline Act*, RSA 2000, c P-15 *Hydro and Electric Energy Act*, RSA 2000, c H-16.

¹⁸ *Provincial Parks Act*, RSA 2000, c P-35; *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, RSA 2000, c W-9.

- The *Municipal Government Act (MGA)* which delegates planning and regulatory power over private land use to municipalities.²⁰

Much, but not all, of the above provincial legislation focuses on a **command and control** approach which sets prohibitions, standards or other requirements that must be met.²¹ MBIs are often considered as an alternative to conventional command and control regulation. While MBIs are designed to operate as incentives (or disincentives) to promote certain behaviours, command and control approaches **require** environmentally beneficial behavior. In addition, MBIs are inherently an outcome-based form of regulation (i.e. a standard is set with flexibility on methods to meet the standard) as opposed to a process-based regulation which dictates how an industry must operate.

In some ways, *ALSA* is an overlay on this legal framework. A significant feature is that *ALSA* enables MBIs for conservation and stewardship of land which implicitly extends to biodiversity and ecosystem functioning. There is potential for regional plans under *ALSA* to provide guidance that is lacking in other legislation, to take legal weight over other regulatory instruments and decisions, and even to directly regulate land use. However, *ALSA* does not enable the issuance of regulatory approvals which results in an ongoing need for other legislation.

Several considerations come into play when determining whether an MBI or command and control regime is the more appropriate policy instrument including:²²

- political feasibility,
- community values,
- transaction costs,
- existing legal framework, policies and schemes,
- community capacity, and
- technical capacity and costs to government to administer.

¹⁹ *Climate Change and Emissions Management Act*, SA 2003, c C-16.[CCEMA].

²⁰ *Municipal Government Act*, RSA 2000, c M-26.[MGA].

²¹ As examples, economic instruments may be used for regulatory purposes under *EPEA* and *CCEMA* to create a system of emissions credits.

²² Jay Anderson et al., *Ecosystem Service Valuation, Market-Based Instruments, and Sustainable Forest Management: A Primer* (Edmonton, AB: 2010, Sustainable Forest Management Network) and Anthea Coggan and Stuart M Whitten, *Market Based Instruments (MBIs) in Australia: What are they, important issues to consider and some applications to date* (Canberra: CSIRO Sustainable Ecosystems, June 2005) paper presented at the Desert Knowledge CRC Workshop Alice Springs, 8-10 June 2005 at page 4 (Table 1).

In designing conservation and stewardship MBIs under *ALSA*, these considerations must be kept in mind. As stated by Stirrett et al.,²³ there is a need for a balance between government regulations and market forces. Any MBIs must operate as a market within a regulatory framework that sets clear boundaries.²⁴ The selection of MBIs as a tool must be made as a conscious policy decision and not be based on an assumption that MBIs will necessarily achieve environmental goals in the most efficient manner. Clear policy and environmental objectives should be used to guide the appropriate placement of MBIs within the overarching regulatory framework. For example, the use of Conservation Offsets should happen within a mitigation hierarchy: avoid, minimize, rehabilitate/restore, and offset.²⁵

Once the decision has been made to implement an MBI as a policy tool, there are a few public policy “landmines” to keep in mind.²⁶ Firstly, the appropriate level of government for administration of the MBI must be selected. *ALSA* contemplates that municipalities will be the primary level of government responsible for implementing regional plans. This raises questions of whether the province or municipalities ought to finance and bear potential liability for the program, and retain control over design and administration of the program. Secondly, given the relatively novelty of MBIs, there needs to be tolerance for failure in order to allow experimentation. Finally, there is a potential that the use of MBIs may have a corrosive effect on altruistic action because tax dollars will be used to subsidize behaviour that was previously done for free.

State of MBI use in Alberta

Unlike other countries that have created markets for wetlands or endangered species, Canada has rarely used trading instruments to address biodiversity problems.²⁷ According to Anderson:²⁸

Canada has been criticized over the lack of development of MBIs for environmental policy (OECD 2004). Canada’s lack of institutional capacity, particularly concerning the

²³ Shawna Stirrett, Robbie Rolfe and Stephanie Shewchuk, *The Invisible Hand's Green Thumb: Market-Based Instruments for Environmental Protection in Alberta* (Calgary, AB: 2012, Canada West Foundation).

²⁴ Shawna Stirrett, Robbie Rolfe and Stephanie Shewchuk, *The Invisible Hand's Green Thumb: Market-Based Instruments for Environmental Protection in Alberta* (Calgary, AB: 2012, Canada West Foundation).

²⁵ See Business and Biodiversity Offsets Programme, *To No Net Loss and Beyond: An Overview of the Business and Biodiversity Offsets Programme (BBOP)*, (Washington, DC: 2013, Forest Trends) and Business and Biodiversity Offsets Programme, *Standard on Biodiversity Offsets*, (Washington, DC: 2012, Forest Trends).

²⁶ Shawna Stirrett, Robbie Rolfe and Stephanie Shewchuk, *The Invisible Hand's Green Thumb: Market-Based Instruments for Environmental Protection in Alberta* (Calgary, AB: 2012, Canada West Foundation).

²⁷ Alex Kenny, Stewart Elgie and Dave Sawyer, *Advancing the Economics of Ecosystems and Biodiversity in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity* (Ottawa: Sustainable Prosperity for Environment Canada, June 2011) at page 34.

²⁸ Jay Anderson et al., *Ecosystem Service Valuation, Market-Based Instruments, and Sustainable Forest Management: A Primer* (Edmonton, AB: 2010, Sustainable Forest Management Network) at page 14.

ability to conduct environmental economic analysis and effectively implement market-based environmental policy, seems to differ from other OECD countries (see Renzetti 2005, Howlet 2007). Adamowicz (2007) argues that jurisdictional issues in Canada, along with frequently overlapping administrative boundaries, may further complicate the issue by fragmenting what limited institutional capacity does exist.

Despite the policy direction provided by the *LUF* and the legislative mandate provided by *ALSA*, there are significant gaps in Alberta's law and policy which impede the use of MBIs as conservation and stewardship tools. In particular:

- Guidance for the use of MBIs under *ALSA* was left to future policies and regulations (which are not yet developed).
- There is a lack of programs and administrative agencies to support and assist with the implementation of MBI programs.
- The other key function of *ALSA* – regional planning – creates a level of uncertainty around the use of MBIs. While MBIs can be used to implement regional plans, their use is not mandatory. On the other hand, MBIs can be used without regional plans being in place but there is little practical support in this regard.

Consequently, the use of MBIs as conservation and stewardship tools under *ALSA* has progressed slowly at best. While there are several MBI initiatives (including pilot projects) underway in Alberta, some are being driven by other policies such as the Wetlands Policy or are being implemented through legislation that was not designed to enable MBIs in the manner of *ALSA*.

A useful overview of some conservation and stewardship MBI programs that have occurred in Alberta is provided by Shirrett et al. (the "Shirrett Paper").²⁹ The Shirrett Paper looked at a TDC program in Beaver Hills and a program that pays farmers to restore or preserve ecologically significant areas in Vermillion River.

The Shirrett Paper assessed these two MBI programs and drew some key lessons. Both clear environmental goals (supported by science and baseline ecological studies) and community support are essential for a successful MBI program. An MBI program must also have an element of flexibility to allow change and adaptation as the program initiates and progresses. There also needs to be recognition that MBIs are complex and will not operate as a "hands-off"

²⁹ Shawna Stirrett, Robbie Rolfe and Stephanie Shewchuk, *The Invisible Hand's Green Thumb: Market-Based Instruments for Environmental Protection in Alberta* (Calgary, AB: 2012, Canada West Foundation). In addition to the two conservation and stewardship MBIs, the Shirrett Paper also looked at an emissions trading program.

approach to environmental conservation. MBIs must operate as a market within a regulatory framework that sets clear boundaries with an established system of monitoring and evaluation. Finally, there must be recognition that MBIs may be subject to volatile market forces which may create unique risks with this choice of policy tool.

Another paper that provides an overview of the experience with the use of MBIs to conserve biodiversity and provide essential ecosystem services in Canada is provided by Kenny et al.³⁰ This paper focuses on two categories of MBIs: those that promote incentives for biodiversity conservation (including tradable permits, offsets and land banks) and those that reduce disincentives to biodiversity conservation (particularly subsidies that create perverse incentives for economic activities that degrade ecosystems and harm species). Based upon their assessment of Canadian experience with MBIs, Kenny et al. set out several policy assessment criteria:

- conservation effectiveness,
- economic efficiency,
- innovation,
- distributional impact (environmentally favourable outcomes should not conflict with social objectives),
- stakeholder participation and support,
- administrative feasibility,
- political factors, and
- complementarity (must work with existing systems or mechanisms).

In developing and implementing MBIs under *ALSA*, guidance should be taken from experiences in Alberta (under other policies and legislation) and other parts of Canada. Especially at the early stages, there will need to be flexibility and room for error in order to develop effective conservation and stewardship MBIs for use in Alberta.

³⁰ Alex Kenny, Stewart Elgie and Dave Sawyer, *Advancing the Economics of Ecosystems and Biodiversity in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity* (Ottawa: Sustainable Prosperity for Environment Canada, June 2011).

The Alberta Land Stewardship Act

This section of the report provides an introduction to the purpose, principles and objectives of *ALSA*. As well, it reviews the main strategies and tools enabled by *ALSA* (regional planning and conservation tools).

Purpose of *ALSA*

In 2008, the Alberta government provided official recognition of the impacts and pressure of growth by releasing the *LUF*. The *LUF* could be described as a high level policy on making future plans, policies and strategies to address land use issues. It calls itself “a blueprint for land-use management and decision-making that addresses Alberta’s growth pressures.”³¹

As discussed below, the *LUF* proposes specific strategies to manage public and private lands, and natural resources. It also identifies specific areas of provincial interest where there are gaps in existing policy. These policy gaps include:

- coordination of minerals and surface activity;
- agricultural land fragmentation and conversion;
- recreational use of public land;
- transportation and utilities corridors;
- under-representation of ecological regions in the protected area system; and
- flood risk management.

The legislative mandate to advance the policy direction envisioned in the *LUF* is provided by *ALSA*. The purposes of *ALSA* are to:

PURPOSES OF *ALSA*

- 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;
- 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;
- provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment; and
- create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

³¹ Government of Alberta, *Land-Use Framework* (Edmonton: Government of Alberta, 2008) at 7, online: *Land Use Framework* <<https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%202008-12.pdf>>

- 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;
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- provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment; and
- create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.³²

These are lofty purposes compared to other land and natural resource legislation in Alberta, especially respecting their connection to the established principles of environmental law.

Preceding the statement of purposes in *ALSA* is the caveat that, in carrying out the purposes of the 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.”³³

Regional Planning under *ALSA*

The *LUF* carves the province into seven land-use regions and calls for the development of a regional plan for each region. The *LUF* provides that regional plans are meant to:

- 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.

ALSA provides the legal power, procedure, purposes and legal effect of regional plans.³⁴ Regional plans are both expressions of public policy and legislative instruments (in other words, a hybrid of policy and legislation akin to other statutory plans).³⁵ However, regional

³² *ALSA* s.2 (2).

³³ *ALSA* s. 2(1).

³⁴ *ALSA*, Parts 1 and 2.

³⁵ *Ibid.* at s.13(1)(2).

plans have potential legal effect beyond that of other types of statutory plans. Regional plans may acquire legal weight through several means:

- **Super Regulations:** *ALSA* provides that regional plans are regulations for the purpose of other enactments.³⁶ If there is a conflict or inconsistency between a regional plan and a regulation under other legislation then the regional plan prevails.³⁷
- **Require Compliance:** Regional plans under *ALSA* can require that official decision-makers (i.e those with authority to grant statutory consents) comply.³⁸ Further, decision-making and local government bodies (this includes provincial government departments and agencies, and municipalities) must ensure their regulatory instruments comply with applicable regional plans.³⁹
- **Alter Statutory Consents:** *ALSA* provides that regional plans may alter statutory consents or classes of statutory consents for the purpose of achieving the objectives of a regional plan.⁴⁰

It should also be noted that *ALSA* itself can take priority over other legislation. The overall effect of *ALSA* and regional plans on Alberta's legislative regime resembles "hopscotch" with *ALSA* prevailing over other statutes, and regional plans prevailing over regulations, decisions and instruments under other statutes. However, because *ALSA* functions largely as a platform for planning and the use of conservation tools rather than as direct regulation of land uses or decisions on land uses, direct conflicts between *ALSA* and other legislation are unlikely (but not impossible). Regional plans are the more significant instrument for tangible effects on the legal regime.

The *ALSA* conservation and stewardship tools

In accordance with the strategy proposed by the LUF, Part 3 of *ALSA* provides a suite of conservation and stewardship tools.⁴¹ This part of *ALSA* mandates general support for "instruments" and "programs" to implement the purposes of *ALSA* and regional plans, and support for the research and design of MBIs, including by way of support for MBI pilot projects.⁴² This mandate is granted to the provincial Cabinet and associated functions may be

³⁶ *Ibid.* at s.13(1)(2).

