



Agricultural Lands LAW AND POLICY IN ALBERTA

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Introduction



Agricultural lands support numerous social, economic and environmental benefits. In addition to making up an invaluable aspect of Alberta's heritage and culture, social benefits of agricultural lands include food security and valued views. In terms of economic benefits, agricultural lands enable significant contributions to employment and GDP. For example, in 2016, Alberta's total farm cash receipts were \$13.5 billion (over 22% of the national total), and agriculture and agrifood product exports were valued at \$10 billion (about 18% of the national total).¹ Finally, agricultural lands contribute to the production of ecological goods and services such as clean air, clean water and habitat.

¹ Alberta Government, Alberta Agriculture and Forestry; Policy, Strategy and Intergovernmental Relations, Food Security in the Context of Agricultural Land Loss in Alberta: A Policy Research Document (Edmonton: Government of Alberta, 2017).

Despite recognition of the social, economic and environmental importance of agricultural lands,² Alberta has lost and continues to lose agricultural lands to land use and development pressures. Historically in Alberta, land use, development and planning regimes have not effectively countered conversion pressures on agricultural land. *How do we move from conversion to conservation and stop the loss of Alberta's agricultural lands?*

In terms of law and policy, a key contributor to the conversion of agricultural lands is Alberta's land use and planning regime found in the *Municipal Government Act (MGA)* and the *Alberta Land Stewardship Act (ALSA)*. By and large, land use planning and development decisions are made by municipalities, although this is overlain by regional planning under the ALSA. Regional planning has the potential to be a powerful tool for preventing further conversion of agricultural lands but this potential is yet to be realized. Currently, only two of seven regional plans have been completed across the province, and, in terms of agricultural lands, the existing regional plans still rely heavily on municipal efforts to address issues surrounding agricultural lands.

This heavy reliance on municipalities for planning and development decisions contributes to conversion of agricultural lands for a variety of reasons. Generally, there is a lack of common agreement and vision on the value of and need for agricultural lands amongst different municipalities. As well, there is often a lack of coordination in planning and decision-making by different municipalities. Furthermore, municipal decision-making is strongly influenced by the municipal taxation structure (essentially, more development results in a larger tax base).

² Alberta Land Institute, *Economic Evaluation of Farmland Conversion and Fragmentation in Alberta, Summary of Findings* (Edmonton: University of Alberta, 2017).

Other laws and policies – those dealing with agricultural operations and activities, and those dealing finance and taxation – can also influence the conversion and conservation of agricultural lands. This report is the first of two reports which aim to answer how to move from conversion to conservation of Alberta's agricultural lands. In this report, the Environmental Law Centre (ELC) provides:

- A primer on the laws and policies which apply to Alberta's agricultural lands from the perspectives of planning, development and conservation; and
- An effective canvassing of the existing legal tools relevant to conversion and conservation of agricultural lands in Alberta.

The subsequent report will provide a gap analysis of Alberta's laws and policies to identify the legal challenges of moving from conversion to conservation of agricultural lands; look at other jurisdictions for alternative approaches to minimizing agricultural land fragmentation and loss and ensuring sustainable agriculture which could be adopted in Alberta; and make recommendations for legal and policy reform.

In its review of the nature of agricultural land losses in Alberta, the Alberta Land Institute³ found that there has been significant conversion of prime agricultural land into other uses. They also found that both farmland and natural areas in the Edmonton-Calgary Corridor have become significantly more fragmented between 1984 and 2013. Given that Alberta has been facing agricultural fragmentation and loss of high value agricultural lands for decades, it is clear

³ *Ibid.*

that the current approach to land use planning is not working to ensure sustainable agricultural lands into the future.

Alberta needs clear policy direction that supports the conservation of agricultural land guided by environmental principles, and sustainable agriculture within the framing of sustainable development. The challenges and opportunities for conservation of agricultural lands need to be identified to ensure coordinated, complementary use of existing regulatory tools. This requires analysis of the application and effectiveness of regulatory and non-regulatory tools, including market-based tools and taxation (as means of conservation and compensation), the use of zoning and provincial designations, and other tools as they may apply. Furthermore, lessons can be learned from the experiences in other jurisdictions – which may have additional or alternative approaches to the conservation of agricultural lands – and can be used to inform Alberta's laws and policies.



Laws and Policies relating to Land



There are several laws that apply to land in general. While not specifically directed at agricultural lands, these may impact upon planning, development and conservation of land in Alberta thereby impacting agricultural land loss and fragmentation.

Interests in Land

When speaking about land, a key concept is the nature of the property rights associated with that land. Property rights are often described as a “bundle of rights” which may include rights to own, access, possess, use, enjoy, manage, control, exclude, profit from or alienate the property.⁴ The “bundle of rights” associated with a particular piece of land varies widely with the land title itself and the type of interest in land that is held. Aside from granting rights, land

⁴ Environmental Law Centre, [Project Backgrounder: Buying a Better Environment? Property Law: Market-Based Instruments and the Alberta Land Stewardship Act](#) (Edmonton: Environmental Law Centre, 2016).

ownership also triggers obligations that can include respecting the common law rights of neighbours, occupiers' liability, and regulation of land use for the public good (discussed further below).

The land title sets out the legal boundaries of the piece of land, notes any reservations held by the Crown (typically, mines and minerals) and notes any other interests in land that may be held by a person other than the owner (for example, utility easements). Effectively, the land title reflects the original grant of land from the Crown and existing interests in that land which have accrued over time.

There are several types of interests in land including:⁵

- fee simple,
- leases,
- easements,
- restrictive covenants, and
- conservation easements.

Fee simple confers the largest bundle of rights. A person with a fee simple interest effectively owns the land outright subject to reservations by the Crown (such as, mines and minerals), to any limitations imposed by legislation (for example, zoning bylaws), and to any lesser interests held by others (for example, leases).

Other interests in land – such as leases or easements - confer smaller “bundles of rights” which will mean limited rights to access, possess, use, enjoy, manage,

⁵ *Ibid.* See also Eran Kaplinsky and David Percy, Alberta Land Institute, *A Guide to Property Rights in Alberta* (Edmonton: University of Alberta, 2014) [Kaplinsky and Percy].

control, exclude, or profit from the land. For instance, an easement allows use or access to land for limited purposes (for example, a utility easement which allows access and use of land only for the installation and maintenance of utility infrastructure). Some interests, such as leases, confer a right to exclusive possession whereas others, such as licenses, just create a right to do something that otherwise would be a trespass.

An interest in land may or may not run with the land. An interest that runs with the land may bind subsequent landowners whereas interests that do not run with the land do not bind subsequent landowners. For example, a lease creates an interest in land whereas a licence generally does not.⁶ It is important to note that interests in land typically must be registered on the land title in order to bind subsequent landowners. The *Land Titles Act*⁷ provides that a person holds land as described in a certificate of title free from all encumbrances other than those expressly listed on the land title.⁸ However, some interests do apply by implication and without special mention on the land title.⁹ These include unpaid taxes including irrigation charges; public highways or rights of way or other public easements; and subsisting lease for a period less than 3 years if there is actual occupation of the land.

Public Lands versus Private Lands

For administrative purposes, the Province of Alberta is divided into the Green Area and the White Area. The Green Area comprises most of Northern Alberta

⁶ Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 294 [Ziff].

⁷ R.S.A. 2000, c. L-4 [*Land Titles Act*].

⁸ *Ibid.*, s. 60.

⁹ *Ibid.*, s. 61.

and is managed for timber production, watershed, wildlife and fisheries, recreation and other uses. Agricultural use in the Green Area tends to be limited to grazing. The White Area is the settled area of Alberta (central, southern and Peace River areas) and is managed for agriculture, recreation, soil and water conservation, and fish and fisheries habitat. Public land in the White Area forms part of the agricultural landscape.

Private ownership of land accounts for approximately 40% of the Alberta land base. The balance (approximately 60%) consists of public lands owned by the Crown (Government).¹⁰ By virtue of laws passed over the years, the Crown (Government) owns provincial lands, wildlife, and water. In addition, the Crown owns the beds and shores of:

- all **naturally occurring** rivers, streams, watercourses and lakes regardless of whether or not they are permanent;¹¹ and
- other water bodies that are **permanent and naturally occurring** (such as wetlands).

Given the water fluctuations inherent to wetlands, the Alberta Government has provided guidance for assessing the permanence of wetlands.¹² Permanence is determined by the long-term nature of the water body and can include

¹⁰ See Government of Alberta website at <https://geodiscover.alberta.ca/geoportal/catalog/search/resource/details.page?uuid=%7BDF54991B-D9DB-494F-B2E0-0A8D711D9CAB%7D>.

¹¹ *Public Lands Act*, R.S.A. 2000, c. P-40, s. 3.

¹² Government of Alberta, *Guide for Assessing Permanence of Wetland Basins* (Edmonton: Government of Alberta, 2016).

ephemeral wetlands that are periodically, or even frequently, dry but are relatively permanent over time.

With respect to ownership of beds and shores, this may be muddied by the existence of common law accretion. Accretion occurs with the gradual, imperceptible retreat of water leading to exposure of the bed of a water body which, at common law, attaches to the owner of land along the water body. Any entitlement to accreted land is limited by the legal description on title.¹³

Relatively recent amendments to the *Public Lands Act*¹⁴ declare all coal-bed methane to be natural gas (subject to any specific grants which state otherwise)¹⁵ and that pore space contained in, occupied by or formerly occupied by minerals or water below the surface of the land is property of the Alberta Crown.¹⁶

There is also legislation which clarifies ownership over minerals and other naturally occurring substances associated with land. The *Law of Property Act*¹⁷ clarifies that clay and marl, and sand and gravel are not minerals and are

¹³ See *Lack v. Alberta (Sustainable Resource Development)*, 2011 ABQB 379 (CanLii) and Arlene Kwasniak, "Lack v. Alberta: Court Unmuddies and Advance Accretion Law" (July 25, 2011), online (blog): Ablawg.ca < <https://ablawg.ca/2011/07/25/lack-v-alberta-court-unmuddies-and-advances-accretion-law/>>.

¹⁴ R.S.A. 2000, c. P-40 [*Public Lands Act*].

¹⁵ *Ibid.*, s. 10.1.

¹⁶ *Ibid.*, s. 15.1.

¹⁷ R.S.A. 2000, c. L-7 [*Law of Property Act*].

owned by the surface owner.¹⁸ The *Mines and Minerals Act*¹⁹ reiterates that clay and marl, and sand and gravel are not minerals and belong to the surface owner.²⁰ The same with peat.²¹

Section 56 of the *Law of Property Act* declares certain other naturally occurring substances to be minerals (these include anhydrite, gypsum, sandstone, among others). For these particular substances, a person who owns or has an interest in the surface of the land, but does not own or have an interest in such substance, still has the right to excavate or disturb for construction incidental to use or occupation of the land, in the course of permitted operations, or farming. All minerals - such as those identified in the *Law of Property Act*, oil and gas, and substances such as gold, silver and other metals - are governed by the *Mines and Minerals Act*.

At common law, a mineral owner was entitled to enter upon land to extract minerals.²² The mineral owner was not permitted to commit waste but otherwise was not required to seek permission of the surface owner or to pay compensation for access. This common law principle has been modified by the *Surface Rights Act*.²³ Section 12 of the Act requires that a mineral owner either obtain consent of the surface owner or a right of entry order to enter land for removal of minerals, construction of tanks, stations, structures, pipelines, power

¹⁸ *Ibid.*, ss. 57 and 58.

¹⁹ R.S.A. 2000, c. M-17 [*Mines and Minerals Act*].

²⁰ *Ibid.*, s.58.

²¹ *Ibid.*, s.57.

²² Kaplinsky and Percy, *supra* note 5. See also Ziff, *supra* note 6 at 104.

²³ R.S.A. 2000, c. S- 24 [*Surface Rights Act*].

transmission lines, or telephone lines. Right of entry orders may also be issued for well conservation schemes, for reclamation under the *Environmental Protection and Enhancement Act*,²⁴ and for injection of captured carbon dioxide.²⁵ In addition, compensation must be provided either via agreement or as determined by the Surface Rights Board in issuing a right of entry order.²⁶

Using dispositions, the Crown may grant an individual an interest in public land. A disposition of public lands allows a person to obtain an interest in land that is owned by the Crown via grants issued in accordance with legislation. The “bundle of rights” conferred by such a grant is determined by looking at the grant itself and the legislation under which it is issued. Dispositions relating to public land are governed by the *Public Lands Act* and its regulations (in particular, the *Public Lands Administration Regulation*²⁷). Permitted dispositions include:

- Grazing dispositions (leases, licences, permits, head tax permits),
- Farm development leases,
- Cultivation permits,
- Licences of occupation,
- Mineral surface leases,
- Surface material dispositions (licences, leases),
- Pipeline dispositions,
- Commercial trail riding dispositions, and
- Miscellaneous dispositions for other purposes.

²⁴ R.S.A. 2000, c. E-12 [EPEA].

²⁵ *Surface Rights Act*, ss. 13, 13.1, and 13.2.

²⁶ *Ibid.*, ss. 23.

²⁷ A.R. 187/2011 [*Public Lands Administration Regulation*].



Restrictions on the Use of Lands

While interests in land can confer broad rights to use and enjoy property, these rights are not unlimited.²⁸ Many of the components that make up the bundle of rights are often subject to some qualification or limitation to avoid unacceptable harm.²⁹ Restrictions or obligations can include respecting the common law rights of neighbours, zoning laws and regulation of land use for the public good.

Common Law Restrictions on Use of Lands

Common law is the law created over time by judicial decisions (in contrast with legislative law which is passed by the government). Over time, the common law has developed rights and remedies to address damage to real property. These

²⁸ Kaplinsky and Percy, *supra* note 5. See also Jason Unger, "Property Rights vs. Planning shouldn't be a battle to the death" (February 28, 2011), online (blog): Environmental Law Centre Blog <http://www.elc.ab.ca/pub-archives/property-rights-vs-planning-shouldnt-be-a-battle-to-the-death/>.