³⁷ *Ibid.* at s.17(1).

³⁸ *Ibid.* at s.2(1)(3)

³⁹ *Ibid.* at ss. 20, 21.

⁴⁰ *Ibid.* at s.11(1). See Property Rights discussion in this report.

⁴¹ *Ibid.* at Part 3. For more information on the conservation and stewardship tools, see Government of Alberta website: <https://landuse.alberta.ca/ConservationStewardship/ConservationStewardshipTools/Pages/default.aspx> and Firyal Mohamed, Market-Based Incentives, Stewardship Instruments, and Regional Land-use Planning in Alberta (August 2010) available at http://cpaws.southernalberta.org/upload/MBIs_in_Alberta_2010_For_distribution.pdf.

⁴² *Supra* note 4 at s.25.

delegated to the Land Use Secretariat, Stewardship Commissioner and Stewardship Minister.

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Five conservation and stewardship tools are specified in *ALSA*:⁴⁴

- Conservation Easements,
- Conservation Directives,
- Transfer of Development Credits,
- Stewardship Units, and
- Conservation Offsets.

This report considers TDCs, Conservation Offsets, Stewardship Units, and the Exchange as these tools can be considered MBIs. Both TDCs and Conservation Offsets offer development opportunities in exchange for conservation whereas Stewardship Units and the Exchange are facilitative tools for either TDCs or offsets. While Conservation Easements and Conservation Directives are not MBIs, both are tools for the direct protection of land and may be used in concert with MBIs.

There is no one common purpose provision for the *ALSA* tools apart from the general purposes of *ALSA*. However, very similar language is used to describe the purpose of these tools; namely, to support the protection, conservation and enhancement of the environment, natural scenic or esthetic values, or agricultural land.⁴⁵

Conservation Easements

A conservation easement is not an MBI but rather is a tool for direct protection of land that may be used alone or in conjunction with MBIs. Essentially, a conservation easement is a voluntary agreement between a landowner and easement holder (usually a land trust) that restricts the surface use of land and creates obligations with respect to the land. A conservation easement may be registered on land title thereby becoming enforceable against future landowners that are not parties to the agreement. Conservation Easements cannot restrict subsurface mineral rights nor restrict government power to grant surface access to extract minerals. In other words, Conservation Easements cannot prevent oil, gas or other mineral activities.

⁴³ *Ibid.* at s. 26.

⁴⁴ For more information on these tools, see Government of Alberta website:

<https://landuse.alberta.ca/ConservationStewardship/ConservationStewardshipTools/Pages/default.aspx>

⁴⁵ *ALSA* sections 25, --.

Conservation Easements were enabled by *EPEA* prior to the passage of *ALSA* and, as a result, Conservation Easements have been used in Alberta for many years. Under *ALSA*, there has been expansion of conservation easement purposes, allowable land uses and eligible easement holders. *ALSA* provides that Conservation Easements may be used to protect, conserve or enhance the “environment, natural scenic or aesthetic values, agricultural land or land for agricultural purposes”.⁴⁶ It also prescribes land uses consistent with these purposes including recreational use, open space use, environmental education research and scientific studies of natural ecosystems.⁴⁷ *ALSA* further requires that the easement holder be a “qualified organization”. This can be the provincial government, a municipality or a charity with objectives that include “the acquisition and holding of interests in land” for purposes that are substantially the same as the purposes of Conservation Easements under *ALSA*.⁴⁸

Conservation Easements are the only *ALSA* tool for which regulations under *ALSA* are in place.⁴⁹ These regulations require that notice of Conservation Easements be provided to municipalities and provincial agencies with municipal-related functions. As part of this notice, the regulations require that conservation easement complies with *ALSA* requirements for purposes, compatible land uses and qualified organizations.

In practice most easement holders are land trusts, with municipalities being the second most common easement holder. However, municipalities may lack funds to purchase easements, lack capacity to administer the easement going forward and may be reticent to take on the liabilities. Although Alberta government departments are not in the practice of holding Conservation Easements, this is done in other provinces and should be considered if easements are to support public policy objectives.

ALSA's general provisions on conservation tools expressly contemplate the use of Conservation Easements to implement the purposes of the Act and its regional plans. However, *ALSA* does not require their use in this way nor does it prevent the use of Conservation Easements for other public and private objectives. Currently, Conservation Easements that match provincial priorities can receive government support through the Land Trust Grant Program. This program is funded by the Alberta Land Stewardship Fund which is established by a regulation under the *Public Lands Act* and is supported through proceeds from public land sales (this fund is not supported by *ALSA* or its funding provisions).⁵⁰

⁴⁶*ALSA*, s.29.

⁴⁷*ALSA*, s.29.

⁴⁸*ALSA*, s.28.

⁴⁹ *Conservation Easement Registration Regulation*, Alta Reg 129/2010.

⁵⁰ *Land Stewardship Fund Regulation*, Alta Reg 31/2011.

Conservation Easements are a top candidate to secure conservation activities associated with MBIs, especially on private lands. However, there are some barriers to use of easements in the MBI context:

- The inability of Conservation Easements to prevent mineral extraction activities may undermine the conservation outcomes necessary to ensure the integrity of the MBI. This is a serious issue with Conservation Offsets aimed at biodiversity, habitat, or species conservation outcomes. This may also dis-incent easement donation by landowners that are motivated more by conservation objectives than market opportunity.
- Land trusts may not share the objectives of the MBI, be connected to municipalities or regulators that implement the MBI, or even understand the MBI.
- Conservation Easements donated to land trusts can typically produce federal income tax receipts for charitable donations. However, an easement granted for credits may not be eligible for a tax receipt as it would not pass the test for gifts or donations made “free and clear” under federal tax law.⁵¹
- Landowners who create Conservation Easements in exchange for credits may face different tax liabilities depending on their occupational status, for example as “farmers” or “developers”.
- Landowners may be reticent to enter Conservation Easements and want alternative forms of conservation agreements due to the potential for Conservation Easements to create perpetual restrictions on land title without providing ongoing payments. This is discussed further below concerning “required securement” as part of a “strong regulatory framework” for MBIs.
- Conservation Easements can only be registered on land titles under the *Land Titles Act* which typically means private land.⁵²

Overall, Conservation Easements should be considered a leading tool for use in concert with MBIs; however, they cannot be the only tool for land securement in a MBI program.

For more about Conservation Easements see
<http://www.ce-alberta.ca/>

⁵¹ Miistakis Institute, *Conservation Easements in Alberta: An Online Resource for Landowners*, Tax benefits and Implications at http://www.rockies.ca/ce_guide/basics_tax.php.

⁵² *Land Titles Act*, ss. 67-68.

Conservation Directives

Conservation Directives are a new tool under *ALSA* described as follows:

A regional plan may permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values by means of a conservation directive expressly declared in a regional plan.⁵³

While no Conservation Directives have yet been used in Alberta, the requirements to create a conservation directive are set out in *ALSA*:

- Describe the precise nature of the conservation directive, its intended purpose and the protection, conservation, management or enhancement that is the subject of the conservation directive; and
- Identify or prescribe a means of identifying the parcels of land that are the subject of the conservation directive.⁵⁴

ALSA expressly provides that a conservation directive does not constitute an estate or interest in land.⁵⁵

A conservation directive may apply to public lands or private lands. *ALSA* provides a “title holder” with rights to notice of a conservation directive and opportunities to apply for compensation.⁵⁶ This will mostly be private landowners. *ALSA* also provides extensive provisions on applications for compensation and further provides for application process through the Alberta Land Stewardship Regulation.⁵⁷

While the purpose of Conservation Directives is similar to the other *ALSA* tools, it is a unique tool in Alberta for several reasons. Conservation Directives:

- may only be created through regional plans (the only conservation tool with this requirement);
- may be imposed by government without consent and provides statutory recognition of compensation for regulation of land use; and

⁵³ *ALSA*, s.37(1).

⁵⁴ *ALSA*, s. 37(2).

⁵⁵ *ALSA*, s. 37(3).

⁵⁶ *ALSA*, s.39 and s.39.

⁵⁷ *Alberta Land Stewardship Regulation*, Alta Reg 179/2011.

- combines a clear conservation purpose on public or private lands with flexibility regarding allowable land uses, duration and management authority.

A Conservation Directive might be described as the regulatory zoning equivalent to a conservation easement, however with broader applicability. Unlike Conservation Easements, Conservation Directives could potentially restrict minerals activity, could be used on public lands, and could require government to pay for conservation on private lands.

Conservation Directives could potentially assist with the identification, securement and management of conservation sites associated with MBIs. Conservation Directives may be particularly useful for:

- protection against mineral activity;
- situations where no one will hold an easement that would support public policy objectives;
- where compensation by government could assist with inadequate market value of conservation;
- on public lands; or
- where there is demand for flexibility in duration, allowable uses and management authority.

The main drawback of Conservation Directives is the need for incorporation into regional planning, which reduces efficiency, voluntariness, and direct use by private parties.

For more on Conservation Directives see the ELC's report on this little-known tool here: <http://www.elc.ab.ca/media/103996/ConservationDirectivesELCRecommendations.pdf>

Transfer of Development Credits (TDCs)

TDCs are a form of MBI that is typically used in the municipal development context to redirect future development away from a location deemed less suitable for development to another location deemed more suitable for development. TDCs can serve to protect important landscape values while still allowing for development and recognizing the interests of landowners in both the areas to be developed and those to be protected.

A TDC scheme generally requires four elements:⁵⁸

- Identification of a conservation area worthy of protection usually called the **sending area**.
- Identification of a development area usually called the **receiving area**.
- A system of valuation and transfer of development potential from one parcel to another. This is usually done by transferable credits. Landowners in the sending area receive a number of credits based on an attributed value of the land. These credits can be sold to landowners in the development (receiving) area in exchange for putting Conservation Easements or other restrictions on the land title that limit future development in the conservation (sending) area. Landowners in the development (receiving) area that purchase credits will be allowed development opportunities beyond those provided by the baseline regulatory zoning.
- A program administrator or oversight body to develop the TDC program and use the tool.

Participation in TDCs is completely voluntary for all landowners; however, acquiring credits should be mandatory for landowners in the development area who seek to develop beyond the regulatory baseline.

While TDCs are relatively new to Canada, they have been used in other jurisdictions, especially the US, for many years. Experience with TDCs suggests that it is a very flexible tool concerning objectives. Examples of landscape values that can be protected include wildlife habitat, open space, agricultural land, watersheds, or other ecological, recreational, historic, architectural or cultural value. Examples of development opportunities provided through credit purchase include increased density, building size or building heights.

ALSA's provisions on TDCs capture the general concepts of TDCs.⁵⁹ However, TDCs are typically implemented through municipal plans and bylaws and this is a central consideration when assessing the regulatory framework for TDCs under *ALSA*. TDCs under *ALSA* are the topic of Volume 2 of this report.

⁵⁸ Guy Greenaway and Kimberly Good, Canadian Experience with Transfer of Development Credits (Miistakis Institute, 2008).

⁵⁹*ALSA*, s.48-50.

Conservation Offsets

In a very general sense, Conservation Offsets are conservation outcomes that compensate for the ecological impacts of development. There are many similar concepts, and *ALSA* provides minimal guidance on exactly what a conservation offset is or should be. The *ALSA* provisions on “conservation offset programs” consist entirely on Cabinet authority to make regulations to “counterbalance” the effect of an activity.⁶⁰ Such regulations can define “counterbalance”, require decision makers to impose offset conditions on activities, set limits on impacts of activities beyond which counterbalancing is required, and determine the Stewardship Units needed to counterbalance the impacts.

The context for discussion of conservation offsets in Alberta is largely around the impacts of the major industries on biodiversity, species at risk and habitat. Recent non-legislated policy groundwork suggests that both *ALSA* regulations and regional plans could help implement regulated conservation offset programs where offsets are routinely required as conditions on development approvals and would be supported by transferable credits. Conservation Offsets under *ALSA* are the topic of Volume 3 of this report.

Stewardship Units and the Exchange

Stewardship Units and the Exchange can be considered facilitative tools. Stewardship Units would be a form of transferable credit that would foreseeably be created where conservation occurs and which may be required for development. The Exchange could be considered an agency or authority to which market and credit-related functions are assigned. As with conservation offsets, the provisions of *ALSA* on these tools mostly provide Cabinet authority to make future regulations and offer minimal guidance for this task.⁶¹ The one significant exception is that *ALSA* contemplates Stewardship Units as separate from interests in land. *ALSA* provides additional provisions on Stewardship Units under the separate sections on TDCs and Conservation Offsets. This indicates that Stewardship Units could apply to TDCs and Conservation Offsets, even though the general scheme of *ALSA* associates them most closely with Conservation Offsets. Stewardship Units and the Exchange under *ALSA* are the topic of Volume 4 of this report.

⁶⁰ *ALSA*, s.47.

⁶¹ *ALSA*, s.45 and 46.

Other types of MBIs possible under ALSA

As discussed, all of the MBIs that are specifically provided for by *ALSA* invoke similar visions of the major land use industries paying for conservation actions or outcomes elsewhere as a condition on development.

However, the broad mandate to develop MBIs under *ALSA* could support tools that are not expressly contemplated. Three such examples that have received popular support but are not yet included in policy direction are:

- cap and trade in land disturbance permits;
- payment for ecosystem goods and services; and
- conservation taxes.

Cap and trade in land disturbance permits is an idea that predates even the *LUF*.⁶² Much like cap and trade in air emissions, permits could be issued up to a desired limit and redistributed by the industry operators. While not reviewed in this report, it is worth noting that a cap and trade scheme might be the simplest MBI scheme to establish using either *ALSA* or the *Public Lands Act*. The main legal challenge would be the need for government involvement to facilitate permit transfers and again *ALSA* might assist. Cap and trade is different from offsets, however the system could allow offsets as an alternative to acquiring permits. Similar concepts such as credits for reclamation more closely resemble Conservation Offsets and are discussed below.

Payment for ecosystem goods and services is a broad topic in the sense that all MBIs involve this concept. However, the term is often used in relation to direct payments to the agricultural sector or private landowners. The concept can include payment of public funds or private donations rather than funding from industry impacts as in TDCs and Conservation Offsets. An example in Alberta is the Alternative Land Use Services (ALUS) program.⁶³

There are merits to a range of conservation commitments and funding arrangements to support MBIs under *ALSA*. One, ongoing funding for land stewardship could complement the securing of conservation areas through TDCs and Conservation Offsets that do not directly provide for this activity. Another is that the stewardship activities might qualify for marketable credits in programs that allow for temporary conservation offsets. If ecosystem service payments are to be directly integrated into MBI programs then some challenges to address

⁶² For a review of this concept, see Simon Dyer et al., *Catching Up: Conservation and Biodiversity Offsets in Alberta's Boreal Forest* (Ottawa, ON: 2008, Canadian Boreal Initiative).

⁶³ ALUS <http://alus.ca/>

include: impacts that could be regulated, non-enforcement, activities that produce no conservation outcomes beyond business as usual, and need for conservation outcomes and legal securement to match the nature of development impacts. Another possible challenge recognized in past proposals for ecosystem service payments is possible characterization as subsidies to agricultural industries.⁶⁴

Conservation taxes can be used both for the acquisition of conservation areas and for supporting ongoing stewardship activities. This important economic tool is already used in British Columbia and multiple US jurisdictions. In Alberta, municipalities often financially support conservation and stewardship efforts (again, the ALUS program is an example). However, it is important to note that the current situation in Alberta is that municipal funding is provided via general revenues thereby invoking competing priorities and political decisions. There is no legislatively separate conservation tax as in other jurisdictions and, as such, the ELC has recommended that such a tax be enabled under the *MGA*.⁶⁵

All of the above examples of other possible MBIs indicate the value of multiple tools supporting each other, as well as the potential for competing incentives. These outstanding needs and potential conflicts should be kept in mind as this report focuses only on those MBIs specifically contemplated by *ALSA*.

***ALSA* as a Platform for MBIs**

This section proposes criteria for assessment of environmentally beneficial MBIs and applies them to the general scheme of *ALSA*. Subsequent volumes of this report apply these criteria to TDCs, Conservation Offsets, Stewardship Units and the Exchange.

Criteria for assessment

In order to advance the use of MBIs provided among the *ALSA* conservation tools in a manner that benefits the environment, the ELC is proposing three key criteria:

- **Guiding environmental principles**, including the established principles of environmental law as well as more specific principles of MBIs.
- **Property law issues are sufficiently resolved**, in light of belief that both MBIs and *ALSA* raise property law issues.

⁶⁴ See for example: Manitoba Cattle Producers Association, *Environmental and Rural Stewardship Renumeration for Agriculture in Manitoba*, (2008).

⁶⁵ <http://elc.ab.ca/media/91733/MGA-Recommendations-final-with-cover.pdf>

- **A strong regulatory framework** should be provided in light of the working definition of MBIs as a form of regulation used to pursue public policy outcomes.

Guiding environmental principles

It is imperative that decisions regarding the design and use of MBIs under *ALSA* be guided by environmental principles. As previously stated, “[o]ne can hardly expect that environmental management will automatically benefit from the assumed advantages of markets simply by using MBIs”.⁶⁶

Principles are the starting point in the characterization of MBIs as a form of regulation. Principles are also important to help uphold the “spirit of the law” in complex systems where there is potential for abuse or unintended outcomes. A comparison would be the use of “anti-avoidance” rules in tax law that can guide application of general regulations. A principled approach may be even more important with MBIs than with “command and control” regulation given that support for MBIs follows considerations beyond mere desire to protect the environment.

Advancing a principled approach to use of MBIs under *ALSA* is challenging. The established principles of environmental law evolved in the context of command and control regulation and are not fully captured in *ALSA* or the more specific principles of MBIs. Principles to consider include:

- **Sustainable development** and **cumulative effects** which are established principles of environmental law applicable to MBIs and are articulated in *ALSA*.
- **Pollution prevention** and **polluter pays** which are established principles of environmental law that are applicable to MBIs but are absent from *ALSA* (although articulated in other Alberta legislation).
- **Precautionary principle** and **public participation** which trigger debate concerning both their applicability to MBIs and their status under Alberta legislation.

In addition to the above environmental principles, there are many considerations and principles specific to MBIs. As previously noted, the ELC is strongly aware of the importance of economic, social, political, administrative, and other practical considerations in the design of

⁶⁶ Romain Pirard, Market-based instruments for biodiversity and ecosystem services: A lexicon, (2012) 19-20 Environmental Science & Policy 59 -68 at page 66.

MBIs. Many of these considerations are noted in this report’s discussion of the choice between MBIs and other tools.

Other considerations of the design of MBIs more closely resemble principles albeit of a non-legal or non-environmental nature. These principles include questions of equity and fairness for market participants, impact on property and economic interests of third parties, and attention to the structure of industry and sectors participating in the market. This report defers most such considerations to other disciplines. The main exception is the need for stakeholder involvement, as this overlaps with the environmental principle of public participation and reveals some tension between these concepts.

Further consideration for MBIs could be considered regulatory design elements. Examples include need for clear rules, goals, limits on impacts, and conservation outcomes. Such considerations fit squarely within the ELC’s criteria of a strong regulatory framework and, as such, are discussed below. Finally, there are some very specific principles of TDCs and Conservation Offsets which are considered in the discussion of those tools.

Nonetheless, the challenges with the established environmental legal principles and the principles of MBIs are similar in many ways. Principles that originate in the international realm or civil society need to be recognized in domestic law and policy, articulated and interpreted in a meaningful way, and operationalized through the decisions of regulators and potentially the courts. High level principles are apt to resemble interpretive aids that can lack impact without including more specific sub-principles. Even then, the impact may be greatest in the high level courts. The review below suggests that lower courts, administrative appeals boards and original decisions makers show propensity to rely more on direct legislative provisions of authority and duties rather than on statements of principle, purpose or policy intention. These are all foreseeable challenges with MBIs under *ALSA*.

For more on environmental principles see:
Environmental Law Centre
<http://elc.ab.ca/our-focus/core-environmental-principles-2/>

Sustainable Development and Cumulative Effects

The expressed purposes of *ALSA* include providing a means to “plan for the future” recognizing the “needs of future generations” and to “enable sustainable development” by “responding to

cumulative effects".⁶⁷ In other words, both sustainable development and cumulative effects are guiding principles for the use of MBIs under *ALSA*. This fits with the intentions of the *LUF*.

The principle of sustainable development originated in international law and builds on an older concept of ecological sustainability. The most widespread definition of sustainable development comes from the World Commission on Environment and Development as stated in the *Brundtland Report*:

*Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*⁶⁸

Inherent to this definition are concepts of needs, limits on the ability of the environment to meet needs and concern for future generations.⁶⁹ This implies an ecological core of the principle, a forward-looking view and a sub-principle of intergenerational equity. Intergenerational equity means fairness to future generations in the distribution of natural and cultural heritage, which requires passing on this heritage in no worse condition than it was received.⁷⁰

Sustainable development has normative weight in the international law regime, has been adopted into numerous Canadian statutes at the federal and provincial levels, and is recognized by the courts.⁷¹ The actual legal effect of the principle of sustainable development is debatable. The clearest impact of sustainable development is in the forward-looking nature of the principle and its focus on future generations. This is a significant shift in the law that demands departure from traditional decision making.⁷² A good many court decisions have considered the principle of sustainable development.⁷³ The bulk of these decisions indicate

⁶⁷ *ALSA*, s. 1(2)(d).

⁶⁸ World Commission on Environment and Development (WCED). *Our Common Future*. Oxford: Oxford University Press, 1987. [Brundtland Report].

⁶⁹ Natasha Affolder, *The Legal Concept of Sustainability*, CIRL symposium on Environment in the Courtroom (2012), online: <http://cir.ca/symposium/2012-symposium>

⁷⁰ Jerry V. De Marco, *Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law*, JELP 15, no 1, 2004.

⁷¹ For example, *Federal Sustainable Development Act*, S.C. 2008, c. 33 (s.5); *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18 (s. 4(3)); *Auditor General Act*, R.S.C. 1985, c. A-17 (ss. 2, 21.1), and the *Pest Control Products Act*, S.C. 2002, c. 28 (preamble, s. 4(2)(a)). See also Natasha Affolder, *The Legal Concept of Sustainability*, CIRL symposium on Environment in the Courtroom (2012), online: <http://cir.ca/symposium/2012-symposium>.

⁷² Natasha Affolder, *The Legal Concept of Sustainability*, CIRL symposium on Environment in the Courtroom (2012), online: <http://cir.ca/symposium/2012-symposium>.

⁷³ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3; *R. v. Tommy*, 2008 BCSC 1095, *Legal Oil and Gas Ltd. v Alberta (Minister of Environment)* (2000) 265 AR 341; *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, 2005 ABCA 283; *Ainsworth Lumber Co. Ltd. and Footner Forest Products*

that the principle of sustainable development is to guide government decisions rather than being directly applicable against the regulated operators. In other words, the principle of sustainable development more often serves to uphold decisions than to require action.

Applicability of sustainable development to MBIs

MBIs are typically framed in various ways as means to:

- allow development while staying within ecological limits;
- achieve integrated environmental, economic or social outcomes from the same policies;
- balance environmental, economic and social concerns.

Thus, MBIs can be considered a route to sustainable development by any definition of the principle.

However, pursuing sustainable development through MBIs instead of command and control regulation does not provide freedom from ecological limits or the economic implications of conservation. Intergenerational equity might be perceived to conflict with economic fairness concerns. Conservation of private lands may raise concerns with future property equity. MBIs are supposed to compensate, however it will be hard for markets for conservation in the present to match the value of land for development in the future. Likewise, restrictions on future natural resource development may be construed as limiting future public options whereas intergenerational equity does seek to preserve options. However, in considering sustainable development, the legal authorities have tended to mandate conservation or, at the very least, reject arguments that these principles require tempering environmental considerations with economic ones. This is a logical interpretation of the principles as it is always easier to erode legal protections than to protect something that no longer exists.

Cumulative Effects

While it is an accepted principle in environmental law, the concept of cumulative effects originated in the field of scientific assessments. In environmental law, the principle of **cumulative effects** refers to effects that may occur from combined past, present and future

Ltd. v. Director, Northwest Boreal Region, Alberta Environment (May 26, 2000) Environmental Appeal Board, Appeal Nos. 00-004 and 00-005.

human actions or activities.⁷⁴ This is a flexible concept that lacks a single definition and trends towards consideration of effects beyond biophysical effects. It also allows some decisions concerning what to measure and over what scale.

As a principle, cumulative effects is challenging to operationalize through conventional regulatory models.⁷⁵ Challenges include:

- assumptions of sufficient scientific knowledge to justify decisions;
- the fragmented nature of the regulatory system;
- the quasi-criminal nature of regulatory offenses that entails case-by-case process;
- judicial preference to review individual government decisions; and
- judicial deference of broad policy considerations to the legislature and technical subjects to administrative agencies.

There has been significant judicial consideration of the principle of cumulative effects.⁷⁶ While most decisions deal with federal environmental assessments, these decisions do provide some general principles:

- where legislation does not define cumulative effects the courts may look to departmental documents;
- it can be mandatory to consider matters beyond the project being assessed and approved;
- finding that a project has no significant effects does not preclude cumulative effects;
- only likely cumulative effects should be considered; and

⁷⁴ Cindy Chiasson, *The Quandry of Cumulative Effects - Fitting a science peg in a law hole*, Paper presented to Canadian Institute of Resources Law, Symposium on Environment in the Courtroom, March 23-24, 2012, University of Calgary, available online: <http://cir.l.ca/symposium/2012-symposium>

⁷⁵ *Ibid.*

⁷⁶ *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 FC 461 (FCA); *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] 3 FCR 610, 2006 FCA 31 (CanLII) — 2006-01-27; *Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263 (FCA); *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 (CanLII) — 2008-03-05; *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, 2005 ABCA 283. In the aboriginal context, see *Fort McKay First Nation v Alberta Energy Regulator*, 2013 ABCA 355 (CanLII); *Lameman v. Alberta*, 2012 ABQB 195; for further tribunal consideration of cumulative effects see also: *Gift Lake Métis Settlement v. Métis Settlements Appeal Tribunal (Land Access Panel)*, 2009 ABCA 143; *Gitxaala Nation v. Canada*, 2016 FCA 187; *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682.