²⁹ Ziff *supra* note 6 at 4.

include actions in nuisance, trespass and strict liability, and actions to protect property based riparian rights. This means that an owner or person with an interest in land must be mindful of their neighbour's common law rights and remedies when making use of the land.

As explained by Professor Kwasniak:³⁰

A private nuisance requires an unreasonable interference with use and enjoyment of property, which to a degree involves a balancing of conflicting rights and interests including the utility of the defendant's conduct; the interference with use and enjoyment of the property must be substantial, and the tort does not apply to abnormal or delicate uses of property.

A trespass occurs when a person or substance has merely entered onto the land of another.³¹

Strict liability (also known as *Rylands v Fletcher*) is established when a person demonstrates that there was a non-natural use of the land, there was a substance likely to cause mischief, the substance escaped, and there was damage to the person seeking a remedy. If these four elements can be established, then the offending party is strictly liable to pay damages.

³⁰ Arlene Kwasniak, "Book Review: Property Rights in Defence of Nature by Elizabeth Brubaker (Toronto: Earthscan, 1995)" (1996) 34(4) Alberta L. Rev. 993 at 995.

³¹ Stuart Buck, "The Common Law and the Environment in the Courts" (2008) 58 Cas. W. Res. L. Rev. 621.

Riparian rights are held by an owner of land that borders or is crossed by a water body. Riparian rights include domestic use of water, access to water and undiminished water quality. Riparian rights do not confer ownership to water or to the beds and shores of a water body. It should be noted that common law riparian rights in Alberta have been modified by Alberta's *Water Act*,³² which states that the riparian right to undiminished flow of water may be impacted by authorized water diversions.³³

Regulation of Property Use

The use of land is subject to regulation by all levels of government (municipal, provincial and federal). Regulation may occur to achieve societal goals such as land use planning and clean water, to protect the interests of others, or both. Unlike the United States where the taking of property (including some levels of regulation) requires the government to pay compensation under Article 5 of the U.S. Constitution, Canada has a presumption that regulation of land use does not give rise to compensation unless the law states specifically that compensation is payable.

A common example is municipal land zoning which restricts the types of activities permitted on parcels of land within a municipality. It is zoning that prevents the construction of a factory in the middle of a residential neighbourhood.

In cases where regulation greatly restricts land use, a landowner may argue that regulation amounts to an expropriation (or a taking of land) and that

³² R.S.A. 2000, c. W-3 [*Water Act*].

³³ *Ibid.*, s. 22.

compensation is payable. This requires showing there was acquisition of a beneficial interest in the property and that the government action removes all reasonable use of the property.

This issue of what might be considered an “implied” or *de facto* expropriation was dealt with in the Supreme Court of Canada case of *Hartel Holdings Ltd. v Calgary*.³⁴ This case involved a developer, Hartel, who owned a parcel of land that was zoned as agricultural land in Calgary with the intention of developing it for residential purposes since 1971. Meanwhile, the City had plans to use Hartel’s land and other land in the same vicinity to create a municipal park and over time developed a number of policy documents and municipal plans reflecting that intention.

In making its decision, the Supreme Court of Canada noted that the land was not re-zoned to suit the City’s purpose rather it refused to rezone to suit Hartel’s purpose or to buy him out at a fair price. The Court stated that there is nothing inherently wrong with a development freeze.³⁵ The Court concluded that since there was no bad faith, and the decision was made pursuant to legitimate and valid planning purposes, the “resulting detriment is one that must be endured [by the property owner] in the public interest”.³⁶

A similar conclusion was reached by the Supreme Court of Canada in the *Canadian Pacific Railway v Vancouver (City)*³⁷ decision. In that case, the Court considered a municipal development plan pertaining to a corridor of land

³⁴ *Hartel Holdings Ltd. v Calgary*, [1984] 1 S.C.R. 337.

³⁵ *Ibid.* at 355.

³⁶ *Ibid.* at 354.

³⁷ *Canadian Pacific Railway Co. v Vancouver (City)*, [2006] 1 S.C.R. 227.

owned by Canadian Pacific Railway (CPR) which was no longer in use for rail traffic and which CPR wanted to develop for commercial and residential uses.

The municipal development plan prescribed that the land could only be used as a (non-motor vehicle) transportation corridor. CPR argued that there had been a *de facto* taking as a result of the municipal development plan and that compensation ought to be provided. The Supreme Court of Canada held that there was no *de facto* taking which required compensation. The Court stated:³⁸

For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.

In other words, unless the restrictions on the owner's rights are so drastic as to amount to an effective taking of the land within the meaning of the *Expropriation Act*,³⁹ there is no common law right to compensation for regulation of land. However, it should be noted that legislation can create compensation rights for regulatory impacts on land (for example, the *Surface Rights Act* and the *Alberta Land Stewardship Act*).

In the case of express expropriation – that is, an outright taking of land for the benefit of public purposes (such as a roadway or school site) – compensation is presumed to be required.⁴⁰ As stated by Professor Ziff, “unless the words of a

³⁸ *Ibid.* at para. 30.

³⁹ R.S.A. 2000, c.E-13 [*Expropriation Act*].

⁴⁰ Ziff, *supra* note 6.

statute demand a different reading, a statute is not to be interpreted as taking away private property without compensation."⁴¹ Further, expropriation is only allowed pursuant to legislative authority⁴² which sets out which government bodies may expropriate and for which purposes. In addition, in Alberta, the process and requisite compensation are set by the *Expropriation Act*.

Impacts on Agricultural Lands

Agricultural lands may consist of privately-owned lands or dispositions on Crown lands. With respect to privately-owned lands, their use will be subject to common law obligations and to provincial, municipal and federal regulations. The extent of common law obligations are modified to some degree by right to farm legislation (in Alberta, the *Agricultural Operation Practices Act*)⁴³ which exempts agricultural operations from liability pursuant to common law nuisance actions so long as operations are in accordance with normal farming practices.

Regulatory restrictions may impose conditions or restrictions on certain agricultural activities (such as pesticide application or manure handling). Planning decisions and instruments may also impact upon privately owned agricultural lands (such as zoning which has the potential to “freeze development” if a greenbelt or urban growth zone is put into place).

Furthermore, interests in mines and minerals under agricultural lands may result in some surface disturbance which is governed by the *Surface Rights Act*. Related to the development of mines and minerals (in particular, oil and gas) are

⁴¹ *Ibid.* at 88.

⁴² In Alberta, expropriation is permitted under several statutes including the MGA, the *Forest Reserves Act*, R.S.A. 2000, c. F-20 and others.

⁴³ R.S.A. 2000, c. A-7 [AOPA].

provincial regulations that require setbacks from pipelines, well-sites, compressors and other industrial structures. In addition, municipalities may require setbacks for a variety of reasons (such as roadways). Setback requirements may restrict the use of agricultural lands to some extent by influencing the siting of agricultural buildings and other infrastructure (on the other hand, setbacks can operate to reduce the potential for competing land uses).

In the case of agricultural activities on Crown land, the nature of the dispositions will indicate the permissible activities (most relevant to agricultural activities are grazing dispositions, farm development leases and cultivation permits). The Crown land may be subject to other dispositions – such as timber dispositions or mineral surface leases – that impact on the agricultural activities.



The Alberta Land Stewardship Act

The ALSA consists of two aspects: regional planning within the province and land stewardship tools. The ALSA is meant to implement the Land-Use Framework and has direct implications for planning and conservation of agricultural lands.

Land Use Framework

The *Land-Use Framework* (LUF)⁴⁴ was released in 2008. The LUF consists of seven strategies designed to improve land-use decision-making:

- Develop regional land-use plans based on seven new land-use regions;
- Create a Land-use Secretariat and establish a Regional Advisory Council for each region;
- Cumulative effects management is to be used at the regional level to manage the impacts of development on land, water and air;
- Develop a strategy for conservation and stewardship on private and public lands;
- Promote efficient use of land to reduce the footprint of human activities on Alberta's landscape
- Establish an information, monitoring and knowledge system to contribute to continuous improvement of land-use planning and decision-making; and
- Inclusion of aboriginal peoples in land-use planning.

⁴⁴ Government of Alberta, *Land-Use Framework* (Edmonton: Government of Alberta, 2008).

The LUF identified five priority actions: legislation to support the framework, metropolitan plans for the Capital and Calgary regions, the Lower Athabasca Regional Plan, the South Saskatchewan Regional Plan, addressing a number of policy gaps and areas of provincial interest. One of the policy gaps and areas of provincial interest identified in the LUF is reducing the fragmentation and conversion of agricultural land. As part of addressing this concern, the LUF indicates that the Government of Alberta may develop mechanisms and approaches such as market-based incentives, transfer of development credits, agricultural and conservation easements, and smart growth planning tools designed to reduce the fragmentation and conversion of agricultural lands.

Regional Planning Tools

As mentioned, the LUF divides the province into seven land-use planning regions and this is reflected in the ALSA. The regions are based around Alberta's major watersheds:

- Lower Athabasca Region;
- North Saskatchewan Region;
- South Saskatchewan Region;
- Upper Peace Region;
- Lower Peace Region;
- Red Deer Region; and
- Upper Athabasca Region.

Regional plans for the Lower Athabasca Region (LARP)⁴⁵ and the South Saskatchewan Region (SSRP)⁴⁶ have been completed, the North Saskatchewan Region plan is in progress, and planning for the remaining regions has not started. After completion of the regional plan, environmental management frameworks are developed as part of the plan implementation for each region.

With respect to the LARP, environmental management frameworks for air quality management, surface water quality management, groundwater management framework, surface water quantity management, and tailings management have been completed. The LARP biodiversity management framework is still in draft form. With respect to the SSRP, the plan was amended in 2018 to reflect the addition of the Castle Provincial Park and expansion of the Castle Wildland Provincial Park. In terms of environmental management frameworks for the SSRP, final review of the biodiversity management framework is underway. Other environmental management frameworks for air and water are pending for the SSRP.

⁴⁵ Government of Alberta, Lower Athabasca Regional Plan: 2012-2022 (Edmonton: Government of Alberta, 2012) available at <https://open.alberta.ca/dataset/37eab675-19fe-43fd-aff-001e2c0be67f/resource/a063e2df-f5a6-4bbd-978c-165cc25148a2/download/5866779-2012-08-lower-athabasca-regional-plan-2012-2022.pdf> [LARP].

⁴⁶ Government of Alberta, South Saskatchewan Regional Plan:2014-2024, amended May 2018 (Edmonton: Government of Alberta, 2018) available at <https://open.alberta.ca/dataset/13ccde6d-34c9-45e4-8c67-6a251225ad33/resource/e643d015-3e53-4950-99e6-beb49c71b368/download/south-saskatchewan-regional-plan-2014-2024-may-2018.pdf> [SSRP].

Once a regional plan is in place, provincial and municipal decision-makers must abide by the regional plan.⁴⁷ Some aspects of a regional plan are binding and regulatory in nature whereas other aspects are policy statements and provide guidance (the distinction is indicated in the plan).⁴⁸ A regional plan may manage the surface or subsurface of land and natural resources, as well as authorize expropriation.⁴⁹ As well, a regional plan may set thresholds for the purposes of achieving or maintaining an objective for the region.⁵⁰ Effectively, a regional plan may impose “zoning” for activities, development or other use of land within the region.⁵¹

Specifically with respect to agricultural lands, a regional plan may permanently protect, conserve, manage and enhance agricultural values by declaring a conservation directive in a regional plan.⁵² Such a declaration has compensation implications as a person who owns or has an interest in land subject to a conservation directive may seek compensation.⁵³ It is noteworthy that municipal zoning powers (discussed below) may be able to achieve the same protection without triggering the compensation implications.

Regional plans could - and, in fact, both the LARP and SSRP do - require municipalities to assess and identify areas where agricultural activities are a priority. However, neither the LARP nor SSRP have gone so far as to expressly direct municipalities to protect identified agricultural lands. In those regional

⁴⁷ ALSA, s. 15. See also ALSA, Part 2, Division 3: Compliance Declarations.

⁴⁸ *Ibid.*, s. 13 which speaks to legal nature of regional plans.

⁴⁹ *Ibid.*, s. 9.

⁵⁰ *Ibid.*, s. 8.

⁵¹ *Ibid.*, ss. 8 and 9.

⁵² *Ibid.*, s. 37.

⁵³ *Ibid.*, ss. 36 and 39-42.

plans, the extent and tools used to protect and conserve agricultural lands are left to the discretion of municipalities.

If a regional plan was highly prescriptive in this regard, might this trigger the requirement for compensation? Generally, ALSA provides that “[n]othing in this Act, a regulation under this Act or a regional plan is to be interpreted as limiting, reducing, restricting or otherwise affecting the compensation payable or rights to compensation provided for under any other enactment or in law or equity.”⁵⁴ ALSA addresses the issue of compensation in three instances:

1. A holder of a statutory consent that is affected, amended or rescinded by express reference in a regional plan to that statutory consent receives compensation as per the statute under which the statutory consent is issued.⁵⁵

Statutory consents may be affected

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

(2) Before a regional plan includes a provision described in subsection (1), a Designated Minister must

...

⁵⁴ *Ibid.*, s. 2(3).

⁵⁵ *Ibid.*, s. 2(1)(gg) for express exclusions from the definition of statutory consent.

(c) give reasonable notice to the holder of the statutory consent of any proposed compensation and the mechanism by which compensation will be determined under any applicable enactment in respect of any effect on or amendment or rescission of the statutory consent.

2. A person who owns land in fee simple or who is freehold mineral owner is entitled to compensation for a compensable taking as a result of a regional plan. A “compensable taking” is defined as “the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity”.

Compensation

19 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

- (a) as provided for under section 19.1,
- (b) as provided for under Part 3, Division 3, or
- (c) as provided for under another enactment.

Right to compensation for compensable taking

19.1(1) In this section,

- (a) “compensable taking” means the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity;
- (b) “private land” means land that is owned by a person other than
 - (i) the Crown in right of Alberta or of Canada or their agents, or
 - (ii) a municipality;

(c) “registered owner” means a person registered in a land titles office as the owner of an estate in fee simple in private land or freehold minerals.