- the courts must ensure that decision makers follow process; however, they will defer on the substantive elements of environmental assessment and approvals.

Applicability of cumulative effects to MBIs

Factors favoring use of MBIs as a response to cumulative effects include:

- Responding to the impacts of activities that are unlikely to be regulated.
- Assisting with non-point source solution.
- A more coordinated or impactful response than project-specific mitigation.

Some factors that may question the merits of MBIs as a response to cumulative effects include:

- Allowing MBIs where levels on cumulative effects are reached, and whether or not credit banking alters the analysis.
- Allowing conservation to occur outside the geographic area in which cumulative effects are being managed.

These general pros and cons are currently surfacing more with Conservation Offsets than with TDCs. In Alberta, there is an additional issue of whether biodiversity frameworks under regional plans, which could drive Conservation Offsets, can or should proxy for lack of provincial species at risk legislation.

The *LUF* and *ALSA* are very significant for embodying the shift to cumulative effects management. The *LUF* recognizes the array of decision makers that deal with land use and contemplates cumulative effects management on the regional scale. *ALSA* does not really define cumulative effects. However, its reference to the concept includes cumulative effects on the objectives of regional plans. Thus regional plans can largely define cumulative effects for their own purpose. Regional plans have unique potential to respond to cumulative effects if they assert legal weight over other regulations, decisions and statutory consents.

For ELC recommendations on cumulative effects see:

Cumulative effects management frameworks

http://elc.ab.ca/Content_Files/Files/Comments_re_SurfaceWaterQualityEMF2013Jan.pdf

Feedback on biodiversity frameworks

<http://elc.ab.ca/biodiversity-management-frameworks/> and <http://elc.ab.ca/wp-content/uploads/2016/08/bmf-elc-comments.pdf>

Model biodiversity framework

<http://elc.ab.ca/wp-content/uploads/2016/08/bmf-elc-comments.pdf>

Pollution Prevention

Although not expressly adopted in *ALSA*, the principle of pollution prevention is directly relevant to MBIs. Pollution prevention means that the creation of pollution and waste should be avoided or minimized at the source. It should be noted that **pollution** extends beyond smokestack emissions to include environmental impacts more broadly. The idea of pollution prevention is tied to intergenerational equity as it seeks to prevent or minimize impacts on future generations.

The Supreme Court of Canada has long upheld pollution prevention as a purpose of regulatory prohibitions and offenses intended to protect public welfare.⁷⁷ Much of Alberta's environmental legislation reflects the pollution prevention principle either explicitly or impliedly.⁷⁸

Applicability of pollution prevention to MBIs

Pollution prevention is a core reason for environmental legislation. The ability to prevent environmental harms from occurring is a key potential of command and control regulation by government as compared to reliance on private rights for which the typical recourse is adversarial disputing over compensation after harm occurs.

A main barrier to realizing pollution prevention is social and economic pressure to approve activities for which pollution cannot be avoided or mitigated. MBIs present an alternative to a binary choice of approving pollution or disallowing development especially when the latter is unlikely. However, adherence to pollution prevention remains necessary if MBIs are to be more than purchase of rights to damage the environment. This can be seen in the design of

⁷⁷ *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

⁷⁸ *EPEA, Water, Responsible Energy Development Act; Oil Sands Conservation Act; Coal Conservation Act; Pipeline Act; Hydro and Electric Energy Act; Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*

MBIs – for example, the mitigation hierarchy found in Conservation Offsets policy (discussed later in this report) and the use of TDCs to redirect development away from water bodies.

Polluter Pays

The Polluter Pays principle means that the costs of environmental impacts should be borne by the party creating the impacts. This may include costs such as pollution prevention, mitigation, reclamation, remediation or restoration. Like pollution prevention, the principle of polluter pays is tied to intergenerational equity as it seeks to ensure that environmental liabilities are not deferred to future generations.⁷⁹

The polluter pays principle is firmly entrenched in Canadian law, being found in almost all federal and provincial environmental legislation.⁸⁰ The Supreme Court of Canada has taken a broad view of the principle as imposing direct costs on polluters as well as asking polluters to pay more attention to the need to protect ecosystems in the course of their economic activities.⁸¹

The polluter pays principle can be used in multiple important ways. It can help uphold government actions or decisions, or it can be used directly against offenders. For examples:

- The Supreme Court of Canada has applied the polluter principle to uphold “no fault” liability for pollution.⁸²
- Multiple federal statutes articulating the polluter pay principle concern sentencing of offenders.⁸³
- The courts have applied the principle to find successor companies liable for the actions of their predecessors.⁸⁴
- The transgenerational environmental harms resulting from illegal conduct have been factors relevant to the sentencing of regulatory offenders in multiple cases.⁸⁵

⁷⁹ Jerry V. De Marco, *Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law*, JELP 15, no 1, 2004, citing numerous cases.

⁸⁰ *Imperial Oil v. Quebec (Minister of Environment)*, [2003] 2 S.C.R. 624.

⁸¹ *Imperial Oil v. Quebec (Minister of Environment)*, [2003] 2 S.C.R. 624.

⁸² *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392.

⁸³ *Canadian Environmental Protection Act*, 1999, S.C. 1999, c.33 (preamble and s. 287); the *Antarctic Environmental Protection Act*, S.C. 2003, c. 20 (s. 50.9); the *Fisheries Act*, R.S.C. 1985, c. F-14 (s. 42); and the *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12 (ss. 6 and 7).

⁸⁴ *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)*, [2005] 1 S.C.R. 3).

⁸⁵ Jerry V. De Marco, *Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law*, JELP 15, no 1, 2004, citing multiple cases.

For more on polluter pays, see Environmental Law Centre blog series
Pollution Pocketbook and related posts
<http://elc.ab.ca/category/pollution-emissions/>

Relevance of polluter pays to MBIs

The connection between the polluter pays principle and MBIs is strong, and is said to lead to substantive environmental outcomes. One fulsome review of this connection in the Canadian context is provided by Kenny et al.⁸⁶ The starting point is the concept that MBIs attempt to internalize the ecological costs of conventional market activity. If the cost of reducing pollution is not great then even modest charges against polluters can produce significant improvements.⁸⁷

Polluter pays in the MBI context is especially important for operational (permitted) pollution. If regulations simply set a limit on pollutants then companies have no incentives to reduce pollution further. However, if permitted pollution is taxed or priced then further reductions below the maximum permissible limit can be expected. Similarly, if forestry companies paid a fee linked to the ecological impacts of logging, there would be an incentive to avoid important habitat areas and use lower-impact practices. An example of polluter pays for permitted pollution often discussed around Conservation Offsets in Alberta is the federal requirement for compensation habitat under the *Fisheries Act*.⁸⁸

MBIs can also involve a principle of “user pay” distinguishable from “polluter pay”.⁸⁹ User pay focuses on paying for the use or depletion of natural resources whereas “polluter pay” focuses on paying for degradation of quality. User pay is well established in Canada. For example the general public pays for electricity while industry pays to extract natural resources. Ideally, the costs of both depletion and degradation are integrated into the price.

It is worth noting that surmounting some barriers to polluter pay through command and control regulation could help enable MBIs as well. Examples include more stringent limits on permitted impacts, timelines on reclamation and enforcing against unauthorized impacts.

⁸⁶ Alex Kenny, Stewart Elgie and Dave Sawyer, *Advancing the Economics of Ecosystems and Biodiversity in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity* (Ottawa: Sustainable Prosperity for Environment Canada, June 2011).

⁸⁷ *Ibid.*

⁸⁸ *Fisheries Act*, RSC 1985, c F-14.

⁸⁹ Alex Kenny, Stewart Elgie and Dave Sawyer, *Advancing the Economics of Ecosystems and Biodiversity in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity* (Ottawa: Sustainable Prosperity for Environment Canada, June 2011).

While the principle of polluter pay is not explicitly mentioned in *ALSA*, this is not problematic given the prevalence of the principle and its implied connection to MBIs. The specific MBIs contemplated by *ALSA* need to go a step farther and see polluter pay for conservation purposes. This might include various taxes and fees that could be considered polluter pay (although these payments might not be spent on conservation). A key example discussed in Volume 3 is payment of fees in lieu of Conservation Offsets. This approach can raise issues with allowable uses of funds, with the availability or eligibility of recipients, or with the price of fees relative to real costs of conservation. Similar issues have arisen in the context of Alberta's greenhouse gas emissions program and the provincial wetlands replacement regime.

The Precautionary Principle

There are numerous articulations of the precautionary principle – some stronger and some weaker – that invite debate on the precise meaning of the principle. The most cited articulation of the precautionary principle is Principle 15 in the *United Nations Rio Declaration on the Environment and Development* (UNCED 1992):

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁹⁰

It has been suggested that the precautionary principle has at least four elements:⁹¹

- a threat of harm;
- scientific uncertainty;
- action in the face of uncertainty; and
- a legal “command” ranging from mandatory (i.e. “must” or “shall” take action) to permissive (“may” take action).

This principle can be understood as a risk management principle applicable to decision making procedure or as an attempt to formalize precaution as a regulatory obligation in face of

⁹⁰ *United Nations Rio Declaration on the Environment and Development* (UNCED 1992), available online: <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>

⁹¹ Chris Tollefson, A precautionary tale: trials and tribulations of the precautionary principle, (paper delivered to Canadian Institute of Resources Law, Symposium on Environment in the Courtroom, University of Calgary, March 23-23, 2012), available online :<http://cirl.ca/symposium/2012-symposium>

environmental threats and scientific uncertainty.⁹² Traditionally, regulators might only weigh risks that exist at high levels of certainty or allow uncertainty to favor approvals. The precautionary principle empowers or requires decision makers to take risks into account, to respond in a manner proportional to the risk, and to adapt as knowledge of risk becomes more certain.

The precautionary principle is well established internationally, appearing in over a hundred international agreements including the Convention on Biological Diversity, as well as scores of domestic laws worldwide. In Canada, multiple federal statutes and non-legislated policies include articulations of the precautionary principle.⁹³ Likewise, the precautionary principle appears in the environmental legislation of several other provinces and territories.⁹⁴ Alberta is notable for having no expressions of the precautionary principle in any of the relevant legislation. Canadian courts, including the Supreme Court of Canada, have recognized the status of the precautionary principle in international law and have applied the principle to help uphold domestic legislation.⁹⁵

Applicability of the precautionary principle to MBIs

The precautionary principle is an established principle of environmental law but both its current status under Alberta law and applicability to MBIs invite debate. While the precautionary principle is completely absent from all relevant provincial legislation, it does appear in select municipal plans relevant to TDCs. Given that the precautionary principle is an established sub-principle of sustainable development, it is fit for inclusion in instruments pursuing the purposes of ALSA.

⁹² Chris Tollefson, *A precautionary tale: trials and tribulations of the precautionary principle*, (paper delivered to Canadian Institute of Resources Law, Symposium on Environment in the Courtroom, University of Calgary, March 23-23, 2012), available online: <http://ciril.ca/symposium/2012-symposium>

⁹³ *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18 (preamble); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 2(1)(a); s.6(1.1); 76.1; *Pest Control Products Act*, S.C. 2002, c. 28 (s. 20); *CEAA 2012* s.4 (1)(b); *Oceans Act*, S.C. 1996, c. 31, (preamble); *Species at Risk Act*, S.C. 2002, c. 29 (preamble and s.38) [SARA]. See also Government of Canada, Fisheries Protection Policy Statement (2013), referencing Government of Canada: A Framework for the Application of Precaution in Science-based Decision-making about Risk, (2003).

⁹⁴ *Environment Act*, SNS 1994-95, c 1; *Endangered Species Act, 2007*, SO 2007, c 6; *Endangered Species Act*, SNS 1998, c 11.

⁹⁵ Cases include *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52; 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40; *Morton v. Ministry of Fisheries and Ocean*, (2015) FC 575; *Blaney et al. v. British Columbia (The Minister of Agriculture Food and Fisheries) et al.*, (2005) BCSC 283; *Weir v. Canada (Minister of Health)*, (2011) FC 1322; *Pembina Institute for Appropriate Development et al. v. Canada (Attorney General) et al.*, (2008) FC 302; *Hanna v. Ontario (Attorney General)*, (2011) ONSC 609; *Sierra Club Canada v. Ontario (Natural Resources & Transportation)*, (2011) ONSC 4655. See also Chris Tollefson, *A precautionary tale: trials and tribulations of the precautionary principle*, (paper delivered to Canadian Institute of Resources Law, Symposium on Environment in the Courtroom, University of Calgary, March 23-23, 2012), available online : <http://ciril.ca/symposium/2012-symposium>, citing multiple Federal Court cases.

The precautionary principle is a key principle for biodiversity conservation, risk-based environmental decision making, and cumulative effects management. The biodiversity frameworks being developed under *ALSA* regional plans are all of these things, so arguably the precautionary principle should be guiding decisions under these instruments. Because Conservation Offsets may be used to pursue biodiversity conservation and are to be guided by *ALSA*'s biodiversity frameworks, the precautionary principle has particular relevance to Conservation Offsets. The precautionary principle is also relevant to TDCs as the enduring nature of municipal development implies irreversible damage. However, the nature of TDC goals will impact the extent to which risks are uncertain.

Other ways that the precautionary principle could assist with any MBI include:

- placing regulatory limits on impacts or conditions on activities;
- placing onus on development proponents to show no impacts of activities or the appropriateness of compensation measures;
- erring on the side of overcompensation for impacts; and
- avoiding reliance on MBIs in lieu of cost-effective regulatory action.

Experience with the precautionary principle does show potential for inefficiency. Uncertainty around the precise meaning and content of the precautionary principle creates an important role for the courts in reviewing process and decisions where the principle applies. There is value in clarifying the seriousness of environmental harm and the level of scientific uncertainty necessary to trigger the principle, the possible actions where the principle is triggered, and whether such actions are mandatory or discretionary. These clarifications should be part of biodiversity frameworks or any other policy adopting the precautionary principle. Any policy, regulations, regional plans or management frameworks under *ALSA* should adopt the precautionary principle, especially where they concern biodiversity. The biodiversity frameworks are an ideal location for this principle.

For more on precautionary principle see:

Chris Tollefson, *A precautionary tale: trials and tribulations of the precautionary principle*, (paper delivered to Canadian Institute of Resources Law, Symposium on Environment in the Courtroom, University of Calgary, March 23-23, 2012), available online: cirl.ca/files/cirl/chris_tollefson-en.pdf

Public Participation

Public participation in environmental decision making is a broad topic and may occur in different aspects of the legal regime. One distinction is public participation involving access to the courts and public participation in decisions of the executive branch of government (i.e. Cabinet, ministries, departments, and agencies).⁹⁶ Participation in government decisions could further be subdivided into **policy development** versus **policy implementation** (or regulatory decisions); although, this distinction can be difficult to maintain.⁹⁷ Looking at the general development process, there are various points of public participation: policy and planning, disposition of land and resource rights, environmental assessment, regulatory approvals, administrative appeals, and court challenges.⁹⁸ It should be noted that not all development may proceed in this order or include all stages.

Public participation in Alberta, like elsewhere, is highly operationalized through legal rules and administrative practices that have fueled litigation, policy debate and legislative reforms. Many examples of participation predate sustainable development and have roots in either democratic concepts or general principles of administrative law.

Access to the courts is subject to simpler, more universally applicable rules. One is that the Canadian courts will grant “public interest standing” to challenge the constitutionality of legislation or the legality of decisions under legislation. This is very significant as it affirms the role of the courts in upholding the rule of law against the executive branch of government. Another is that the Canadian courts remain very restrictive against private citizens or non-government entities attempting to enforce regulations in situations where there is no allegation of unlawfulness on the part of government. As legislation and the courts rarely impose positive duties to act, the executive retains discretionary control over law enforcement.

Public participation in government decisions is more context-dependent. Participation in policy development is often unlegislated and ad-hoc, at least in Alberta outside of *ALSA*. Participation in regulatory decisions is very dependent on the specific legislation. Alberta provides rules for participation in regulatory decisions under most relevant legislation such as *EPEA*, the *Water Act*, and the various industry regulatory statutes. For example, *EPEA* begins with a purpose section which recognizes the shared responsibility of all Alberta citizens for environmental protection and offers opportunities to provide advice on decisions through the Act.⁹⁹

⁹⁶ See for example, Aarhus Convention on “public participation, access to justice and access to information”. --

⁹⁷ See for example, Alberta Regulatory Enhancement Project -- resulting in *Responsible Energy Development Act*.

⁹⁸ See for example, Human Rights in Natural Resource Development. --

⁹⁹ *EPEA* s.2(f) and (g).

One key feature of all of the relevant Alberta legislation is provisions attempting to restrict rights to participate in regulatory decisions and administrative appeals to persons that may be directly affected by the decision in question. Various articulations of this restrictive rule are used for:

- Environmental assessments and approvals under *EPEA*.
- Approvals and licenses under the *Water Act*.
- Appeal of *EPEA* and *Water Act* decisions to the Environmental Appeals Board.
- Appeal of *Public Lands Act* decisions to the Public Lands Appeals Board.
- Intervener standing at the energy, utility and natural resource boards.
- Appeals of municipal decisions at the Subdivision and Development Appeals Board and the Municipal Government Board.¹⁰⁰

Some existing concerns with restrictive participation in regulatory decisions might increase with MBIs.

While restrictive participation theoretically serves efficiency goals, it also creates disputes and thus might create costs and delay in any given case. The rules also create reliance on parties with private property and economic interests to represent public interests in an adversarial context, which can be unfair and confusing. Some MBI policies to be considered by regulators will foreseeably not be encoded into regulations so they can be applied with flexibility, which will make it even harder to maintain a policy/regulatory divide. Limiting public interest representation at the regulatory level may jeopardize policy implementation and could undermine public support for the MBI even if consultations on policy development were held. The ELC, like most law reform agencies that consider the topic, has long advocated for broader standing in environmental regulatory matters.¹⁰¹

One universally applicable argument is for non-government participation in program administration and oversight. Examples include:

- Need for transparency and accountability of government activity for the general public, not just transparency and accountability for market players.

¹⁰⁰*Ibid.* s.685

¹⁰¹ See for example Adam Driedzic, *Standing in Environmental Matters*, (Edmonton, AB: Environmental Law Centre, 2014) available online at <http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf>.

- The capacity challenge created by increased administration needs may warrant broader involvement.
- Connection of MBIs to other instruments like conservation funds.

In many ways the challenge of appropriate participation is similar with MBIs and command and control regulation. The question is not “whether participation” but the details of why, where, and how.

Applicability of Public Participation to MBIs

While including public participation (and the precautionary principle) may be a pre-condition to support from public interest environmental organizations and the citizenry, operationalizing this principle could result in political non-feasibility of an MBI, challenge purported conservation outcomes, and conflict with economic and administrative efficiency. Questions of public participation in MBIs involve significant tensions. This is an area where the principles of MBIs and the more established principles of environmental law show both convergence and divergence.

At the policy development level, participation by public interest organizations or the general public in the development and implementation of MBIs might be unnecessary or perceived as unhelpful. At the implementation level, there may also be fairness arguments against allowing third party intervention or challenges to private transactions and associated regulatory approvals. This is in addition to the potential for delay and inefficiency.

On the other hand, MBIs are inherently more participatory than command and control regulation. The experience with similar tools like eco-certification highlights the significant level of civil society involvement.¹⁰² Near every source considered in this report considers some form of “stakeholder participation”, “stakeholder involvement” or “stakeholder support” to be a principle of MBIs.

As MBIs are regulations in pursuit of public policy objectives, they do not preclude need for planning and policy exercises that should arguably be open to public input. There are some key differences between TDCs and Conservation Offsets respecting participation in policy development, as a TDC results from municipal planning and legislative (bylaw) process not just provincial policy. These differences are discussed in subsequent volumes of this report.

¹⁰² Chris Tollefson et al., *Setting the Standard: Certification Governance, and the Forest Stewardship Council* (Vancouver, B.C.: 2008, UBC Press).

Implementing MBIs require sufficient number of buyers and sellers, assessors and verifiers, bankers and brokers, administrators and enforcers. MBIs need to involve organizations with conservation mandates, private consultants and outside experts. However, all of these roles may fall short of involving persons who lack directly affected property and economic interests, or at least directly applicable expertise.

One matter that deserves more exploration is the possibility of restrictive public participation at the regulatory implementation level creating barriers to MBIs. This relates to the need for regulatory limits. Specific provisions of *EPEA* that restrict public participation and are relevant to various design features of MBIs include:

- Seeking input from the public through advisory committees.¹⁰³
- Mandatory reporting on the state of the environment.¹⁰⁴
- Making information publically available.¹⁰⁵
- Public input into setting environmental quality guidelines and objectives.¹⁰⁶
- Involvement in review of proposed activities.¹⁰⁷

However, Alberta provides no public participation opportunities on the disposition of natural resource rights under the *Mines and Minerals Act*, *Public Lands Act* and *Forests Act*. While the 2-step process for minerals dispositions and development approvals enables participation at the approval stage, the public lands and forest regimes do not. This is an important consideration for Conservation Offsets as there would be zero public participation in dispositions enabling private conservation of public lands.

The *MGA* provides a very different participation regime that reflects the legislative function of municipal councils. Provisions relevant to TDCs include requirements to provide notice and public hearings before the second reading of bylaws, and providing council a broad mandate to hear from persons.¹⁰⁸ The *MGA* further provides opportunities to challenge the validity of bylaws based on compliance with process requirements.¹⁰⁹ The issue with the *MGA* is more with lack of guidance or structure for public participation, lack of municipal capacity, and reliance on late-stage bylaw hearings as reflections of community interest.

¹⁰³ *Ibid.* s.4.

¹⁰⁴ *Ibid.* s15.

¹⁰⁵ *Ibid.* s.35.

¹⁰⁶ *Ibid.* s. s.14.

¹⁰⁷ *Ibid.* S.40.

¹⁰⁸ *MGA* part 7.

¹⁰⁹ *Ibid.* s. 537 and 538.

ALSA continues some Alberta trends in public participation that will probably not help with public support for MBIs. Most participation opportunities are tied to regional planning while the restrictions on participation apply in a broader range of situations.

ALSA requires public consultations on regional planning and allows the creation of Regional Advisory Councils. This provides more direction and structure than many policy consultations. However, regional planning is not very effective for consultations on MBI development. Regional plans are fairly high level and broad in scope, MBIs need not be linked to regional plans, and the resulting plan content on MBIs is minimal. Also, the Regional Advisory Councils have not been given a mandate to propose other regulatory reforms and Cabinet is not required to take their advice.

Once regional plans are made *ALSA* becomes very restrictive of rights to challenge planning decisions or to enforce plans. Title holders may request variances of regional plans and persons who are directly affected by regional plans may seek review of regional plans. However, judicial review of regional planning decisions is limited. Persons concerned about non-compliance with regional plans are restricted to filing complaints with the Stewardship Commissioner who may decide whether to pursue administrative channels or seek court enforcement of regional plans.

ALSA is fairly silent regarding participation in the development of the MBIs. The closest example may be provisions to support research, development, pilot projects, and programs. This mostly provides broad discretion to engage specific researchers and project developers inside or outside of government. *ALSA* might imply a role for “qualified organizations” beyond holding Conservation Easements. However there are no clear prescriptions to that effect.

ALSA may limit access to the courts to enforce against non-compliance with *ALSA* and regulations, not just regional plans. The provisions limiting access to the courts are housed under the regional planning part. However they expressly contemplate non-compliance with the Act and regulations as well.¹¹⁰ This was the finding of the Alberta Court of Queen’s Bench in the case of *Keller v. Bighorn*.¹¹¹

This may limit ability to challenge TDCs approved under *ALSA* or Conservation Offsets under *ALSA* regulations. It will also create high stakes in municipal planning processes for persons affected by TDCs. This is because the *MGA* provides no rights to intervene in development permit applications. The restriction on access to the courts does not create similarly high stakes in the development of conservation offset policy or regulations. Persons who are directly affected by a natural resource project or the offset site might still be able to intervene

¹¹⁰ *ALSA* s.18(1)and(2).

¹¹¹ *Keller v. Bighorn, infra* -----.

in regulatory approvals process to challenge the substantive merit of a conservation offset even if they cannot challenge the offset for non-compliance with ALSA.

ALSA might provide some new participation opportunities for private conservation actors. If regional plans prescribe development activities that have direct adverse effects on tangible conservation interests then it might be possible for a title holder to seek a variance or for a qualified organization to seek a review of a regional plan. However, this would require some assertively pro-development regional plans. If regional plans are silent and enable “development by default” then opportunities are more limited.

For more on public participation see:

<http://elc.ab.ca/category/public-participation/>

See ELC report on standing:

<http://elc.ab.ca/media/98894/Report-on-standing-Final.pdf>

See ELC Access to Environmental Appeals:

<http://elc.ab.ca/pub-archives/public-access-to-environmental-appeals-a-review-and-assessment-of-albertas-environmental-appeals-board/>

See Lucas (ed.) text – Human Rights in Natural Resources Development

<https://global.oup.com/academic/product/human-rights-in-natural-resource-development-9780199253784?cc=ca&lang=en&>

See ELC backgrounders on ALSA (Bill 36):

<http://elc.ab.ca/?s=ALSA>

Property law issues are sufficiently settled

The system of property law in the Canadian context includes legislation and “common law” principles developed by the courts. Legislation can take legal priority over the common law where it intends to. MBLs raise numerous issues in the field of property law. Markets depend on the existence of property and to attract participants the rights attached to this property must be sufficiently clear. Property rights need to be well-defined and governed by rules for their creation, enforcement and termination.