(2) If, as a direct result of a regional plan or an amendment to a regional plan, a registered owner has suffered a compensable taking in respect of the registered owner’s private land or freehold minerals, the registered owner may, within 12 months from the date that the regional plan or amendment comes into force, apply to the Crown for compensation in accordance with the regulations.

...

(9) Nothing in this section gives a person a right to compensation

(a) for anything done by a decision-maker under Part 17 of the Municipal Government Act, or

(b) as a result of the operation or application of any provisions of that Part.

3. A person who is a title holder with an estate or interest in land is entitled to compensation for a conservation directive that affects their estate or interest in land. This is a broader group of potential claimants than (2) above as it can include persons with lesser interests in land than fee simple (such as lessees). The definition of title holder expressly excludes persons with dispositions under the *Mines and Minerals Act*.⁵⁶

⁵⁶ *Ibid.*, s. 2(1)(gg).

Right to compensation

36 A title holder whose estate or interest in land is the subject of a conservation directive has a right to apply for compensation in accordance with this Division.

While (1) and (3) above are relatively straightforward as to the circumstances in which compensation will be payable, (2) is less clear. The definition of “compensable taking” - diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity – is circular, creating uncertainty as to what exactly is a compensable taking. As explained by Kaplinsky and Percy⁵⁷

The main difficulties with this definition, other than that it is circular, are that the traditional view in Canada is that there is no compensation in law or equity (all compensation claims originate in statute), and further, that unless the government acquires an interest in the land while denying the owner all reasonable private uses, there is no “taking” at all. In sum, it is likely that the legal and practical effect of sections 19 and 19.1 is only to create a right of compensation for owners whose lands are sterilized by a conservation directive. Otherwise, those sections neither expand nor restrict the right to compensation.

Thus, unless a regional plan requires municipalities to deny all reasonable private uses of land, compensation should not be an issue. Municipal zoning in response to the directions of a regional plan can occur without triggering compensation

⁵⁷ Kaplinsky and Percy, *supra* note 5 at 25.

(so long as municipal zoning does not go so far as to effectively expropriate the land).

The LARP sets as an objective the maintenance and diversification of the region's agricultural industry. The strategies adopted in this regard include encouraging municipalities to identify areas where agriculture activities should be the primary use, to limit agricultural fragmentation, to direct non-agricultural development to places where it will not constrain agricultural activities or to lower quality agricultural lands and to minimize conflicts between intensive agricultural activities and other land uses. The relevant Information Bulletin issued by Alberta Municipal Affairs⁵⁸ indicates that:

In reviewing their regulatory instruments, municipalities will need to consider whether they have identified areas where agricultural activities should be the primary land use within their municipal boundaries. If these areas are not identified, municipalities will have to consider making any necessary amendments to these regulatory instruments.

While this statement is made, there is not really any "teeth" to ensure that such identification necessitates protection. The indicator selected to monitor this objective is the fragmentation and conversion of agricultural land. There are no specific zoning restrictions or conservation directives regarding agricultural land in the LARP. In other words, while LARP provides some guidance and direction with respect to agricultural land, it is not accompanied by regulatory authority and enforceability.

⁵⁸ Alberta Municipal Affairs, *Information Bulletin, No. 03/12 (August 2012)* (Edmonton: Government of Alberta, 2012) at 5.

Agricultural activity plays a larger role in the SSRP (likely due to being the primary renewable and sustainable resource in the region) albeit the focus is on economic activity of the industry. The SSRP indicates that agricultural activity on public land in the Green Area is limited to grazing that is compatible with other uses. In the White Area, public land forms part of the agricultural landscape. The objective with respect to agriculture in the SSRP is to maintain and diversify the industry. The implementation plan adopted for this objective is to:

- Maintain an agricultural land base by reducing the fragmentation and conversion of agricultural land (via municipal land-use policies and private voluntary actions).
- Support a diverse and innovative irrigated agriculture and agri-food sector (via implementation of *Alberta's Irrigation: A Strategy for the Future*, and review and update of the irrigation suitability map when new information arises).
- Assist the agriculture and agri-food industry to maximize opportunities for value-added agricultural products.
- Support a business climate and complementary production and marketing approach that recognize the contribution of local production in addition to existing domestic and international market opportunities.
- Support and enhance the next generation of agricultural, food and rural enterprises.
- Encourage the use of voluntary market-based instruments for ecosystem services on order to recognize and reward the stewardship and conservation of private agricultural land.

As with the Information Bulletin issued for the LARP, Alberta Municipal Affairs⁵⁹ indicates that:

Regional planning presents an opportunity for assessment of agricultural lands within the region, identification of priority areas for conservation, and creation of a process to limit fragmentation. To date, this opportunity has not been taken.

In reviewing their regulatory instruments, municipalities will need to consider whether they have identified areas where agricultural activities should be the primary land use within their municipal boundaries. If these areas are not identified, municipalities will have to consider making any necessary amendments to these regulatory instruments.

Again, there are no “teeth” requiring steps beyond identification of agricultural lands. Agricultural land conversion and fragmentation are two (of many) indicators for agricultural growth and diversification under the SSRP.

Strategies for implementation address a variety of matters. For instance, municipalities have the same expectations with respect to agricultural lands as under the LARP. In terms of biodiversity, a strategy is completion of the development and evaluation of the Southeast Alberta Conservation Offset Pilot (voluntary program to offset industrial impacts on native prairie by contracting private landowners to convert annual cropland to native species rangeland).

⁵⁹ Alberta Municipal Affairs, *Information Bulletin, No. 05/14 (August 2014)* (Edmonton: Government of Alberta, 2014) at 5.

Regarding watersheds and agriculture, the strategy is to develop a water storage opportunities study for the South Saskatchewan River Basin.

Under Part 3 of the Regulatory Details, the Pekisko Heritage Rangeland is under the SSRP. The implementation details indicate that within the Pekisko Heritage Rangeland, new cultivated agriculture is not compatible; however, existing grazing activities can continue (managed grazing and traditional ranching practices). Aside from the Pekisko Heritage Rangeland, there are no specific zoning restrictions regarding agricultural land in the SSRP. Nor are there any conservation directives regarding agricultural land in the SSRP. Again, as with the LARP, the SSRP provides some guidance and direction with respect to agricultural land but lacks regulatory authority and enforceability.

Furthermore, in both the LARP and the SSRP, the guidance and direction provided is not as fulsome as one might hope. Regional planning presents an opportunity for assessment of agricultural lands within the region, identification of priority areas for conservation, and creation of a process to limit fragmentation. To date, this opportunity has not been taken. It is essential that any such planning steps be accompanied by some level of regulatory authority and enforceability (otherwise, the planning lacks teeth).



Stewardship Tools

In addition to the regional-scale “zoning” (distinct from municipal zoning) and conservation directives that can occur under ALSA’s regional planning regime, there are a variety of conservation and stewardship tools available. These tools can be utilized regardless of whether or not a regional plan is in place. These tools are conservation easements, transfer of development credit schemes, conservation off-sets, and stewardship units and exchange.

Conservation Easements

Of the conservation and stewardship tools enabled by the ALSA, by far the most established and commonly used tool is the conservation easement. The ALSA permits conservation easements for the protection, conservation and enhancement of agricultural land or land for agricultural purposes (they may also be used for biological diversity or natural scenic values).⁶⁰

A conservation easement is a legal contract between a qualified private land conservation organization or government agency and a private landowner.⁶¹ Effectively, a conservation easement is used to grant away certain property rights or development opportunities to protect identified conservation values. The conservation easement is registered on title and runs with the land thereby

⁶⁰ ALSA, s.29(1)(c).

⁶¹ Cindy Chiasson, Kimberly Good, Guy Greenaway, Jason Unger *Conservation Easements for Agriculture in Alberta: A Report on a Proposed Policy Direction* (Edmonton: Environmental Law Centre and the Miistakis Institute, 2012) [Chiasson et al.], online: [http://www.ce-alberta.ca/pages/pdf/Conservation Easements for Agriculture in Alberta.pdf](http://www.ce-alberta.ca/pages/pdf/Conservation_Easements_for_Agriculture_in_Alberta.pdf) .

binding subsequent owners. Typical restrictions imposed on conservation easement lands include:⁶²

- no use or set aside: usually to protect an environmental feature, usually allow only current uses to continue;
- no clear, no break, no drain: no clearing of trees, no tillage of soils or draining wetlands but may retain rights to harvest hay, graze permanent cover forages, travel on current roads/trails and live on the property;
- restricted agricultural/ forestry use: allow use of the land consistent with specific standards of practice considered beneficial to the environmental state of the property and limit activities that reduce environmental benefits or ecological functions; or
- restricted development: usually most flexible and allow most forms of agricultural or renewable resource use.

While conservation easements for agriculture are enabled by ALSA, there is little direction for their use. The ELC and Miistakis Institute have developed recommendations to assist the Government of Alberta in identifying identified gaps in policy, and to articulate a more comprehensive vision of the role of conservation easements for agriculture.⁶³

⁶² Kimberly Good and Sue Michalsky, *Summary of Canadian experience with conservation easements and their potential application to agri-environmental policy* (Ottawa: Government of Canada, Agriculture and Agri-Food Canada, 2008) [Good and Michalsky].

⁶³ Cindy Chiasson et al., *supra* note 61.

As a primary recommendation, the ELC and Miistakis Institute recommend that the purpose of conservation easements for agriculture should be sustainable agriculture, food production and agricultural heritage.⁶⁴ Supporting recommendations are made to assist in resolving conflicts between these three purposes:

- promote sustainable agriculture (where sustainable agriculture conflicts with food production or agricultural heritage purposes, primacy is given to sustainable agriculture);
- focus on cropland and tame pasture (protect against conversion and promote sustainable agriculture);
- support mixed-purpose conservation easements (thoughtfully, without fatal conflict);
- draft a *Conservation Easements for Agriculture Policy* with reference to existing sub-purposes in ALSA (recreational use, open space use, environmental education use, and use for research and scientific studies of natural ecosystems); and

Related Publications

[Conservation Easements for Agriculture in Alberta: A Report on a Proposed Policy Direction](#) (Edmonton: Environmental Law Centre and the Miistakis Institute, 2012)

[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](#)

⁶⁴ Cindy Chiasson et al., *supra* note 61 at 51. The report does not provide a definition of sustainable agriculture. Future development of laws and policy in support of agricultural land conservation will likely have to address this definition.

- keep provincial government policy at a high level because flexibility for municipalities and land trusts to adapt to unique and evolving circumstances is required.

Since there is no focused policy direction for conservation easements for agriculture in Alberta, the provincial government (in particular, Agriculture and Rural Development and the Land Use Secretariat) should provide clear policy direction that:⁶⁵

- has a focus on outcomes;
- emphasizes public benefit in suggested purposes of sustainable agriculture, food production and agricultural heritage;
- defines and clarifies key terms especially “agricultural land” and “agricultural purposes”; and
- develops a guidance document.

Unfortunately, the terms “agricultural land” or “agricultural purposes” are not defined in ALSA. As per the report by the ELC and Miistakis Institute, discussions with the Land Use Secretariat indicate that the intended focus of conservation easements for agriculture is on the environmental and conservation values of cultivated lands including food production and protection of all environmental attributes of the land without requiring reversion of cultivated land back to its native condition.⁶⁶

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

Transfer of Development Credit Schemes

Transfer of development schemes are permitted under sections 48 to 50 of ALSA. There has been some use of transfer of development credit (TDCs) schemes in Alberta but not to the extent of conservation easement use. A TDC scheme generally consists of four elements:⁶⁷

- Identification of a conservation area worthy of protection (usually referred to as 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 via transferable credits. Landowners in the conservation area receive a number of credits based on an attributed value of the land. These credits can be sold to landowners in the development area in exchange for putting conservation easements or other restrictions on the land title that limit future development in the conservation area. Landowners in the development 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 and administer the TDC scheme.

Effectively, a TDC scheme enables protection of identified landscape values while still allowing development in other areas. The interests of landowners in

⁶⁷ Guy Greenaway and Kimberly Good, *Canadian Experience with Transfer of Development Credits* (Calgary: Miistakis Institute, 2008).

both the conservation area and the development area are recognized. While the legislative framework for TDCs is found in ALSA,⁶⁸ TDC schemes are typically implemented through municipal plans and bylaws as a tool to direct development to certain areas.

There is very little policy or administrative support currently in place and, as such, the ELC has previously made recommendations for enhancing the use of TDCs in Alberta.⁶⁹ These recommendations include developing TDC regulations which affirm municipal authority to develop TDC schemes and which provide necessary clarification. It is also recommended that a formal administrative structure be put into place to support the use of TDC schemes. Similar recommendations are made by Sandeep Agrawal⁷⁰ who states that the provincial government needs to develop broad parameters, as well as encourage and facilitate municipal participation in TDC schemes by creating awareness programs and relevant land use bylaws.

⁶⁸ ALSA, ss. 48-50.

⁶⁹ See Adam Driedzic and Brenda Heelan Powell, *Buying a Better Environment? Volume 1: An Introduction to Market-Based Instruments & the Alberta Land Stewardship Act* (Edmonton: Environmental Law Centre, 2016) and Adam Driedzic, *Buying a Better Environment? Volume 2: Transfer of Development Credits under the Alberta Land Stewardship Act* (Edmonton: Environmental Law Centre, 2016).

⁷⁰ Sandeep Agrawal, *Urban, Suburban, Regional and Wet Growth in Alberta* (Edmonton: Department of Earth and Atmospheric Sciences, University of Alberta, 2016) [Agrawal].

Conservation Off-sets

The ALSA does not provide a lot of guidance or detail regarding conservation off-sets.⁷¹ Essentially, the Act enables regulations “to counterbalance the effect of an activity” but to date no regulations have been developed. Nevertheless, there is a history of using conservation off-sets in Alberta as a means to counteract the impacts of an activity. Previous work by the ELC has resulted in recommendations to improve the use of conservation offsets.⁷² These recommendations include developing policies, regulations and regional plans that reflect a mitigation hierarchy (avoidance first with off-sets as a last option), set limits on what can be off-set and set goals (at the least, net neutral outcomes). As well, it is essential that tools exist to ensure that the duration of offsets meet or exceed the duration of impacts.