Debate about MBLs is apt to focus on property issues. Proponents may rely on the “tragedy of the commons” to suggest that lack of private ownership results in inadequate resource conservation. Opponents may fear a “tragedy of the anti-commons” where privatization of public resources creates exclusive access and environmental inequity.

Regardless of these views, an effective MBI will need to show sufficient resolution of property law issues. This includes:

- Foundational concepts such as:
 - Recognition of property, including “ecosystem goods and services”.
 - Types of property (real property vs. personal property).
 - Property ownership.
- Issues with land and resource rights including:
 - Separation of surface and subsurface (mineral) rights.
 - Public lands and natural resources.
- Regulatory restrictions on property rights and compensation for restrictions.
- Property administration issues including registration and enforcement of property rights.

These issues are discussed here concerning the general legal regime and the scheme of *ALSA*, then in subsequent volumes concerning the specific MBIs. It should be noted that indigenous rights - based on a fiduciary relationship between indigenous people and the Crown, and protected by the Constitution – are very different from standard property rights. Discussion of indigenous rights falls outside the scope of this report but it possible that, in some cases, these rights may add a layer of complexity to implementation of MBI schemes.

Recognition of property

Property is a notoriously hard concept to define. One of the most common explanations of property is as a “bundle of rights”. This bundle might include rights to: own, access, possess, use, enjoy, manage, control, exclude, profit from and “alienate” (transfer, sell, or dispose of the property). However, not all rights exist in all bundles that are recognized as property. Property can also be subject to a bundle of duties, responsibilities, liabilities and restrictions. In the MBI context it may be critical that some property rights come with conservation and stewardship obligations towards land, watersheds and biodiversity. Overall, property is highly relational in nature as it is defined by rights and duties exercised against others.

The recognition of property in the environment or “ecosystem goods and services” is an evolving area of law. Ecosystem goods and services can be defined as the benefits derived from functioning ecosystems. The SSRP lists four categories of ecosystem services:

- Provisioning services, for example food, fiber and water.
- Regulating services, for example flood control.
- Cultural services, for example recreational benefits.
- Supporting services, for example soil formation.¹¹²

Where markets for **ecosystem goods and services** are already well established one finds the existence of well-established property rights in these components of the environment. These are usually “provisioning services” including the major natural resources. Where markets for ecosystem services are less established -- for example, water quality, flood control, wildlife habitat, air quality or scenic views-- one finds greater uncertainty of property rights.

Recognizing and valuing ecosystem services is about informing decisions, not just recognizing property rights or enabling markets. For the latter situations, the legal literature is apt to use the term “environmental property rights”.

Compared to traditional property rights, environmental property rights are more likely to be created by legislation or contracts for specific purposes rather than by common law rules.¹¹³ These creations will provide fewer rights, for example rights to access land and withdraw resources, but not to exclude other persons or to alienate the property rights. Some implications are that environmental property rights may not be bound by conventional rules, the courts can be inconsistent in recognizing these rights, and these rights are more susceptible to change. Some environmental property rights could be built on traditional rights to land, water or other resources.¹¹⁴ These rights may be more stable and easier for courts to recognize.

The different advantages and disadvantages to different types of property rights for use in MBIs suggest some merit for “blended models” of property rights. Rights could be recognized through a mix of common law, legislation and contracts. This would provide a mix of stability

¹¹² For the same conceptual framework see Millennium Ecosystem Assessment <http://www.millenniumassessment.org/en/index.aspx>

¹¹³ Rowena Maguire and Angela Phillips, “The role of property law in environmental management: An examination of environmental markets” (2011) 28 EPLJ 215.

¹¹⁴ Terry L. Anderson, Gary D. Libecap, *Environmental Markets: A Property Rights Approach* (New York, Cambridge University Press, 2014).

(through common law), purpose (through legislation) and flexibility (through contracts). A conservation easement is the best example in Alberta.

While some MBIs may require recognizing new forms of “environmental property rights”, other MBIs may not require changing our basic conception of property at all.

Types of property (real vs. personal)

All property is either land (“real property”) or things (“personal property”). An MBI might involve both types of property: interests in the real property where development, conservation or stewardship activities occur, plus personal property in the form of credits or units that can be traded. Rights in ecosystem services can create challenges for the distinction between real property and personal property.

Real Property

Real property interests often provide greater security than personal property interests as they are less dependent on legislation for recognition of the rights in the bundle. There are separate legal regimes for the ownership of public and private lands. Public lands are discussed further below. For private lands, the type of interest with the greatest bundle of rights is a “fee simple” land title (what most people think of as owning of land). Subject to the law, the fee simple title holder can use the land, exclude others from the land, transfer the land, or grant other people interests in the land.

Some lesser interests “run with the land” and can bind subsequent landowners, sometimes in perpetuity. A key example for use in MBIs is Conservation Easements. Conservation Easements are land interests that are created through contracts made for specific purposes pursuant to legislation. Easements are fairly secure in their enforceability against a private landowner although they can be altered by government if it is in the public interest to do so. This is less secure than a common law restrictive covenant, however, legislation makes Conservation Easements more readily accessible and fit for their purpose. Other types of interests that run with the land include leases, right of ways, rights of entry and caveats used to secure surface access for energy and utilities developments. To determine the bundle of rights created by any interests other than fee simple land title ownership, one must refer to the form of rights that were granted and ideally the specific grant of rights.

Personal property

Legal rights in personal property are normally only binding and enforceable on the specific parties to the contractual agreement or transaction that concerns the property. They do not bind subsequent owners of the property after the property has been alienated by the prior owner. Personal property rights can be recognized through the common law or created by legislation or contracts. As above, rights created by legislation are less stable. However, personal property rights offer more efficiencies as they are more readily created and extinguished under contracts and legislation.

There are some lesser interests in land that more closely resemble personal property. These interests are granted by landowners however they do not “run with the land” to bind subsequent landowners. Examples include contractual agreements that create rights and obligations between the landowner and another party for a limited term and which are not registered on title. This can offer alternatives to Conservation Easements thereby requiring commitments for shorter terms (for better or worse).

Ownership

Property can be owned by private individuals, corporations, public bodies and their delegates. Private property is owned by individuals or corporations whereas public property is owned by the Crown as represented by federal or provincial governments. Municipal authorities are delegates of the province and can also own property. Common property is owned by nobody. The best example is air, although even airspace is subject to legal interests. The distinction between public property and common property is very important to a discussion of MBIs. Ownership and regulation of public property by government is a potential response to “tragedy of the commons” and the main alternative to privatization. However, public property comes with its own conservation issues. In the Canadian legal tradition, the property rights of government in public lands and resources resembles private ownership in that it creates very few positive duties of conservation.

Separation of surface and subsurface rights

In Canada, title to the surface of the land and title to subsurface mineral resources are separate. As with surface ownership, mineral titles may be owned by private parties (known as “freehold” ownership), or they may be owned by the provincial Crown. The vast proportion of mineral resources in Alberta are owned by the Crown, even on private land. In most situations other than public land, the owner of the surface and the subsurface are different people. The typical means to extract the minerals is for the owner to lease mineral rights to individuals or

companies to do so. This may lead to conflict if mineral rights are allocated without regard to compatibility with surface uses or policies on surface use.

Furthermore, surface rights are usually subordinated to the right of access to mineral rights holders. On private lands, Conservation Easements and other surface rights cannot prohibit mineral extraction. On public lands, other disposition holders cannot exclude mineral rights holders from an area. Municipalities cannot prohibit provincially approved mineral projects on lands that are otherwise under municipal authority. As a result, surface activity for minerals extraction is a pervasive threat to conservation value of public and private lands in Alberta. This is a major issue for Conservation Offsets and it should also be considered an issue wherever private land conservation pursues provincial policy objectives.

Public lands and resources

Government ownership and management authority over public lands and resources flows from being the representative of the Crown, from the jurisdiction granted by the constitution, and from the details of legislation. In Alberta, the province owns, in addition to provincial Crown land, the wildlife,¹¹⁵ the water in natural and permanent water bodies,¹¹⁶ and the beds and shores of permanent and naturally occurring water bodies.¹¹⁷ These provisions on water and water bodies cover many wetlands on private lands.

Public lands can be sold to private parties and become private lands. They can further be converted to fee simple land under the *Land Titles Act* with the Crown as the title holder. As well, the Alberta government grants lesser property rights in public lands and natural resources through the use of legislative tools often referred to as “dispositions”. These dispositions are created under numerous pieces of legislation that concern specific lands and resources. There are over 25 types of dispositions that can be made with respect to Alberta public land plus legislative provisions for further, undefined types of dispositions.

Dispositions grant incomplete bundles of rights: rights to access and occupy land, and to extract and manage specific resources. Determining the exact bundle of rights created by a public land disposition involves reviewing the legislation that created the form of disposition and the specific disposition itself. Some dispositions resemble mere activity permits granted by government, while other dispositions have elements of private contracts between two parties. Some dispositions grant short-term or one-time rights for a specific purpose.

¹¹⁵ *Wildlife Act*, R.S.A. 2000, c. W-10, ss. 7-8.

¹¹⁶ *Water Act*, R.S.A. 2000, c. W-3, s. 3.

¹¹⁷ *Public Lands Act*, R.S.A. 2000, c. P-40.

Public lands in Alberta create an extremely challenging context for implementing Conservation Offsets as compared to private land. This is discussed below and represents one of the largest issues in the report.

In brief, Alberta has a history of policies favoring overlapping use of public lands and a practice of granting overlapping dispositions on these lands. Most dispositions are issued largely for resource development or extraction purposes, do not create clear rights to non-development or conservation, provided limited ability to exclude other uses, and cannot be alienated without government consent. The most poignant example is mineral leases granted with a 5 year “use it or lose it” term. Even those dispositions that provide longer terms and stewardship functions such as Forest Management Agreements and grazing leases still tie these functions to use of the resource. There are no tools available directly to private parties to implement Conservation Offsets on public lands. Government involvement is necessary to provide access to public lands for conservation purposes and protection of conservation sites against other uses. An alternative is reform to resource tenure regimes to recognize rights in ecosystem services.

Regulatory restrictions on property rights

Constitutional protection of property rights is very limited in Canada. Property rights are not covered by the *Canadian Charter of Rights and Freedoms*. The *Alberta Bill of Rights* provides some procedural protection to property owners by requiring due process of law in order to deprive individuals of property, however this is not substantive protection.

Governments may use legislation to expropriate private land and take other private property. Legislation may also regulate or impose restrictions on property rights so as to protect public resources or the public good. Federal, provincial and municipal authorities all have abilities to impact property rights to varying degrees. The constitution assigns direct legal authority over “property and civil rights” to the provinces who consequently are the main regulators of property in Canada. The federal government can impact property rights when regulating matters under its authority. Municipal powers are limited to those given municipalities under provincial legislation. In Alberta, like most provinces, municipalities have been delegated significant authority to plan and regulate private land use. Furthermore, the Canadian approach to federalism allows federal, provincial and municipal authority to overlap, particularly on environmental matters.

The authority of government to regulate property rights creates multiple challenges for MBIs. For example:

- Other tools might exist to achieve the same environmental outcome as the MBI.
- Property rights in ecosystem goods and services can have broad impacts on public interests which makes it likely that such rights will be more restricted than conventional property rights.
- Rights may be less stable even if sufficient in scope.
- Conservation sites may need regulatory protection if property rights and private tools are inadequate.

A further issue more specific to Conservation Offsets is need to establish where the outcomes of private conservation go beyond what government could or should do.

ALSA was the subject of controversy and speculation over its impact on property rights. This resulted in amendments mostly around compensation as discussed below. Around this time the province also commissioned a Property Rights Task Force Report that is very informative.¹¹⁸ The report captured intense rural concern with centralized planning and power imbalance. Thus, concerns with property rights were fairly interwoven with concerns about local autonomy. There were at least three statutes of concern around the same time – the *Land Assembly Project Area Act*, *Electric Statutes Amendment Act*, and *ALSA* -- the other two being more focused on enabling large infrastructure and utilities projects. The main debate was not framed in terms of “property rights vs. environmental protection”. In fact the reports cites only a handful of landowner comments about the environment in total and all were fairly in favor of the province increasing priority on the environment. Examples included getting serious with the environmental record of the oil and gas industry, providing better access to information on the impact of activities, and some demands for ecosystem service payments. Some of the major demands including better consultation and access to the courts are aligned with environmental principles of public participation. Further, concern with restrictions on property rights were not just about private land ownership they also included statutory consents of value to landowners. Overall, potential that *ALSA* would be used to restrict property rights for environmental objectives was not the highest concern, especially concerning private land rights.

¹¹⁸ Report of the Property Rights Task Force: Engagement with Albertans (Government of Alberta, February 2012), http://justice.alberta.ca/programs_services/about_us/prao/assets/PropertyRightsTaskForce-Report.pdf. [Property Rights Task Force Report].

Compensation for regulatory restrictions

There is no common law right to compensation for the regulation of property in Canada. The general rule is that legislative restrictions in the public interest may “injuriously affect” property values on the market. The courts have found that government action must be a practical equivalent to expropriation before a property owner can seek legal protection and they have been unwilling to compensate property rights holders for “regulatory takings”.

However, legislation including statutory consents can create rights to compensation for impacts on property rights as a result of regulation. Compensation is also presumed by the courts where legislation authorizes expropriation.

ALSA currently contains multiple provisions on compensation whose impact on the baseline, if any, is unclear. *ALSA* provides that:

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

- as provided for under section 19.1,
- as provided for under Part 3, Division 3 (the “conservation directive” provisions),
- as provided for under another enactment.

Section 19.1 of *ALSA* provides that a “compensable taking” means the “diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity”.¹¹⁹ It then provides that registered owners of private land or freehold minerals may apply for compensation according to regulations for “compensable takings” suffered as “a direct result of a regional plan or amendment to a regional plan”.¹²⁰ The landowner may apply to court or to the Compensation Board, and the Compensation Board is required to determine compensation in the same manner as if there was a conservation directive.¹²¹ *ALSA* further provides that the section does not create rights to compensation for anything done under the planning part of the MGA or by the operation of that part of the MGA.¹²²

On one hand, *ALSA* suggests that it intends to maintain the status quo by defining compensable takings as those already recognized by the existing legal regime. Also, the expressed exception for municipal planning could be interpreted as intention to create rights to compensation for injurious affection by other types of government activity. It is noteworthy

¹¹⁹ *ALSA* s.19.1(1).

¹²⁰ *Ibid.*, s.19.1(2).

¹²¹ *Ibid.*, s.19.1(4).

¹²² *Ibid.* s.19.1(9).

that *ALSA* provides if, as a direct result of a regional plan, a person suffers a compensable taking in respect of private land or freehold minerals, that person may apply for compensation. The application for compensation must be made within 12 months of the regional plan coming into force and is calculated on the basis as though a conservation directive was imposed.

Reference to property rights in the purpose provision of *ALSA* is similarly vague. It states that property rights must not be infringed on without due process and unless in the public interest, which is basically the status quo.¹²³ These provisions of *ALSA* were considered in the Alberta Land Institute Guide to Property Rights in Alberta. The conclusion was that they largely replicated the baseline.

ALSA also includes the conservation directive which definitely alters the baseline by offering compensation for regulation. This could be considered a statutorily recognized regulatory taking and one of very few examples in Canada. The Guide to Property Rights concluded that, overall, Alberta law is as generous to property rights holders as that of any province, if not more so.¹²⁴

Resources on property rights and *ALSA*:

Environmental Law Centre, Submissions to the Property Rights Task Force, January 2012:
http://elc.ab.ca/Content_Files/Files/PropertyRightsTskForceComment.pdf

Alberta Land Institute, A Guide to Property Rights in Alberta
<http://propertyrightsguide.ca/>

Registration

Registration of property provides notice to the world of property ownership, rights and liabilities. Registration is very important to providing security to market players and as well as transparency for the public. There are multiple types of registries relevant to MBIs under *ALSA*:

- Fee simple ownership, Conservation Easements and other interests that run with private land are registered on the land titles registry under the *Land Titles Act*.
- Dispositions, protective notations and other interests in Crown land are registered in searchable government records of Crown land decisions.

¹²³ *Ibid.*, s.1(1).

¹²⁴ Eran Kaplinsky and David Percy, A Guide to Property Rights in Alberta (Alberta Land Institute), available online: <http://www.albertalandinstitute.ca/public/download/documents/10432>

- Credits may be registered in specialized registries. *ALSA* contemplates this as one function of the Exchange (discussed in Volume 4). The closest analogy in the province is the Alberta Emission Offset Registry for greenhouse gas emissions.

Enforcement

Property rights are enforced by the rights holder rather than by a third party authority. It is the rights holders' responsibility to pursue the appropriate process such as court, an administrative tribunal or alternative dispute resolution. Enforcement of property rights in public resources can often be remedied through regulatory processes rather than through court. MBIs will create needs and incentives for private rights enforcement. They will also create needs for regulatory enforcement.

The remedy for breach of property rights is almost always financial compensation. This is the case both under legislation and the common law. One exception is common law nuisance – that is, infringement on the use and enjoyment of property – which can be remedied by injunctions to prevent the ongoing activity that causes the nuisance. Another exception is that a contract for the purchase and sale of a unique piece of real estate can be remedied by a court order of “specific performance” to force a transfer of the land. However, this is extremely uncommon in the modern age where real estate development produces fungible commodities. There are cases where the natural values of a piece of land have had influence on findings that it is unique, and this may become relevant to MBIs. Reliance on financial compensation for breach of property rights creates issues for MBIs. Money might compensate for lost market value of a conservation project but not for the environmental harm. Examples of such shortfalls on ecological value include compensation for surface access for minerals activity and for damage to timber resources.

If the government is the property rights holder then other remedies may exist to restore environmental damage or to prevent it from occurring. Fines may be paid into environmental funds where they exist. Governments may issue stop orders, clean up orders, impose standards on activity operators, alter statutory consents, or withhold reclamation and remediation certificates.

It is also important to recognize some further rules of contracts. Private contracts are typically only enforceable by the parties to the contract against each other. There is a presumption that contracts are not made for the benefit of third parties. This is a concern where the performance of the contract is intended to produce environmental goods as a condition on regulatory approval of development. The second rule is that contracts are not enforceable

against third parties that damage the goods as these third parties are not part of the contract. If government approves environmental impacts that damage the ecosystem good that are subject to the contract then there may be no recourse against government by either the conservationist or the developer that purchased the conservation.

Strong regulatory framework

Numerous publications identify characteristics of “effective MBIs”, “policy assessment criteria” or “regulatory design” elements that go beyond general principles and considerations.¹²⁵ These include clear goals and objectives, and clear rules that include definitions of the MBIs regulated under *ALSA*. Several factors tie MBIs to regulatory approvals, for example:

- guidance or direction for regulators,
- authority to use the MBI,
- limits on impacts beyond which it is necessary to use MBIs and/or beyond which MBIs are not allowed, and
- required securement (legal protection) of conservation sites.

MBIs must also be grounded in the larger legal and institutional framework. This raises issues of alignment, coordination and harmonization. As well, administration and oversight are important considerations. Further considerations of this nature are:

- flexibility and adaptability,
- complexity versus simplicity, and
- transparency and accountability.

This topic could be viewed more broadly as the need for a strong policy, planning and regulatory framework. Some of the features like goals and objectives could foreseeably fit in non-legislated policies, for example the provincial wetland policy or species plans. They could fit into statutory plans like municipal development plans or regional plans and environmental

¹²⁵ See for example: Robert Stavins, Experience with market-based environmental policy instruments (2002) Nota di Lavoro, Fondazione Eni Enrico AMttei, No. 52.2002 available at <http://hdl.handle.net/10419/119660> at page 1; David W. Poulton, Biodiversity Offsets: A Primer for Canada (Ottawa, ON: 2014, Sustainable Prosperity and the Institute of the Environment); and Jay Anderson et al., Ecosystem Service Valuation, Market-Based Instruments, and Sustainable Forest Management: A Primer (Edmonton, AB: 2010, Sustainable Forest Management Network); and Alex Kenny, Stewart Elgie and Dave Sawyer, Advancing the Economics of Ecosystems and Biodiveristy in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity (Ottawa: Sustainable Prosperity for Environment Canada, June 2011).

management frameworks. Other features might best be left to technical guidance documents outside of regulations. Multiple examples below concern the application of conservation offset principles. As above, this report focuses largely on what could fall under *ALSA*, its regulations and regional plans. Placement choices are discussed below under “flexibility and adaptability”.

Goals and objectives

Policies, statutes or regulations must provide the objective towards which MBIs are directed. Commentary often favors quantifiable “objectives” that allow for measurement of performance or conservation effectiveness, especially for conservation offsetting. Measurable outcomes are also pre-requisite to recognition of Conservation Offsets as discussed in Volume 3 of this report. TDCs might suggest more flexibility if there are social and cultural goals, or a direct target like a heritage building.

Some cautions are warranted around goals and objectives. One is that lack of clear environmental objectives is a common criticism of regional plans and environmental management frameworks under *ALSA*. Likewise, non-adherence to recognized goals of conservation offsetting is already a criticism of the Alberta wetland policy. As well, source of goals as between *ALSA* and other provincial or municipal sources can be an issue.

Using measurable objectives creates further need for environmental assessments, ecological valuations or inventories to determine what is being lost to development impacts or gained through MBIs. The objectives and measurement should apply to a clear geographic scale, be it provincial, regional, sub regional, or local.

A caution is warranted around assessment, as environmental assessments are often not required under federal, provincial or municipal legislation. This assessment gap includes many activities with cumulative effects that could be targeted for the *ALSA* MBIs including, for example, residential development in the TDC scenario or conventional oil and gas wells in a conservation offset scenario. Discussion of both TDCs and Conservation Offsets involves consideration of options for identifying or inventorying ecological value.

Clear rules including clear definition of the MBI

Demand for clarity (and certainty) of the regulatory environment acquires a different dimension in the MBI context as environmental outcomes are more dependent on it. Broad prohibitions on environmental impacts, unguided discretion to impose conditions on regulated

activities and an unstable regulatory environment can potentially help command and control regulation but create barriers to effective MBIs.

There is also need to define what will be a TDC or a conservation offset for the purpose of *ALSA*. In both cases there is some tension between the general concepts and legal terms of art, and a need to see that best practices carry through. The issues for TDCs and Conservation Offsets are different however. *ALSA* itself recognizes TDCs by inclusion of several specific elements whereas defining Conservation Offsets under *ALSA* is left to regulations that could allow practically anything.

Tie to development approvals

The type of “upstream” MBIs contemplated by *ALSA* all require that the land use industries face mandatory conditions or compliance options. As development approvals are issued under legislation other than *ALSA* there must roles for provincial regulators and municipal authorities.

Guidance for use of the MBIs

ALSA provides minimal guidance on where, when, why and for what objectives the conservation tools should be used. At most there is indication of “who” uses the tools: private landowners use Conservation Easements, Cabinet uses Conservation Directives, municipalities or Cabinet use TDCs, and practically any decision maker might use Conservation Offsets depending on regulations. However, there remain missing links in the chain between high-level support for MBIs in the *LUF* and regional plans, and the regulatory decisions where these tools are implemented. This could be viewed as a need for governance paths.

Like goals, the source of guidance as between *ALSA*, regional plans, regulations and other provincial or municipal policies is an important issue. The best provincial precedent outside of *ALSA* would be the wetland policy driving wetlands replacement under the *Water Act*. However, it is notable that wetland replacements under the *Water Act* predated the wetlands policy.

Authority to use the MBI

ALSA leaves potential for the involvement of numerous authorities in the creation of MBIs including Cabinet, government policy departments, the Land Use Secretariat and municipalities. Further, the ways in which ALSA is required or not required varies with the specific MBI.

Limits on impacts

Regulatory limits are needed from a market perspective as well as a conservation one. Limits can incent developers to pay for conservation as a condition on development and to incent property holders to sell conservation in lieu of seeking development opportunities.

Limits on impacts coupled with authority to grant conditional approvals might be more important than consciously constructing an MBI. Of the multiple TDC initiatives discussed below, the most advanced initiatives involve limits on subdivision or development density. Multiple precedents of offsetting discussed in Volume 3 such as the US wetlands offsets or compensation under the federal *Fisheries Act* have regulatory drivers of this nature.

As a caution, lack of limits is a common criticism of the Alberta context at both the provincial and municipal levels. This includes no clear limits on cumulative effects under ALSA regional plans and multiple environmental management frameworks. As well, the wetlands policy has been criticized for lack of limits on what can be offset. Limits on the impacts that can be redressed with MBIs are warranted. This speaks to the irreparable or unquantifiable nature of some environmental harms. It will also assist private parties to protect the value of their conservation interests.

Required securement of conservation sites

Protecting conservation activities and outcomes being carried out as part of an MBI will protect the integrity of the system. ALSA is somewhat flexible on securement tools and does not prescribe requirements. Access to tool choice has benefits due to the array of potential TDCs and Offsets. However, regulations should require legal securement appropriate to the specific MBI schemes.

TDCs provide the easier context as there should usually be perpetual securement tools registered on land title, and this is simpler in the private land context. Conservation Offsets raise more issues around duration and legal weight of protection.