Stewardship Units and the Exchange

Much like conservation off-sets, the ALSA enables stewardship units and the exchange but does not provide much detail or guidance on their use.⁷³ Stewardship units and the exchange are credits which represent stewardship values and the accompanying trading platform. These could be used to facilitate TDC schemes and conservation off-sets (likely in concert with

⁷¹ ALSA, s.47.

⁷² Adam Driedzic, *Buying a Better Environment? Volume 3: Conservation Offsets under the Alberta Land Stewardship Act* (Edmonton: Environmental Law Centre, 2016).

⁷³ ALSA, ss. 45 and 46.

conservation easements as a compliance and enforcement tool). Both stewardship units and the exchange require regulations which do not yet exist.⁷⁴



Impacts on Agricultural Lands

At the present time, ALSA is a piece of legislation that enables regional planning and stewardship tools that contain potential for conservation of agricultural lands. In particular, regional “zoning” (as opposed to municipal zoning) and conservation directives could be used to establish an agricultural “green-belt” (the latter in particular has compensation implications). However, as discussed,

⁷⁴ For more information, see Adam Driedzic, *Buying a Better Environment? Volume 4: Stewardship Units & the Exchange under the Alberta Land Stewardship Act* (Edmonton: Environmental Law Centre, 2016).

much of the provincial regional planning is still incomplete and the two completed plans do not set such an agricultural green-belt.

The stewardship tools can be used with or without the completion of an applicable regional plan. It should be noted that in the case of TDC schemes, the TDC scheme must either be established by a regional plan, or by a local authority or authorities with approval of the Lieutenant Governor in Council.⁷⁵ The ALSA clearly states that conservation easements and TDC schemes can be used for the "protection, conservation and enhancement of agricultural land or land for agricultural purposes".⁷⁶ The legislative language with respect to conservation off-sets and stewardship units is broad enough to encompass agricultural lands (although there remains a need for the development of policy and regulation for these tools). It is noted, however, that ALSA provides no definition of agricultural land or land for agricultural purposes.

As noted by Sandeep Agrawal,⁷⁷ as it currently stands, conservation easements typically do not provide much financial incentive or compensation to landowners. The most common compensation being tax receipts (see discussion of taxation below). This was echoed by Good and Michalsky⁷⁸ who found that tax benefits are often not a sufficient incentive to landowners, especially those with agricultural lands.

⁷⁵ ALSA, s. 48. See also the decision in *Keller v. Municipal District of Bighorn No. 8*, 2010 ABQB 362 (CanLii).

⁷⁶ ALSA, ss. 29(1)(c) and 49(1)(a)(iii).

⁷⁷ Agrawal, *supra* note 70.

⁷⁸ Good and Michalsky, *supra* note 62.

Good and Michalsky recommend expansion of conservation easements for agricultural lands by enhancing paid conservation easement programs and developing an agricultural gifts program.⁷⁹ Conservation easements for agricultural lands could also be enhanced by Transferable Tax Credit programs where a landowner who would receive more value from cash than from a tax credit could sell or otherwise transfer the tax receipt received from a conservation easement donation to another person who it could use the tax credit when filing their annual income tax return.⁸⁰ On the other hand, conservation easements may prove more palatable than regulatory measures that restrict use without compensation.⁸¹

Variants of conservation easements include conservation easements for agriculture, agricultural gifts program, transfer of development credit programs, purchase of development credit programs, and transferable tax credit programs. These approaches may encourage greater protection of ecological goods and services from agricultural lands while recognizing the stewardship contributions of agricultural producers.⁸²

As noted by Sandeep Agrawal,⁸³ while TDC programs are common in the U.S (and in some places exist alongside an agricultural land reserve), they are not well used in Alberta. The provincial government needs to develop broad

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Agrawal, *supra* note 70.

parameters, and encourage and facilitate municipalities to partake in such programs by creating awareness programs and relevant land use bylaws.⁸⁴

Good and Michalsky describe TDC programs as those where industry “pays for conservation”⁸⁵ A TDC program could be initiated via a “Purchase of Development Credit” program where development credits are either extinguished upon purchase or are banked.⁸⁶



⁸⁴ *Ibid.*

⁸⁵ Good and Michalsky, *supra* note 62.

⁸⁶ *Ibid.*

The Municipal Government Act



The MGA, as the primary piece of legislation governing municipalities, has relevance to the conservation, conversion and fragmentation of agricultural lands. This includes provisions dealing with municipal planning, intermunicipal planning and cooperation, and reserve lands which may be used to address the conversion pressure exerted by municipal development. Another aspect of the MGA that is relevant to conversion pressure exerted by municipal development is municipal taxation (which will be discussed in a later section of this paper).

Overview of the *Municipal Government Act*

The MGA is the piece of legislation that creates and governs municipalities. Legislative purposes of municipalities include developing and maintaining safe and viable communities, and to work collaboratively with neighbouring municipalities to plan, deliver and fund intermunicipal services.⁸⁷ Another legislated purpose of a municipality is to “foster the well-being of the environment”.⁸⁸

The MGA sets out the powers, duties and functions of municipalities. This includes natural person powers, bylaw powers, expropriation authority (in specified circumstances), planning authority, and taxation powers. Perhaps most relevant to agricultural lands are those provisions dealing with planning and development, environmental matters (such as water and reserves), intermunicipal cooperation, and taxation.

A municipality may pass bylaws for the “safety, health and welfare of people and the protection of people and property”.⁸⁹ This is often referred to as a “general welfare” bylaw power and similar powers have been used to uphold bylaws dealing with environmental matters.⁹⁰ Furthermore, as Charter Cities, Edmonton and Calgary have extended bylaw powers to make bylaws for the

⁸⁷ MGA, s. 3.

⁸⁸ *Ibid.*, s. 3.

⁸⁹ *Ibid.*, s. 7.

⁹⁰ For example, see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.

well-being of the environment including the creation, implementation and management of programs for environmental conservation and stewardship, and for the protection of biodiversity and habitat.⁹¹

In addition to its natural person and bylaw powers, by virtue of s.60, a municipality has the direction, control and management of the bodies of water within a municipality (including the air space above and the ground below).



⁹¹ *City of Calgary Charter Regulation, A.R. 40/2018 s. 4 and City of Edmonton City Charter Regulation, A.R. 39/2018 s. 4.*

Planning and Development

Part 17 of the MGA deals with planning and development matters. The purpose of this part is to “achieve orderly, economical and beneficial development, use of land and patterns of human settlement, and to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta”.⁹² Municipal planning and development must comply with the ALSA.⁹³ The MGA requires a number of planning document be prepared by a municipality including:

- **Intermunicipal development plans (IDPs)** which must be developed by two or more municipalities that have common boundaries and are not part of a growth region.⁹⁴ Municipalities that are not required to adopt an IDP may choose to do so. These plans address, among other things, future land use and environmental matters relevant to those lands within the municipal boundaries as considered necessary by the municipalities.
- **Municipal Development Plans (MDPs)** which must be developed by every municipality in Alberta.⁹⁵ MDPs must address, among other things, future land use within the municipality; coordination of land use, future growth patterns and other infrastructure with adjacent municipalities; and future development in the municipality. These plans may also address environmental matters, development constraints, and policies

⁹² MGA, s. 617.

⁹³ *Ibid.*, s. 630.2.

⁹⁴ *Ibid.*, ss. 631 and 631.1.

⁹⁵ *Ibid.*, s. 632.

regarding conservation reserves. It is required that MDPs contain policies respecting the protection of agricultural operations. The MGA incorporates by reference the definition of agricultural operation provided by the AOPA.⁹⁶

- **Area Structure Plans (ASPs)** provide a framework for subsequent subdivision and development of an area of land. These plans must be consistent with any relevant IDPs and MDPs.
- **Area Redevelopment Plans (ARPs)** are used to designate areas within a municipality as redevelopment areas for a variety of purposes including preserving or improving land and buildings within the area. Again, these plans must be consistent with relevant IDPs and MDPs.

In the course of developing a statutory plan, the municipality is required to undertake public consultation.⁹⁷ However, these requirements do not apply to amendments to a statutory plan.

In addition to statutory plans, section 639 of the MGA requires that each municipality pass a land use bylaw (LUB). The LUB divides the municipality into districts and sets the permitted land uses for each district (commonly called “zoning”).⁹⁸ As well, the LUB sets out the process for applying for development permits and the decision-making process for same. This process may include

⁹⁶ *Ibid.*, s. 616.

⁹⁷ *Ibid.*, s. 636

⁹⁸ *Ibid.*, s. 640.

allowing development even though it does not comply with the LUB or is a non-conforming building (as long as certain requirements are met).⁹⁹

A statutory plan or LUB may be amended in accordance with the process outlined in the MGA: this involves providing notice and holding a public hearing during a council meeting.¹⁰⁰ This means that a statutory plan and LUB can be fairly easily amended to accommodate an activity or development that would be otherwise not permissible. If there is a conflict between a statutory plan or a LUB and an ALSA regional plan, the regional plan prevails.¹⁰¹

The MGA expressly provides that a LUB must consider the protection of agricultural operations unless an ALSA regional plan requires agricultural operations or lands to be protected, conserved or enhanced in which case the municipality must comply with the regional plan.¹⁰²

As part of the planning and development process, there may be lands taken as reserves when an application to subdivide land is made. Reserves are taken for a variety of purposes: roads and public utilities, schools, municipal, environmental and conservation. An environmental reserve may be required if land consists of:¹⁰³

⁹⁹ *Ibid.*, s. 640(6).

¹⁰⁰ *Ibid.*, ss. 230 and 692.

¹⁰¹ *Ibid.*, s. 638.1.

¹⁰² *Ibid.*, s. 638.1.

¹⁰³ *Ibid.*, s. 664.

- A swamp, gully, ravine, coulee or natural drainage course;
- Land that is subject to flooding or is, in the opinion of the subdivision authority, unstable; or
- A strip of land, not less than 6 metres in width, abutting the bed and shore of any body of water.

An environmental reserve may only be required for certain purposes set out in s. 664.¹⁰⁴ These include preservation of the natural features of land, to prevent pollution of land or the bed and shore of an adjacent body of water, to ensure public access to and beside the bed and shore of a body of water, or to prevent development where the natural features of the land present a significant risk of personal injury or property damage occurring during development or use of the land. Environmental reserve land is transferred to the municipality and designated as an environmental reserve on title.¹⁰⁵ Under s. 664, rather than setting aside a municipal environmental reserve, the land may be protected with an environmental reserve easement. An environmental reserve easement does not require transfer of the land to the municipality, rather a caveat is placed on title indicating that the land is subject to an environmental reserve easement thereby notifying and binding any future owners to the terms of the easement.¹⁰⁶ An environmental reserve easement has the potential to offer a more calibrated approach to protecting lands (that

¹⁰⁴ See also Kelly Learned, *Discussion Paper: Environmental Reserve in Alberta* (Calgary: Miistakis Institute, 2017).

¹⁰⁵ MGA, s. 665.

¹⁰⁶ *Ibid.*, s. 664.

is, an easement can specify what is and is not permitted on the lands versus a blanket declaration of environmental reserve).

A relatively new provision allows a municipality to take a conservation reserve if land has environmentally significant features, the land is not land that could be required as an environmental reserve, the purpose of the conservation reserve is to protect and conserve the land, and the taking of land is consistent with the MDP and ASP.¹⁰⁷ Unlike an environmental reserve, the conservation reserve triggers an obligation to pay compensation to the landowner for the market value of the land. To date, there appear to be no regulations or policies in place providing further guidance on conservation reserves.

Intermunicipal Planning

Relatively recent amendments to the MGA are designed to facilitate and improve intermunicipal planning and cooperation (for all municipalities, not just major urban centres). Aside from the sections dealing with IDPs (discussed above), provisions dealing with intermunicipal cooperation are found in Parts 17.1 and 17.2. Part 17.1 enables the establishment of Growth Management Boards. To date, there are two Growth Management Boards: the Edmonton Metropolitan Region Board (EMRB) and the Calgary Metropolitan Region Board (CMRB). Part 17.2 requires the development of Intermunicipal Collaboration Frameworks.

The purpose of Part 17.1 is to establish growth management boards for the Edmonton and Calgary regions, and to enable 2 or more municipalities to establish a growth management board on a voluntary basis. As mentioned

¹⁰⁷ *Ibid.*, s. 664.2.

above, the EMRB and CMRB have already been established pursuant to the *Edmonton Metropolitan Region Board Regulation* and the *Calgary Metropolitan Region Board Regulation*. The mandate of both Boards includes ensuring environmentally responsible land-use planning, growth management and efficient use of land. Each Board is tasked with the development of a Growth Plan which must, among other things, identify agricultural lands and provide policies regarding the conservation of agricultural lands.

Part 17.2 requires the development of Intermunicipal Collaboration Frameworks. These Frameworks are intended to:

1. provide for the integrated and strategic planning, delivery and funding of intermunicipal services,
2. steward scarce resources efficiently in providing local services, and
3. ensure municipalities contribute funding to services that benefit their residents.

Municipalities with common boundaries must develop an Intermunicipal Collaboration Framework and a municipality may belong to more than one Framework. Municipalities without common boundaries may enter into a Framework. For municipalities that belong to a growth management board, a Framework with other members of the same growth management board is only required for those matters not addressed in the growth plan or the servicing plan. The Intermunicipal Collaboration Framework must address services related to transportation, water and wastewater, solid waste, emergency services, recreation, and any other relevant services.



Impacts on Agricultural Lands

With their extensive planning and development powers, municipalities can exert significant control over urban encroachment onto agricultural lands. Within a municipality, zoning and other planning decisions can be made that directly impact upon agricultural lands. Beyond the municipal power to directly regulate land use through municipal zoning, municipalities are capable of holding land in fee simple, holding conservation easements and using TDC schemes to redirect development activities.

Municipal planning and development powers can be enhanced by the new intermunicipal planning provisions within the MGA. While there is no direct reference to agricultural lands in the intermunicipal provisions, intermunicipal development clearly has implications for infrastructure and long term sustainability of our communities. By enhancing intermunicipal cooperation and requiring some attention toward agricultural lands, these new provisions may prove to be a tool to move from agricultural land conversion to conservation and to stop the loss of Alberta's agricultural lands.

An MDP must contain policies regarding the protection of agricultural operations (although that is the full extent of guidance and detail provided in the MGA in that regard). An example of an MDP addressing agricultural lands is the Wheatland County MDP.¹⁰⁸ That MDP contains many policies related to preserving agriculture and protecting natural areas, and proposals are reviewed vis a vis potential impacts on these features. As mentioned, every municipality must adopt an MDP and other statutory plans must be consistent with the MDP.¹⁰⁹ If there is an IDP in place, the IDP prevails in the event of an inconsistency between it and other statutory plans including the MDP.¹¹⁰ While public consultation is required in the development of an MDP (and other statutory plans), it is not required for making amendments.¹¹¹ Although an MDP (or other statutory plan) may reference intended projects, the municipality is not bound to undertake any such projects.¹¹² As such, while municipal planning must be consistent with the MDP, a municipal council may amend the plan or choose not to pursue projects anticipated in the MDP. Therefore, if a municipality intends to preserve agricultural or natural areas, actions beyond merely stating that intention in an MDP (or other statutory plan) will be necessary.

¹⁰⁸ Alyssa Cumberland, *2017 Environmental Program Update* (Strathmore, AB: Wheatland County, 2017) available at https://www.wheatlandcounty.ca/images/edocman/administration/Environmental_Report.pdf.

¹⁰⁹ MGA, s. 638.

¹¹⁰ *Ibid.*, s. 638.

¹¹¹ *Ibid.*, s. 636.

¹¹² *Ibid.*, s. 637.

In terms of intermunicipal planning, the Edmonton Metropolitan region Board (EMRB) commissioned a Situation Analysis¹¹³ as a first step to developing a regional master agricultural plan (RAMP). The Situation Analysis was meant to provide a summary of opportunities and issues facing the Edmonton Municipal Region agriculture and food community, and to formulate a preliminary set of directions from which to build the RAMP. The objectives for the RAMP are set out in the Edmonton Metropolitan Region's Growth Plan:

- identify and conserve adequate supply of prime agricultural lands to provide secure local food source for future generations;
- minimize fragmentation and conversion of prime agricultural lands to non-agricultural uses; and
- promote diversification and value-added agricultural production and plan infrastructure to support the agricultural sector and regional food system.

The four core issues to be addressed by the RAMP are:

- assured long-term agricultural land base with clear visions for agriculture and food in the Edmonton Municipal Region which consists of a productive land base and flexibility to respond to changing dynamics;
- agricultural zoning and effective land use policies (this could include use of urban growth boundaries and agricultural area boundaries);

¹¹³ Toma and Bouma Management Consultants, Sermon Inc., Stantec and Dr. Thomas Daniels, *Regional Agricultural Master Plan, Situation Analysis* (Edmonton: Edmonton Metropolitan Region Board, 2018).

- mitigation measures to address current expectations with respect to land values (many landowners expect the ability to monetize the value of lands as a result of the ability to sub-divide); and
- supported and targeted economic development programs.

Some of the recommendations that came out the Situation Analysis include a need for a “shared vision” for agriculture and its role. As well, it was recommended that a standard rating system for land quality ought to be developed to facilitate planning focus on prime lands. Also recommended is development of an agreed settlement of agricultural zones across the region. Finally, tools such as “freezing land” (noted to be politically challenging), TDCs, conservation easements, farmland trusts, and cluster development should be considered.

The Strategic Analysis expressed a need to look at agricultural policy strategically, as the current approach tends to be piecemeal rather than cohesive and wholistic. Barriers identified include transportation; lack of incubator space and cold storage, lack of co-packing space; a lack of appreciation of economic importance of agriculture; and legislative barriers (such as food safety, liability, taxation). As well, there was identification of the right to farm as a growing issue in the Edmonton Metropolitan Region's farming community.

Laws and Policies relating to Water

Alberta's laws and policies regarding water, irrigation and wetlands, have an impact on the development and conservation of agricultural lands. In Alberta, issues related to water quality are primarily governed by EPEA whereas matters of quantity and use of water are governed by the *Water Act*.



Water Act

The general purpose of the *Water Act* is to "support and promote the conservation and management of water, including the wise allocation and use of water". The *Water Act* sets out the licensing and priority regime which enables the allocation of water, its diversion and its use throughout the province. The Act also regulates disturbances on land (such as removing or disturbing ground and vegetation) that might alter the flow of water, change the location of water, cause siltation of water, cause erosion of a water body's bed or shore, or effect

the aquatic environment.¹¹⁴ In addition, the *Water Act* contains provisions addressing planning, management and conservation of water resources.

The *Water Act* contains some provisions specific to agricultural use of water. For the purposes of diverting water for agriculture there are several aspects of the Act that apply. An agricultural user may be considered an “exempt agriculture user” or a “traditional agricultural user”. The latter category of agricultural use has the benefit of a priority date (based on when use started) and the rights to divert run with the land (in the same way as other types of licenced water use). While the diversion right is effectively the same for both categories of agricultural user, the latter’s priority date means that the registered agricultural use has priority over later authorized diversions that may be granted.

An “exempt agriculture user” is someone who owned or occupied land adjoining a water body or under which groundwater exists on January 1, 1999 and diverted water for the purposes of raising animals or applying pesticides to crops on or before that date. An exempt agricultural user may continue to divert up to 6,250 cubic metres of water per year or to the maximum specified in a water management plan (whichever is greater).¹¹⁵ In addition, a person who owns or occupies land that adjoins a water body has a right to divert water for household purposes.¹¹⁶

¹¹⁴ *Water Act*, s. 1(1)(b). See also Jason Unger, “Of backhoes and water woes: reviewing the breadth of landscaping regulation under the Water Act” (January 28, 2015) online (blog): Environmental Law Centre Blog < <http://elc.ab.ca/pub-archives/17141/>>.

¹¹⁵ *Water Act*, s. 19.

¹¹⁶ *Ibid.*, s. 21. Household purposes is defined as “the use of a maximum of 1,250 cubic metres of water per year per household for the purposes of human consumption, sanitation, fire

A “traditional agricultural user” is an exempt user that has registered their use. Provision is made for traditional agricultural users allowing diversions for the purposes of raising animals or applying pesticides to crops as part of a farm unit.¹¹⁷ This provision applies to a person who owns or occupies land that has a water registration and that adjoins a body of water or under which groundwater exists.

Agricultural users that require in excess of 6,250 cubic metres or were not undertaking farming prior to January 1, 1999, will need a water licence unless otherwise exempt (this includes prescribed dugouts¹¹⁸ and some offsite watering systems).¹¹⁹ A licensee of water for irrigation purposes (or a person who has acquired water from such a licensee) may divert, as part of the acquired water, up to 1,250 cubic metres per year for household purposes and up to 6,250 cubic metres per year for raising animals or applying pesticides to crops.¹²⁰ This is in addition to any entitlements under s. 21 of the Act (which allows diversions for household purposes).

In considering a license or preliminary certificate application, the Director may take into account a variety of factors including impacts on household users and

prevention and watering animals, gardens, lawns and trees” (s.1(1)(x)). If the Director determines that diversion for household purposes is having a significant adverse effect on the aquatic environment, a licensee or a traditional agriculture user, the Director may issue a water management order declaring that the diversion is not permitted.

¹¹⁷ *Ibid.*, s. 24.

¹¹⁸ Government of Alberta, *Water Act: Dugouts* available at <https://albertawater.com/docs-work/toolkit/legislation/11-factsheet-dugouts/file>.

¹¹⁹ *Water (Ministerial) Regulation*, A.R. 205/1998 [Water (Ministerial) Regulation].

¹²⁰ *Water Act*, s. 51.

traditional agricultural users.¹²¹ With respect to irrigation, the Director (designated by the Minister pursuant to the *Water Act*) may consider the suitability of the land for irrigated agriculture.¹²²

Land based activities – such as removing or disturbing ground, vegetation or other materials – may require an approval under the *Water Act* where there is a potential to alter the flow of water, change the location of water, cause siltation of water, cause erosion of a water body's bed or shore, or effect the aquatic environment.¹²³ The *Water (Ministerial) Regulation* sets out which activities are exempt from the requirement for an approval and which activities must follow a Code of Practice (or otherwise require an approval). Landscaping is exempt from the requirement for an approval unless it is adjacent to a watercourse frequented by fish or in a lake or a wetland, or it changes the flow or volume of water on an adjacent parcel of land or adversely affects an aquatic environment.¹²⁴ Also exempt from an approval requirement is the placing, constructing, installing, maintaining or operating works to prevent surface water from flowing through or from a CFO or manure storage facility (as long as certain conditions are met).¹²⁵ The regulation also exempts dugouts from the requirement for an approval as long as it is not located in a watercourse frequented by fish or in a lake or a wetland.¹²⁶ An exempt dugout also cannot

¹²¹ *Ibid.*, s. 51.

¹²² *Ibid.*, s. 51.

¹²³ *Ibid.*, s. 1(1)(b).

¹²⁴ *Water (Ministerial) Regulation*, Schedule 1, s. 2(d).

¹²⁵ *Ibid.* Schedule 1, s. 2(n).

¹²⁶ *Ibid.*, Schedule 1, s. 2(l).

change the flow of water on an adjacent parcel of land, have a capacity greater than 2,500 cubic metres, be located in the same watercourse or parcel of land as an existing dugout, or be restricted by a water management plan.

The *Water Act* addresses other matters such as enforcement and water management planning. The *Water Act* required development of a provincial framework for water management planning including a strategy for the protection of the aquatic environment.¹²⁷ In addition to the provincial framework for water management planning, the Minister may require development of a water management plan which must be consistent with the provincial framework. The Minister may also establish water guidelines and water conservation objectives.

The Government may use administrative orders to address violations of the *Water Act* or to remedy impacts on water or adjoining land. This has clear implications for agricultural lands and agricultural activities. This includes enforcement orders that may require the minimization or remedying of an adverse effect on the aquatic environment; the environment, caused by a problem water well or drilling; or human health, property, or public safety. An enforcement order may also require “the restoration or reclamation of the area affected to a condition satisfactory to the Director”. Remedial action may also be required with respect to problem water wells. As with a water management

¹²⁷ In 2003, the Government of Alberta issued its provincial water strategy – *Water for Life: Alberta's Strategy for Sustainability* - which has been updated with *Water for Life: A Renewal* in 2008 and *Water for Life: Action Plan* in 2009. Taken together, these documents set out a number of water management principles, and goals, outcomes and key actions.

order, an enforcement order may be enforced by recourse to the Court of Queen's Bench or, alternatively, the Director may carry out the necessary work and seek costs from the person subject to the enforcement order.

Contravention of a water management order or enforcement order constitutes an offence and is subject to fines and/or imprisonment.

Several regulations have been issued pursuant to the *Water Act*. This includes the Oldman River Basin Water Allocation Order¹²⁸ and the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order.¹²⁹ The Oldman River Basin Water Allocation Order reserves 11,000 acre-feet of water to reservoir area projects to be used for designated purposes including agricultural and irrigation. More recently, the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order reserves all non-allocated water in those water basins to the Crown and restricts the grant of new allocations. Effectively, those water basins are closed with no new allocations permitted (except for limited First Nation use, or for water conservation or aquatic environment protection objectives).

¹²⁸ A.R. 319/2003.

¹²⁹ A.R. 171/2007.

Wetlands Policy



In 2013, the Alberta Government updated its existing policy relating to wetlands with the release of the *Alberta Wetland Policy*¹³⁰ replacing the *Wetland Management in the Settled Areas of Alberta: An Interim Policy*¹³¹. The *Alberta Wetland Policy* is augmented by a variety of guidelines, directives and other government information. Particularly relevant to the issue of avoiding and mitigating negative impacts to wetlands, and where necessary restoration and replacement, are the *Alberta Wetland Restoration Directive*¹³² and the *Alberta*

¹³⁰ Environment and Sustainable Resource Development, *Alberta Wetland Policy* (Edmonton: Government of Alberta, Environment and Sustainable Resource Development, 2013) [*Alberta Wetland Policy*].

¹³¹ Environmental Protection, *Wetland Management in the Settled Area of Alberta: An Interim Policy* (Edmonton: Environmental Protection, Government of Alberta, 1993).

¹³² Environment and Parks, *Alberta Wetland Restoration Directive* (Edmonton: Environment and Parks, Government of Alberta, 2016).

*Wetland Mitigation Directive*¹³³ both of which have been updated frequently over the years

Irrigation Districts Act

A major use of water in Alberta is agricultural irrigation.¹³⁴ Irrigation occurs on approximately 525,000 hectares of land in Southern Alberta under the *Irrigation Districts Act*.¹³⁵ About another 100,000 hectares throughout the province is irrigated privately.¹³⁶



¹³³ Agriculture and Forestry, *Alberta Wetland Mitigation Directive* (Edmonton: Agriculture and Forestry, Government of Alberta, 2018).

¹³⁴ Arlene Kwasniak, *Alberta Wetlands: A Law and Policy Guide*, 2nd ed. (Calgary: Canadian Institute of Resources Law, 2016).

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

The formation, dissolution and governance of irrigation districts in Alberta is regulated by the *Irrigation Districts Act*.¹³⁷ The *Irrigation Districts Act* functions to ensure that the management and delivery of water in the districts occurs in an efficient manner that provides for the needs of the users.

There are 13 irrigation districts in Alberta. The purpose of each district is:¹³⁸

- to convey and deliver water through the irrigation works of the district in accordance with the Act;
- to divert and use quantities of water in accordance with the terms and conditions of its licence under the Water Act;
- to construct, operate and maintain the irrigation works of the district; and
- to maintain and promote the economic viability of the district.