Alignment, harmonization and coordination issues

There are many issues related to the fragmented nature of the environmental regulatory system. Examples in Alberta that are certainly not unique to our province include:

- Need to remove perverse incentives that encourage resource exploitation.
- Policies favoring overlapping land uses and property interests.
- Need to align plans, policies, regulations and decisions.
- Need to beware competing MBIs or incentives.
- Need to harmonization of regulatory requirements to prevent duplicate process or compliance requirements, double costing and inefficiencies.

As previously noted, numerous commentators point to the need for MBIs to work within existing institutional and legal systems and the challenges that creates.¹²⁶ Also as mentioned above, *ALSA* has some game changing potential if regional plans were to be provided their unique legal weight to prevail over other plans, regulations, decisions and statutory consents. There is also ability to change some matters without regional plans.

Administration and oversight

MBIs create a need for numerous administrative functions. Some are discussed in subsequent volumes of this report as they arise. These include credit systems, monitoring and enforcement (of regulations and private agreements), policy development, program monitoring and evaluation. In designing these structures general administrative law principles like fairness, efficiency and practical feasibility will need consideration.

Transparency and accountability in price and in environmental outcomes will largely be a result of administrative structures. Transparency and accountability are often cited as an imperative for market participants as well as for public support. Resistance to MBIs is linked to belief that public authorities provide the most transparent and accountable management of public resources.

¹²⁶Jay Anderson et al., *Ecosystem Service Valuation, Market-Based Instruments, and Sustainable Forest Management: A Primer* (Edmonton, AB: 2010, Sustainable Forest Management Network); Stuart Whitten, Martin van Bueren and Drew Collins, *An Overview of Market-Based Instruments and Environmental Policy in Australia* (based on presentation at 2003 AARES Symposium); Alex Kenny, Stewart Elgie and Dave Sawyer, *Advancing the Economics of Ecosystems and Biodiversity in Canada: A Survey of Economic Instruments for the Conservation & Protection of Biodiversity* (Ottawa: Sustainable Prosperity for Environment Canada, June 2011); Shawna Stirrett, Robbie Rolfe and Stephanie Shewchuk, *The Invisible Hand's Green Thumb: Market-Based Instruments for Environmental Protection in Alberta* (Calgary, AB: 2012, Canada West Foundation).

However, *ALSA* foresees private administration of public resources in the sense that Conservation Offsets could apply to public lands (or public resources on private lands) and involve ongoing management functions. *ALSA* also foresees public administration of private conservation lands in the case of Conservation Directives or easements held by government.

ALSA expands administrative options in Alberta. This includes a Land Use Secretariat, and Exchange, potential for delegated authorities under regional plans, and perhaps implied roles for “qualified organizations” beyond holding Conservation Easements. This is on top of the decision makers that implement TDCs and Conservation Offsets. Other administrative issues are discussed in subsequent volumes of this report.

In Volume 2 of this report dealing with TDCs, guidance for municipal credit system administration is discussed. Volume 3 of the report dealing with Conservation Offsets raises further considerations about dividing substantive policy from day-to-day systems administration. The section on the Stewardship Units and Exchange (Volume 4) raises further questions about the range of functions falling on the agency administering the Exchange. Discussion of administrative functions further ties to questions of public or stakeholder participation.

Flexibility and Adaptability

Application of MBIs may need to be case-specific and there is need for room to adapt the system as it gets off the ground. Legally speaking, this entails decisions on what best to encode in:

- Statutes which are made by the legislature.
- Regulations that are made by either Cabinet or Ministers.
- Statutory consents (dispositions, permits and approvals) which are issued by regulatory agencies, departments or ministries.
- Regional plans which are made by Cabinet under *ALSA*.
- Industry-specific plans that are made under legislation.
- Executive orders which are made by Cabinet or Ministers.
- Directives that are made by regulatory agencies and departments that may or may not be approved by ministers or incorporated into regulations.

- Municipal instruments such as statutory plans and bylaws.
- Contractual agreements that are made under legislative authority.
- Contractual agreements which are made under the common law.
- Non-legislated plans and policies at all levels (Cabinet, ministerial, departmental, municipal and private sector).

These instruments fall along a spectrum of flexibility with statutes being the least flexible and non-legislated policies being the most flexible.

Matters that are certain, settled, crucial or that must be enforceable should go to the least flexible instrument. Matters involving the most uncertainty, non-criticality or voluntariness might best be left to more flexible instruments.

Regional plans, along with conservation tools they can directly create, are a very unique instrument in their ability to combine legal enforceability with flexibility. However, they have also been subject to a cumbersome and politicized process that does not fit with operational MBIs. On the other hand, a cycle of 5-year review and 10-year renewal coupled with discretionary Cabinet amendments for stable regions provides an alternative structure to plans and regulations of uncoordinated dimensions.

Complexity v. simplicity

The literature and direct comments to ELC present conflicting views around whether or not MBIs must be complex and the relative merits of simple versus complex models. This could be considered an unsettled question and, ultimately, the requisite simplicity or complexity of a MBI scheme may depend upon context-specific considerations.

Some comments concern the complexity of individual MBIs. For example:

- TDCs are “inherently complex” versus TDCs can start simple and later tailor increasing complexity to circumstances.
- Individual initiatives such as wetlands offsets and TDCs reveal the steep learning curve for stakeholders at the front end.
- Municipalities are still grappling with the implications of the wetland policy.

Other comments are directed at the potential overlap, synergy, or competition between MBIs. For example:

- Some municipalities “get” wetland conservation but other ones want to protect agriculture.
- Incentives to create temporary wetland offsets can disincent the creation of Conservation Easements that serve other goals.
- Wetlands restorations can push agriculture into riparian areas worthy of conservation for other values.
- There is interest in overlapping MBIs such as integrated credit markets or multiple credits from the same land (credit stacking, discussed in Volume 4).
- Various MBI initiatives appear scattered and there is demand for one-stop shopping.
- There are competing views on the complexity of trading models for Conservation Offsets (discussed in Volume 3).

This is not an attempt to reconcile these divergent views, only to indicate that there is no settled principle of simplicity or complexity. The ELC has previously stated that good MBIs should be simple and remains predisposed towards this view.¹²⁷ The strongest consensus may be that MBIs are sufficiently complex that they will not work as a “hands off” approach to environmental conservation and that this points to the need for a strong regulatory framework.

General assessment of ALSA as a platform for MBIs

The general scheme of *ALSA* suggests high potential to subordinate markets to desired policy outcomes. This is a key hallmark of MBIs as a form of regulation and it is aligned with the *LUF*. The conservation tools part of *ALSA* in particular:

- Provides a clear mandate to Cabinet to pursue regulations, programs, pilots and funding for the development of MBIs.

¹²⁷ See ELC SSRP Eastern Slopes recommendations ELC Comments on the Draft South Saskatchewan Regional Plan <http://elc.ab.ca/media/86833/ELC-feedback-on-Draft-SSRP.pdf> and/or ELC Comments on South Saskatchewan Regional Plan: Feedback on the Advice of the Regional Advisory Council. http://www.elc.ab.ca/Content_Files/Files/ELC_comments_SSRP_Jan_8_2013.pdf http://www.elc.ab.ca/Content_Files/Files/CommentsSSRPApril302012.pdf

- Includes a variety of tools that offer a mix of incentives for voluntary action and coercive regulation.
- Provides most tools with the similar purposes of protecting, conserving or enhancing the environment, natural scenic or esthetic values, or agricultural land.

The *ALSA* conservation tools include multiple specific MBIs and further potential for undefined MBIs. There are multiple securement tools (Conservation Easements, Conservation Directives) that could be used to secure conservation activities delivered through MBIs or to designate and establish lands in advance of conservation activities. Provisions for Stewardship Units and the Exchange, while lacking guidance, provide significant flexibility in credit systems, the oversight or facilitation of credit trading, and the extent to which multiple TDC and Conservation Offset programs can be kept separate or “integrated”.

However, the *ALSA* conservation tools taken as a whole are incomplete in some other ways:

- Conservation Easements cannot prevent minerals activity and face multiple barriers to their use.
- There are no private securement tools for public lands.
- Conservation Directives are the most flexible tool however are limited by connection to regional planning and compensation rights.
- There are no expressed tools to fund ongoing stewardship activities (although this is certainly possible through the general MBI mandate or use of Stewardship Units).
- Most qualified organizations are land trusts, however there is no expressed connection to MBI programs.
- Viewed as a whole, the part of *ALSA* on the Exchange, Stewardship Units and Conservation Offsets might put the pursuit of new markets ahead of conservation merits.
- The MBIs have an appearance of being constructed and imposed rather than growing organically from simple regulatory drivers.

Guiding principles in *ALSA*: *ALSA* is significant in Alberta with respect to the principles encoded in its purpose. Looking at Alberta’s environmental law regime as a whole, an expression of environmental principles is incomplete in most legislation concerning natural resources, public lands and private lands under municipal authority. To the extent that Alberta’s legislation does

adopt environmental principles, it is typically in *EPEA* and to a lesser extent the various natural resource statutes. The largest gap in environmental principles is in the *Public Lands Act, Forests Act* and the *MGA* [prior to current proposed reforms]. Thus, *ALSA* helps fill a gap in the main land management statutes. Expressions of sustainable development have carried forward somewhat into regional planning although not in the strongest forms. *ALSA* is also driving a shift to cumulative effects management previously lacking in Alberta.

A challenge for *ALSA* is that sustainable development and cumulative effects are hard principles to operationalize when not supported by subprinciples or direct authority. *ALSA* also continues the lack of the precautionary principle in provincial legislation. As this is the most important principle for biodiversity conservation, risk-based decision making and cumulative effects management it should be included in future regional plans, cumulative effects frameworks and regulations aiming to advance MBIs under *ALSA*. *ALSA* further perpetuates systemic issues with public participation in Alberta. This is sufficient to create barriers for private conservation interests as compared to development interests.

Property law issues with *ALSA*: Property law issues with *ALSA*, perhaps surprisingly, are not a main issue in this report. *ALSA* creates several types of property interests for use in MBIs without fundamentally changing the regime. Conservation Easements are very appropriate securement tools for MBIs as they amount to interests in land with a legislated purpose. Stewardship Units and municipal development credits both meet needs for tradeable personal property separate from interests in land. The *ALSA* MBIs may not require creating new property rights in ecosystem services except for the issue of how to implement Conservation Offsets on public lands.

ALSA does not detract from property rights so much as it provides purpose for use of existing regulatory powers. Perhaps the most significant change to the property law regime is the possibility of compensation for Conservation Directives. Overall *ALSA* affirms that Alberta is as generous as any province if not more so respecting property rights.

However, *ALSA* does not help fix existing property rights issues either. It does not strengthen private conservation rights in any way to provide protection from minerals extraction. It also does not help clarify questions around compensation for regulatory takings apart from Conservation Directives. The main uncertainty may be the impact of protecting Conservation Offsets on existing natural resource rights.

Regulatory framework under *ALSA*: *ALSA* can definitely provide a strong regulatory framework for MBIs. For many matters *ALSA* effectively provides two options – regional plans or provincial regulations of general application – each with different advantages and drawbacks. Regional plans can provide objectives, geographic scope, designated areas for conservation

and development, and offer additional opportunity to surmount systemic barriers to MBIs resulting from the fragmented regulatory framework. Regulations of general application are more amenable to encoding universally applicable direction for TDCs and Conservation Offsets while providing more autonomy over programs. Regulations are also necessary for Stewardship Units and the Exchange. Either regional plans or regulations can be used to set limits, impose conditions on activities, require securement, and provide for administrative responsibilities. *ALSA* definitely expands options for administering MBIs although this matter requires more attention.

However, the potential regulatory framework for MBIs under *ALSA* is also the source of many outstanding issues. Several issues are with *ALSA* in general and therefore, by default, impact MBIs. The legal effect of *ALSA* depends heavily on future regulations and regional plans. These are tasks for which Cabinet is provided broad discretion, few substantive criteria, and little accountability for outcomes. The *ALSA* model depends on strong political leadership, an independent Land Use Secretariat and Commissioner, and widespread capacity for implementation.

ALSA was likely unnecessary for simple TDCs or Conservation Offsets. *ALSA* also is not a platform for regulatory approvals so authority under other legislation will remain relevant. The main need is for program goals and guidance for decision makers, and there is uncertainty around what plans or policies this should best come from. The intended connection between the conservation tools and regional planning remains unclear. No MBIs need to be used to implement regional plans; however, they could be used this way. Further, given the lack of prescriptive elements in *ALSA* there is no certainty that regional plans will state objectives, that MBIs will be relevant to pursuing these objectives, or that plan implementation will be pursued.

The clearest need for *ALSA* regulations is for Stewardship Units and the Exchange, and these are facilitative tools rather than being core MBIs. Administrative structures for these facilitative structures remain lacking. While this is not an issue created by *ALSA*, it is one it could help resolve.

Understanding that *ALSA* is a strong platform for MBIs in some ways yet an unstable one in others, the subsequent volumes of this report now apply the same criteria to the specific MBIs.