Each irrigation district holds a water licence and must act within the terms of the licence, the *Water Act* and the *Irrigation Districts Act*

Impacts on Agricultural Lands

The *Water Act* impacts on the use of water in agricultural operations in that diversions (taking) water must abide by the terms of the *Water Act* and any relevant licences or registrations. Further, if water is used for irrigation purposes (in an irrigation district), use must be in accordance with the *Irrigation Districts Act*.

¹³⁷ *Irrigation Districts Act*, RSA 2000, c. I-11 [Irrigation Districts Act].

¹³⁸ *Ibid.*, s. 6.

For agricultural operations located in the Bow, Oldman or South Saskatchewan river basins, the closure of those basins to new allocations is particularly noteworthy for new agricultural users, those who wish to increase their diversion volume, and exempt agricultural users. Agricultural users that require in excess of 6,250 cubic metres or were not undertaking farming prior to January 1, 1999, will need a water licence unless otherwise exempt. A person who is an “exempt agriculture user” (i.e. someone who owned or occupied land adjoining a water body or under which groundwater exists on January 1, 1999 and diverted water on or before that date) may continue to divert up to 6,250 cubic metres of water per year or to the maximum specified in a water management plan (whichever is greater).¹³⁹ However, on a transfer of land, those rights will not transfer. In contrast, for a person who is “traditional agricultural user” (i.e. an exempt user who has registered their use), the right can be transferred with the lands.

Aside from regulation on the diversion of water for agricultural purposes, the *Water Act* and the *Alberta Wetlands Policy* have other implications for agricultural lands. When a wetland is present on agricultural lands, drainage and conversion of the wetland without prior approval may not be permissible. The beds and shores of a naturally occurring permanent wetland are owned by the Crown, as is the water within the wetland. This means that, for a naturally occurring permanent wetland, permission is required to drain, fill or otherwise

¹³⁹ *Water Act*, s. 19.

convert that wetland. Guidance for determining permanence of wetlands is found in the *Guide for Assessing Permanence of Wetland Basins*.¹⁴⁰

One of several recommendations made by Sandeep Agrawal is that the “provincial government should consider using water as a tool to manage regional growth across the province and integrate it with the “efficient use of land” strategy in the Land Use Framework.”¹⁴¹ Agrawal asserts that regulating water could emerge as an important tool to manage growth, decrease waste and consumption.



¹⁴⁰ Environment and Parks, *Guide for Assessing Permanence of Wetland Basins*, Guide No. 8, Public Land Management (Edmonton: Government of Alberta, 2016).

¹⁴¹ Agrawal, *supra* note 70 at 4.

Laws and Policies relating to Agricultural Practices and Operations

There are several pieces of legislation that regulate agricultural practices, some of which may have an impact on conservation and conversion of agricultural lands. While primarily a matter of provincial jurisdiction, there is some relevant federal legislation.



Federal Laws

The *Prairie Farm Rehabilitation Act*¹⁴² provides for the rehabilitation of drought and soil drifting areas in Alberta (as well as in Manitoba and Saskatchewan). In particular, the Act requires development and promotion of systems of farm practice, tree culture, water supply, land utilization and land settlement designed for rehabilitation in designated areas.

¹⁴² R.S.C. 1985, c. P-17.

This Act was passed in the 1930s as a response to pervasive drought in the prairies. Until 2009, it was administered by the Prairie Farm Rehabilitation Administration which has since been subsumed into Agriculture and Agri-Food Canada. There does not appear to be significant activity directly related to this piece of legislation.

While not directly focussed on agricultural operations, the federal *Species at Risk Act*¹⁴³ and the *Migratory Birds Convention Act, 1994*¹⁴⁴ can impact agricultural operations.

The *Species at Risk Act* is meant to protect individuals and recover populations of species at risk (species of special concern, and threatened, endangered or extirpated species). The Act prohibits the killing, harming, harassing, capture or taking of listed species.¹⁴⁵ As well, it prohibits the damage or destruction of a residence of a listed species.¹⁴⁶ The prohibitions in the *Species at Risk Act* operate as a “federal safety net”. This means that the prohibitions have limited application throughout Canada. Firstly, these prohibitions apply to all listed aquatic or migratory bird species¹⁴⁷ throughout Canada and all listed species that are on federal lands.¹⁴⁸ However, in terms of species that are not aquatic or migratory birds, the prohibitions apply on provincial or territorial lands only when the federal government has ordered that to be the case.¹⁴⁹ Nevertheless, in the course of agricultural operations, it is necessary to confirm whether or not

¹⁴³ S.C. 2002, c. 29 [*Species at Risk Act*].

¹⁴⁴ S.C. 1994, c. 22 [*Migratory Birds Convention Act*].

¹⁴⁵ *Species at Risk Act*, s. 32.

¹⁴⁶ *Ibid.*, s. 33.

¹⁴⁷ That is, migratory bird species protected by the *Migratory Birds Convention Act*.

¹⁴⁸ *Species at Risk Act*, s. 33.

¹⁴⁹ *Ibid.*, ss. 34 and 35.

the *Species at Risk Act* prohibitions are applicable and, if so, necessary precautions be taken.



Another aspect of the *Species at Risk Act* relevant to agricultural lands is the Species at Risk Partnerships on Agricultural Lands program (SARPAL)¹⁵⁰ operated by the Canadian Wildlife Service. The focus of this program is facilitating recovery of species at risk on agricultural lands through voluntary stewardship actions related to critical habitat. These actions include development of Beneficial Management Practices, agreements under s. 11 of the *Species at Risk Act*, and funding. Section 11 agreements provide incentives to agricultural

¹⁵⁰ See <https://www.canada.ca/en/news/archive/2015/06/species-risk-partnerships-agricultural-lands.html>.

operators to undertake management decisions and actions that are beneficial to particular species at risk.¹⁵¹

The *Migratory Birds Convention Act* implements the *Migratory Birds Convention* (an international convention) and is designed to prevent harm to those migratory bird species listed in Schedule 2 to the Act. In addition to imposing restrictions on hunting, regulations under the Act¹⁵² prohibit the disturbance, destruction or taking of a nest, egg, or nest shelter, or the possession of a live or dead migratory bird, nest or egg. Agricultural operations may incidentally result in violation of the regulations (referred to as “incidental take”). This means that agricultural operations may need modification to avoid incidental take of migratory birds. The Canadian Wildlife Service has published a guide for avoiding incidental take.¹⁵³ In June 2019, regulatory amendments were proposed¹⁵⁴ to clarify, in part, incidental take of nests. The proposed amendments clarify that the prohibition against damaging, destroying, disturbing or removing a nest do not apply to unoccupied nests. Active nests (that is, nests in use during breeding and nesting times, and nests of those species that reuse their nests year to year) will still be subject to protection. The latter species are identified in the proposed Schedule 1 to the regulations.

¹⁵¹ For example, see the South of the Divide Conservation Action Program website at <https://www.sodcap.com/>.

¹⁵² *Migratory Birds Regulations*, C.R.C., c. 1035.

¹⁵³ Canadian Wildlife Service, Environment Canada, *Incidental Take of Migratory Birds in Canada* (Ottawa: Environment Canada, 2014).

¹⁵⁴ *Migratory Bird Regulations*, Canada Gazette, Part I, vol. 153, no. 22, June 1, 2019.

Provincial Laws

As mentioned, agricultural operations and practices are primarily a matter of provincial jurisdiction. Relevant legislation in Alberta is the *Soil Conservation Act*¹⁵⁵ and the AOPA.

The *Soil Conservation Act* imposes a duty on every landholder to prevent soil loss or deterioration, and if it is occurring to stop the loss or deterioration from continuing.¹⁵⁶ An agricultural field or soil conservation officer may direct that remedial action be taken.¹⁵⁷ If remedial action is not taken by the landholder, then the officer may carry out the remedial measures and demand payment for same (s. 6).

The most significant piece of legislation dealing with agricultural operations in Alberta is the AOPA. The AOPA is Alberta's "right to farm" legislation which protects agricultural operations from nuisance actions. As well, the AOPA and its regulations enable issuance of permits for confined feeding operations (CFOs) and set manure management standards. The Act is administered by Alberta Agriculture and Forestry and by the Natural Resources Conservation Board (NRCB). Municipalities have jurisdiction with respect to structures not specifically approved by the NRCB and may regulate animal operations not listed in the AOPA and CFOs that fall below the registration threshold.

Under the AOPA¹⁵⁸ agricultural land is defined as land:

¹⁵⁵ R.S.A. 2000, c. S-15 [*Soil Conservation Act*].

¹⁵⁶ *Ibid.*, s. 3.

¹⁵⁷ *Ibid.*, s. 4.

¹⁵⁸ AOPA, s.1(a.1).

- for which agriculture is a permitted or discretionary use under the municipal land use bylaw;
- that is subject to an approval, registration or authorization under the Act; or
- described in a regional plan under the *Alberta Land Stewardship Act* (ALSA), conservation easement, conservation directive or transfer of development credits scheme and that is protected, conserved or enhanced as agricultural land or land for agricultural purposes.

An agricultural operation means an agricultural activity conducted on agricultural land for gain or reward (or in the hope of same). This includes cultivation of land; raising of livestock; production of field crops; production of eggs and milk; production of fruit, vegetables, sod, trees, shrubs and other horticultural crops; production of honey, and other similar activities.¹⁵⁹ A CFO is defined as a fenced or enclosed land or buildings where livestock are confined for the purpose of growing, sustaining, finishing or breeding other than by means of grazing.¹⁶⁰

Section 2 of the AOPA modifies the common law rules pertaining to nuisance for agricultural operations (the “right to farm” provision). A person who carries on agricultural operations without contravening the land use bylaw; the regulations or an approval, registration or authorization; or the generally accepted agricultural practice is not liable in an action in nuisance resulting from the agricultural operation and is not to be prevented from carrying on by injunction

¹⁵⁹ *Ibid.*, s. 1(b).

¹⁶⁰ *Ibid.*, s. 1(b.6).

or other court order. A generally accepted agricultural practice is an activity conducted in a manner consistent with appropriate and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances.¹⁶¹ A generally accepted agricultural practice can include the use of innovative technology used with advanced management practices.

If a person seeks to pursue an action in nuisance, that person must first apply to the Minister for a determination of whether the disturbance occurs from a generally accepted agricultural practice.¹⁶² Such an application may result in a practice review committee.¹⁶³

The AOPA also establishes the framework for approval, registration and authorization processes for CFOs, manure facilities, and certain other operations. Subject to the regulations, a person may require either an approval or registration for a CFO.¹⁶⁴ Similarly, subject to the regulations, an authorization may be required for a manure storage or collection facility.¹⁶⁵ Whether a registration or approval is required for a CFO is based on type of livestock and number in accordance with the *Agricultural Operations Part 2 Matters Regulation*.¹⁶⁶ That regulation also sets out which manure storage facilities or collection areas require authorization. The details of the registration, approval or

¹⁶¹ *Ibid.*, s. 1(b.8.)

¹⁶² *Ibid.*, s. 3.

¹⁶³ *Ibid.*, ss. 5-9.

¹⁶⁴ *Ibid.*, s. 13.

¹⁶⁵ *Ibid.*, s. 14.

¹⁶⁶ A.R. 257/2001.

authorization application process are found in the *Agricultural Operation Practices Act Administrative Procedures Regulation*.¹⁶⁷

The *Standards and Administration Regulation*¹⁶⁸ applies to those activities that require approvals, registrations or authorizations under the AOPA and its regulations. This includes those CFOs which require approvals, registrations or authorizations; manure storage facilities which require authorizations; seasonal feeding and bedding site; manure collection areas; manure storage facility which requires authorization; and to application of manure, composting materials or compost. The regulation sets minimum distances from residences¹⁶⁹ and from bodies of water.¹⁷⁰ Requirements for flood areas, layers and liners to protect groundwater, leak detection, catch basins, bottom filling structures, sealing, fly and dust control, and soil testing and protection are also set out in the regulation. As well, the regulation adopts the *Manure Characteristics and Land Base Code*¹⁷¹ and sets a requirement to develop nutrient management plans.

The AOPA sets out offences and penalties, as well as enforcement powers such as inspection, access to premises, enforcement orders, and emergency orders. An enforcement order can be issued if there is a risk to the environment or an inappropriate disturbance, or a contravention of an approval, registration, authorization, regulations or the Act. An enforcement order can direct a person to create a compliance plan; to stop specified activities; to undertake an

¹⁶⁷ A.R. 106/2017.

¹⁶⁸ A.R. 267/2001.

¹⁶⁹ AOPA, s. 3.

¹⁷⁰ *Ibid.*, ss. 5-7.

¹⁷¹ *Ibid.*, s. 2.1.

investigation, construction, alteration, repair or other measures; suspend approval, registration or authorization; or to specify measures to be taken. If necessary, a court order can be obtained to require compliance with an enforcement order. Emergency orders may be issued for release of manure, composting materials or compost into the environment if it may cause or is causing an immediate and significant risk to the environment even if such release was authorized or in compliance with an approval, registration or authorization.¹⁷²

Aside from provincial legislation that directly addresses agricultural operations, other pieces of legislation may impact operations on farmland. For instance, the use of pesticides in farming operations is regulated by the *Environmental Protection and Enhancement Act*.¹⁷³ In particular, several regulations govern the sales, handling, use and application of pesticides:

- Pesticide (Ministerial) Regulation;¹⁷⁴
- Pesticide Sales, Handling, Use and Application Regulation;¹⁷⁵ and
- Environmental Code of Practice for Pesticides.¹⁷⁶

¹⁷² *Ibid.*, s. 42.1.

¹⁷³ R.S.A. 2000, c. E-12. As well, the federal *Pest Control Products Act*, S.C. 2002, c. 28 and its regulations provide for evaluation and registration of pesticides for use in Canada. There is also a federal *Fertilizers Act*, S.C. 1985, c. F-10 which regulates the import and sale of fertilizers in Canada.

¹⁷⁴ A.R. 43/1997 [Pesticide (Ministerial) Regulation].

¹⁷⁵ A.R. 24/1997 [Pesticide Sales, Handling, Use and Application Regulation].

¹⁷⁶ Alberta Government, *Environmental Code of Practice for Pesticides* (Edmonton: Government of Alberta, 2010) [Environmental Code of Practice for Pesticides].

The *Pesticide (Ministerial) Regulation* sets out requirements for applicators (including classes of certificates), regulates vendor registration and certification, sets out record management requirements, and provide guidance on safe use and handling of pesticides. Section 3 creates an exception to the requirement for an applicator certificate for a “commercial agriculturist using or applying pesticides on land he owns”. There are prohibitions against using or applying pesticides in or near open bodies of water without special approval¹⁷⁷ with some limited exceptions for persons using or applying pesticides on cultivated land.¹⁷⁸ Cultivated land is defined at “land that has been cleared, improved and prepared to raise agricultural crops or livestock, and includes pastures, improved rangeland and areas that have been landscaped for managed turf and ornamental plantings”.¹⁷⁹

The *Pesticide Sales, Handling, Use and Application Regulation* sets out the requirements for sales, use and handling of pesticides. Further details and requirements for safe sales, handling, use and application of pesticides is found in the *Environmental Code of Practice for Pesticides*.¹⁸⁰ Aside from the specific regulations dealing with pesticides, the EPEA generally prohibits the release of

¹⁷⁷ *Pesticide (Ministerial) Regulation*, s.1(1)(a).

¹⁷⁸ Generally, there is a prohibition against use or application of a Schedule 1, 2 or 3 pesticide with a horizontal distance of 30m from an open body of water but this does not apply to use or application on cultivated land (s.9(1)(4)(b)).

¹⁷⁹ *Pesticide (Ministerial) Regulation*, s.9.

¹⁸⁰ *Environmental Code of Practice for Pesticides*.

substances in an amount, concentration or level that is in excess of an amount prescribed by regulation or Code of Practice.¹⁸¹

Also potentially relevant to agricultural operations is the *Wildlife Act*¹⁸² and its regulations which govern hunting and fishing activities in Alberta. As well, albeit limited in scope, provisions regarding the protection of species at risk are found in the Act and the *Wildlife Regulation*.¹⁸³ The *Wildlife Regulation* also implements a compensation scheme for lost livestock resulting from wildlife predation.¹⁸⁴

Agricultural operations may also trigger application of the *Water Act* (discussed above). These operations may include drainage issues (including those associated with wetlands), augmentation of soil in a manner that affects flows of water on adjoining lands, or runoff.

Impacts on Agricultural Lands

With its right to farm provision, the AOPA operates to insulate agricultural operations from nuisance actions. This is meant to lessen the impact of urban encroachment on agricultural operations (at least to some degree) in that new urban neighbours cannot complain about regular agricultural practices. Aside from the right to farm provision, the AOPA and its regulations regulate CFOs and manure management to lessen impacts on water.

Aside from the AOPA, other pieces of legislation may impact operations on farmland including those pertaining to pesticides, to protection of migratory

¹⁸¹ EPEA, s. 108.

¹⁸² R.S.A. 2000, c. W-10.

¹⁸³ A.R. 143/97 [Wildlife Regulation].

¹⁸⁴ *Wildlife Regulation*, ss. 14-16.

birds, and to protection of species at risk. Pesticide application must comply with the EPEA, its regulations and the *Environmental Code of Practice for Pesticides*. The presence of a migratory bird species or a species at risk may trigger prohibitions against harming, harassing or disturbing individuals and/or their immediate habitat which can impact upon agricultural operations.

As discussed above, agricultural operations may also trigger application of the *Water Act*. Agricultural operations may trigger drainage issues (including those associated with wetlands), augmentation of soil in a manner that affects flows of water on adjoining lands, or runoff. As well, the *Soil Conservation Act* imposes a duty on every landholder to prevent soil loss or deterioration, and if it is occurring to stop the loss or deterioration from continuing.

Agricultural Lands and Taxation



Laws and legal principles of tax law may impact upon transfer, development and conservation of land in Alberta. Taxation occurs at the federal, provincial and municipal levels. Particularly relevant to agricultural lands are capital gains taxes and exemptions (federal), eco-gifts (federal), and property taxes (municipal).

Federal Taxation

Federally, under the *Income Tax Act*,¹⁸⁵ income from agricultural operations is treated in a similar manner as that from self-employed persons. However, there are capital gains exemptions, eco-gift provisions and other tax measures that are particularly relevant to agricultural operations and lands.

Rules relating to income from agricultural operations can be found in *Guide T4002 Self-employed Business, Professional, Commission, Farming and Fishing Income*.¹⁸⁶ Farming income can come from a variety of activities including, among others, soil tilling, livestock raising, poultry raising and chicken hatcheries, dairy farming, tree growing, fruit growing, cultivating crops in water or hydroponics, and feedlot operations.¹⁸⁷

There are special capital gain and loss rules applicable to qualified farm property. Qualified farm property includes real property, share of the capital stock of a family farm, interest in a family-farm partnership, and eligible capital property used in course of carrying on a farming business such as milk and egg

¹⁸⁵ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [ITA].

¹⁸⁶ *T4002 Self-employed, Business, Professional, Commission, Farming and Fishing Income 2018* available at <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/t4002.html>.

¹⁸⁷ ITA, s. 248(1).

quotas. There is a capital gain on the sale of qualified farm property and a corresponding capital gain deduction. In the event qualified farm property is transferred to a child, spouse or common-law partner, payment of taxes on the taxable capital gain may be delayed.

In order to encourage conservation of lands, there is provision for ecological gifts.¹⁸⁸ An ecological gift is a gift of land, including a covenant or an easement, that is certified by the Minister or a designated person to be ecologically sensitive, the conservation and protection of which is important to the preservation of Canada's environmental heritage. Under this program, individuals receive a tax credit of 15% for the first \$200 and 29% of the balance of the value. Corporations receive a deduction from taxable income. It is possible for a land donor to receive some consideration for the land and still qualify for benefits under the ecological gifts program (referred to as split receipting).¹⁸⁹ While split receipting allows up to 80% payment as consideration, with a 20% tax receipt, most land trusts are unlikely to afford such a payment. Further, the capital gain from disposition of an ecological gift is deemed to be zero.¹⁹⁰

¹⁸⁸ *Ibid.*, s. 118.1.

¹⁸⁹ See *Income Tax Folio S7-F1-C1, Split-receipting and Deemed Fair Market Value* available at <https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-7-charities-non-profit-organizations/series/income-tax-folio-s7-f1-c1-split-receipting-deemed-fair-market-value>.

¹⁹⁰ ITA, s. 38.

In order to qualify for the ecological gifts tax benefits, a donation of land must meet the following conditions:

- Land must be certified as ecologically sensitive.
- The ecological gift must be made to an eligible recipient who provides a donation receipt. The *Ecological Gifts Handbook*¹⁹¹ provides detail on which environmental charities are eligible recipients. Provincial and municipal governments can also be eligible recipients.
- Fair market value must be certified by an AACI appraiser.

If a donation of land does not fit within the ecological gifts program, then it is treated as any other donation meaning there is no capital gains reduction and lesser income tax benefits.¹⁹²

Other tax rules relevant to agricultural operations include:

- *Farm Equipment Income Tax and Canada Pension Contributions Remission Order, SI 92-28* which cancels the tax payable on the proceeds of farm equipment traded in as long as the value is at least equal to trade-in allowance.
- Certain farm products are zero rated for GST and HST. These include fruit and vegetables, grains, feed sold by a feedlot operator, livestock, and

¹⁹¹ Canadian Wildlife Service, *The Canadian Ecological Gifts Program Handbook: A legacy for tomorrow – a tax break for today* (Ottawa: Government of Canada, 2011) at 11 [Ecogifts Handbook].

¹⁹² Good and Michalsky, *supra* note 62.

other items. As well, some farm purchases (various pieces of farm equipment) are zero rated for GST and HST.

- Drought and excessive moisture tax measures allow for exclusions or deferrals of income in some circumstances. Annually, if applicable, certain regions are prescribed as regions of flood or excessive moisture.¹⁹³ In those prescribed regions, if drought or excess moisture and flood conditions forces sale of all or part of breeding herd, then a farmer is eligible for a one-year tax deferral on part of the income on that sale. In consecutive years of drought or excess moisture/flooding, the sales income may be deferred to the first year in which the area is no longer designated. This deferral is requested when filing income tax returns.



¹⁹³ Prescribed areas are published annually on the Agriculture and Agricultural-Food website <http://www.agr.gc.ca/eng/programs-and-services/drought-watch/livestock-tax-deferral-provision/?id=1463574780220>. This program has been in place since 2014.

Provincial Taxation

Under the *Alberta Personal Income Tax Act*,¹⁹⁴ taxable income is calculated in accordance with the federal *Income Tax Act*. There are no specific references to farming or farmlands in the *Alberta Personal Income Tax Act*.

However, the *Fuel Tax Regulation*¹⁹⁵ enables a Farm Fuel Benefit. This allows use of purple fuel for farming activities (a \$0.09 per litre benefit). To qualify, a farmer must have \$10,000 or more of gross annual farm production.¹⁹⁶

Municipal Taxation

Under the MGA, municipalities have the power to impose a variety of taxes including property and business taxes. From the perspective of farmland, there are three aspects to property taxation: the farm residence, the farm buildings and the land.

As explained in the *Guide to Property Assessment and Taxation in Alberta*,¹⁹⁷ farmland is a type of regulated property. This means assessed values, for taxation purposes, are determined using rates and procedures prescribed by

¹⁹⁴ R.S.A. 2000, c. A-30.

¹⁹⁵ A.R. 62/2007 which is promulgated pursuant to the *Fuel Tax Act*, S.A. 2006, ch. F-28.1 [*Fuel Tax Regulation*].

¹⁹⁶ *Fuel Tax Regulation*, s. 1(1)(r).

¹⁹⁷ Municipal Affairs, *Guide to Property Assessment and Taxation in Alberta* (Edmonton: Government of Alberta, 2018).

Municipal Affairs (as opposed to market values which are used to assess non-regulated categories of property).

In the case of farmland, municipal assessment is based on productive value. That is, the ability of the land to produce income from growing crops and/or raising livestock. The productive value is determined using a process that sets a value for the best soils and then makes adjustments for less than optimum conditions (such as stones, presence of sloughs, or topography). A local assessor conducts the assessment in accordance with the *Alberta Farm Land Assessment Minister's Guidelines*¹⁹⁸ which sets four categories of farmland: dry arable land, dry pasture land, irrigated arable land and woodlots. When farmland is no longer used for agricultural purposes, it becomes assessable at market value.

Some property is not assessable (such as growing crops)¹⁹⁹ or is assessable but not taxable (most farm residences and buildings).²⁰⁰

A farm building is any improvement, other than a residence, to the extent it is used for farming operations.²⁰¹ Farming operations are defined²⁰² as the raising, production and sale of agricultural products and includes:

- Horticulture, agriculture, apiculture, and aquaculture,

¹⁹⁸ 2018 Alberta Farm Land Assessment Minister's Guidelines, Ministerial Order No. MAG:020/18.

¹⁹⁹ MGA, s. 298(w).

²⁰⁰ MGA, s. 361 and Matters Relating to Assessment and Taxation Regulation, 2018, A.R. 203/2017, Part 5 [Assessment and Taxation Regulation].

²⁰¹ Assessment and Taxation Regulation, s. 2(1)(e).

²⁰² *Ibid.*, s. 2(1)(f).

- The production of horses, cattle, bison, sheep, swine, goats, fur-bearing animals raised in captivity, domestic crevices with the meaning the *Livestock Industry Diversification Act*, and domestic camelids,
- The planting, growing, and sale of sod.
- An operation on a parcel of land for which a woodland management plan has been approved.

One farm residence is exempt from taxation to a maximum of \$61,540 if it is situated in a county, municipal district, improvement district or special area and it is situated on a parcel not less than one acre. Additional residences may be exempt to a maximum of \$30,770 (must meet same requirements).²⁰³ There are the same exemptions made for certain specific locations (eg. Strathcona County and Wood Buffalo).

Aside from municipal property taxes, farming operations may be subject to business taxes. As expressed by John Groenewegan:²⁰⁴

Municipalities have the right to apply a business tax on farming operations to offset the additional costs that are created by the presence of the business. These fees can be based upon the assessed value of the property, gross rentals, capacity of tanks (e.g. bulk oil tanks) or square footage. To date [2000], Lethbridge is the only municipality charging a business tax on intensive livestock operations. Their fee is based on square footage. Some

²⁰³ *Ibid.*, s. 24.

²⁰⁴ John Groenewegan, *Agricultural Property Tax Concessions and Government Transfers to Agriculture* (Ottawa: Government of Canada, Agriculture and Agri-Food Canada, 2000) at B-8.

municipalities are charging development fees. The result is inconsistent treatment of intensive operations between municipalities.

Generally, business taxes on agricultural operations are used to offset municipal service or infrastructure costs caused by presence of the business.²⁰⁵

Further, the distinction between “farming operations” and processing or manufacturing operation that uses farm products is not necessarily clear.²⁰⁶ This means there is potential to assess and tax the latter as machinery and equipment. Machinery and equipment refers to materials, devices, installations, and so forth used in processing or manufacturing.²⁰⁷ Machinery and equipment is taxed in accordance with the Alberta Machinery & Equipment Assessment Minister’s Guidelines.²⁰⁸

Taxation as an Incentive or Disincentive to Conserve Agricultural Lands

Currently, there are some tax incentives to conserve certain types agricultural lands namely, the federal ecological gifts program which offers tax credits or

²⁰⁵ MLA Farm Property Assessment Review Committee, *Final Report and Recommendations on Farm Property Assessment Issues* (Edmonton: Government of Alberta, 2002).

²⁰⁶ Municipal Affairs, MGA Review Discussion Paper: Farm Property Assessment and Taxation (Edmonton: Government of Alberta, 2013) [MGA Review Discussion Paper].

²⁰⁷ *Assessment and Taxation Regulation*, s. 2(1)(j).

²⁰⁸ 2018 Alberta Machinery & Equipment Assessment Minister’s Guidelines, Ministerial Order No. MAG 020/18. See also *Assessment and Taxation Regulation*, s. 12.

deductions and reduces capital gains.²⁰⁹ This program has limited application however, as the agricultural land must harbour the ecological features recognized by the ecological gifts program.²¹⁰ The national criteria for ecological sensitivity are:²¹¹

- areas identified, designated, or protected under a recognized classification system; natural spaces that are significant to the environment in which they are located;
- sites that have significant current ecological value or potential for enhanced ecological value as a result of their proximity to other significant properties;
- private lands that are zoned by municipal or regional authorities for the purpose of conservation; natural buffers around environmentally sensitive areas such as water bodies, streams, or wetlands; and
- areas or sites that contribute to the maintenance of biodiversity or Canada's environmental heritage.

Despite the fact that agricultural lands may offer ecological goods and services worthy of conservation, it may not meet the criteria for the ecological gifts program. Furthermore, the ecological gifts program gives consideration to ecological context with the result that similar cultivated agricultural lands may qualify in some regions but not others. As an example, agricultural lands

²⁰⁹ Environment and Climate Change Canada, *The Canadian Ecological Gifts Program: Donation and Income Tax Scenarios*, (Ottawa: Government of Canada, 2019).

²¹⁰ Cindy Chiasson et al., *supra* note 61

²¹¹ Ecogifts Handbook, *supra* note 191.

providing migratory bird habitat is more limited in the Fraser Valley, B.C. as compared to that in Alberta with the result that the former may qualify for the ecological gifts program whereas the latter may not. Specific regional ecological sensitivity criteria have been developed for Ontario²¹² (and Quebec) which streamlines the process for certifying certain lands as qualifying for the ecological gifts program and encompasses some agricultural lands. However, no such criteria have been developed for Alberta.

Given the strictly ecological focus of the ecological gifts program, it has been suggested that a specific agricultural gifts program be developed with a focus on conserving agricultural lands.²¹³ An agricultural gifts program would acknowledge that there can be significant overlap between working landscapes (agricultural lands) and important ecological features. Such a program should include an option for split receipting and a transferable tax credit.²¹⁴ A transferable tax credit would enable a landowner who would receive more value from cash than a tax credit could sell or otherwise transfer his or her tax receipt received from a donation to another person who could use the tax credit when filing their annual income tax return. In addition, because valuation of land donated as an ecological gift is based on market value, it is recommended that valuation methods be revisited to fully recognize the non-

²¹² See <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program/assessing-sensitivity.html>. See also Environment Canada, *The Ontario Ecogifts Handbook 2001* (Ottawa: Environment Canada, 2001).

²¹³ Good and Michalsky, *supra* note 62.

²¹⁴ *Ibid.*

market ecological goods and services benefits provided.²¹⁵ An alternative valuation method might be to implement a “bonusing” system which recognizes the value of specific features such as high quality agricultural lands.²¹⁶ This would increase the value of the ecological gift thereby providing a greater tax benefit to conservation of the land. This is key given that there is survey evidence that indicates that the tax benefits are often not an adequate incentive for landowners especially those who are agricultural producers.²¹⁷ In order to achieve its conservation goals, an agricultural gifts program will need to ensure mechanisms are in place to protect and maintain the agricultural lands and its appurtenant ecological goods and services through time (such as an conservation easement for agricultural purposes).

Aside from the ecological gifts program, there are tax incentives available for transfers of agricultural lands in the form of reduced capital gains taxes. This facilitates transfers of agricultural lands as agricultural lands with additional benefit for transfers within families (presumably to maintain family farms). However, this may have unintended consequences as some families may have non-farming children.

Other tax incentives arise with property tax reductions at the municipal level. With reduced taxation on agricultural lands, there is an incentive for individuals to maintain lands for agricultural purposes (assuming the tax benefit outweighs the development benefits). However, from the perspective of a municipality, these property tax reductions act as a disincentive to maintain agricultural lands. The fact that municipalities can tax “developed” land at a higher base

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

than “undeveloped” land creates an incentive to develop land rather than conserve or use land for agricultural purposes.

Furthermore, the municipal property taxation scheme can inadvertently benefit high density agricultural operations such as CFOs (cattle feedlots, intensive poultry and hog operations), greenhouses and mushroom barns.²¹⁸ Since intensive operations use smaller areas of farmland, they pay proportionately less tax as compared to more traditional operations. That is, the income may be comparable but lesser tax burden as operations become more intensive using a smaller land base. Some municipalities may impose business taxes on high density agricultural operations to offset municipal costs and infrastructure related to these operations.



²¹⁸ MGA Review Discussion Paper, *supra* note 206.

Impacts on Agricultural Lands

Tax structures are certainly a factor in the drive to conserve or convert agricultural lands. However, these structures interplay with market forces, local demands and individual choices. Incentives to conserve offered through tax schemes must outweigh the benefit of converting land for development. Further, local demands at the municipal level for a strong tax base must also be addressed.

The Standing Senate Committee on Agriculture and Forestry has looked at this issue.²¹⁹ Their recent report looked at the use of farmland, and the changes in farmland values and their impact on farmland availability. It also outlined ways to ensure access to farmland for future generations.

Recommendations made by the Senate Committee were:²²⁰

- The possibility of increasing the amount of the lifetime capital gains exemption for qualified farm property should be explored to make it easier for new farmers to acquire farmland.
- Data on the classification and use of farmland needs to be improved. Provinces must be kept informed about technological advances in imaging and remote sensing, and the way in which soil maps could assist in provincial land-use planning.

²¹⁹ Standing Senate Committee on Agriculture and Forestry (chairs: the Hon. Diane F. Griffin and the Hon. Ghislain Maltais), *A Growing Concern: How to Keep Farmland in the Hands of Canadian Farmers* (Ottawa: Standing Senate Committee on Agriculture and Forestry, 2018) [Standing Senate Committee on Agriculture and Forestry].

²²⁰ *Ibid.*

- Funding for the national research project on farmland protection (through SSHRC) should be renewed. This will encourage cooperation between provincial land-use planning experts and support the development of standardized analytical frameworks and tools that would enable harmonized land-use planning data to be obtained for all provinces.
- The federal government should work with provincial counterparts to take advantage of initiatives that will enhance tools needed to track land transactions. An example of such an initiative is the national research project on farmland protection.
- Both the federal and provincial governments should work together to protect and promote the use of land for agricultural purposes.

These recommendations demonstrate that while tax-based incentives (and disincentives) may be a factor in driving conversion of agricultural lands, they are not a comprehensive answer. Taxation schemes need to be designed to work in concert with other land planning and management tools as one piece of a larger puzzle.



Financial Tools (not taxation) and Agricultural Lands

Aside from taxation, there are other pieces of legislation relating to financial tools specific to agricultural lands and operations. Generally, these pieces of legislation are designed to provide enhanced access to financing opportunities for those involved in the agricultural industry.

Federal

Federally, the relevant pieces of legislation are the *Canadian Agricultural Loans Act*,²²¹ the *Farm Credit Canada Act*,²²² the *Farm Debt Mediation Act*,²²³ and the *Farm Income Protection Act*.²²⁴

The *Canadian Agricultural Loans Act* provides a guarantee to lenders for loans made to farmers or farm product marketing cooperatives up to 95%. The loans must be made for specified purposes related to farming operations. This Act is supported by the *Canadian Agricultural Loans Act Lenders' Guidelines*²²⁵ (June 2009) which provides guidance to lenders intending to provide loans that qualify for a guarantee under the Act. The purpose of the federal loan guarantee program is to increase availability of loans for the purpose of establishment,

²²¹ R.S.C. 1985, c. 25 (3rd Supp.) [*Canadian Agricultural Loans Act*].

²²² S.C. 1993, c. 14 [*Farm Credit Canada Act*].

²²³ S.C. 1997, c. 21 [*Farm Debt Mediation Act*].

²²⁴ S.C. 1991, c. 22 [*Farm Income Protection Act*].

²²⁵ Government of Canada, *Canadian Agricultural Loans Act Lenders' Guidelines* (Ottawa: Government of Canada, 2009) available at www.agr.gc.ca/resources/prod/doc/prog/calalcpa/pdf/calalcpa_info_e.pdf.

improvement and development of farms. As well, it aims to increase availability of loans for processing, distribution and marketing of farm products by agricultural co-operatives.

The *Farm Credit Canada Act* establishes Farm Credit Canada which operates to enhance rural Canada by providing specialized and personalized business and financial services and products to farming operations. The primary focus is on farming operations, although activities related to small and medium sized businesses related to farming are also covered by Farm Credit Canada operations.

The *Farm Debt Mediation Act* allows all insolvent farmers to apply for a stay of proceedings, a review of financial affairs, and mediation between the farmer and all the creditors. Alternatively, an insolvent farmer may seek review of his/her financial affairs and mediation.

The *Farm Income Protection Act* enables establishment of programs for net income stabilization account, gross revenue insurance, revenue insurance, and crop insurance. For example, the Federal AgriInsurance Program (operating in Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia) falls under this Act.²²⁶ The Act requires that program agreements must provide for circumstances and conditions under which insurance may be withheld,

²²⁶ See Agriculture and Agriculture-Food Canada, *Evaluation of AgriStability, AgriInvest, AgriInsurance, and the Wildlife Compensation Program: Summary* (Ottawa: Government of Canada, 2017) available at http://publications.gc.ca/collections/collection_2017/aac-aafc/A29-2-20-2-2017-eng.pdf.

restricted or enhanced for the purpose of protecting the environment.²²⁷ As well, a program must encourage sound management practices to ensure environmental sustainability.²²⁸ The Act requires that an environmental assessment of programs developed under this Act be conducted.²²⁹

The Government of Canada has developed the AgriStability and AgrilInvest programs in which agricultural producers may voluntarily participate. AgriStability is a margin-based program that provides support when there is relatively large income loss. AgrilInvest is a self-managed producer government savings account designed to help producers manage small income declines and to make investment to manage risk and improve market income.



²²⁷ *Farm Income Protection Act*, s. 5(2).

²²⁸ *Ibid.*, s. 5(2).

²²⁹ Results for environmental assessment of the AgriStability and AgrilInsurance programs is available at https://foragforum.org/docs/2016/4-5_Shakeri_ForAgForum_2016.pdf.

Provincial

In addition to the federal financial legislation, the province of Alberta has enacted the *Agriculture Financial Services Act*²³⁰ which establishes the Agricultural Financial Services Corporation. This Act allows loans to primary producers of agricultural products, owners of associated businesses and persons engaged in agricultural industries. Loans may be given to support agricultural purposes²³¹ or to promote development of resources and economic growth and diversification. The government may guarantee loans made for these purposes.²³²

In addition, under the *Agriculture Financial Services Act*, the Corporation may offer insurance on land or agricultural products.²³³ Under the *Agriculture Financial Services Regulation*,²³⁴ provision is made for crop insurance, livestock price insurance, wildlife crop damage, and farm income disaster compensation. As well, the regulation sets up Canadian Agricultural Income Stabilization Program and Local Opportunity Bonds.

²³⁰ RSA 2000, c. A-12 [*Agriculture Financial Services Act*].

²³¹ *Ibid.*, s. 25.

²³² *Ibid.*, s. 28.

²³³ *Ibid.*, s. 28.

²³⁴ A.R. 99/2002.



Market for Agricultural Lands

A key factor in shaping agricultural fragmentation and loss is the market value of agricultural lands. The market value of agricultural lands may be strongly influenced by land development potential. In the face of legislative tools that “freeze” development, there may be concerns about compensation for decreased value due to lost development opportunities. Other tools – such as conservation easements – may prove more effective with improved evaluation of value.

Plantinga et al. have looked at the influence of future land development on current agricultural land development²³⁵ (using New York State to apply their model). The authors conclude that the only effective deterrent to farmland conversion may be compensation for foregone development rents and seek to understand the dynamic structure of agricultural land prices via estimating a model that explicitly accounts for uncertainty over future development rents and allows separation of the current value into agricultural and development

²³⁵ Andrew J. Plantinga and Douglas J. Miller, “Agricultural Land Values and the Value of Rights to Future Land Development” (2001) 77(i) *Land Economics* 56. See also Andrew J. Plantinga et al., “Working Paper: The Effects of Potential Land Development on Agricultural Land Prices” (February 27, 2002) SSRN Electronic Journal. 10.2139/ssrn.305498 // *Nota di Lavoro*, No. 41.2002 Fondazione Eni Enrico Mattei (FEEM), Milano.

components. This conclusion was based on economic modelling that assumed land could be allocated to agriculture or development. As such, provincial regulation, such as establishing a green belt for agricultural lands, could impact this conclusion.

Impacts on Agricultural Lands

The financial tools are designed to help farmers weather the ups and downs of agricultural operations. By doing so, these tools can lead to enhanced continuity of agricultural operations thereby assisting with keeping agricultural lands in use for that purpose.

As information and understanding about the market valuation of agricultural lands improves, so can the design of incentives to conserve land. As mentioned above, one of the Senate Standing Committee on Agriculture and Forestry's recommendations was to enhance tracking land transfer information.²³⁶ Despite this recommendation, there are some readily available general market valuation sources such as the annual reports issued by Farm Credit Canada,²³⁷ information maintained by Statistics Canada,²³⁸ and information provided by professional appraisers such as the *Farmland Value Trend Newsletter* issued by Serecon.²³⁹

²³⁶ Standing Senate Committee on Agriculture and Forestry, *supra* note 219.

²³⁷ See Farm Credit Canada, *2018 FCC Farmland Values Report* available at <https://www.fcc-fac.ca/fcc/about-fcc/reports/2018-farmland-values-report-e.pdf>.

²³⁸ See <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210004701>.

²³⁹ See Serecon, *2018 Farmland Value Trend Newsletter* available at <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210004701>.

Conclusion

Agricultural activities are governed by multiple pieces of legislation addressing matters such as soil degradation, pesticide use and application, manure handling, the presence of migratory birds or species at risk, and the use of and impacts upon water. In addition, common law restrictions on land also impact on agricultural operations (albeit these are tempered to some extent by the AOPA).

In the case of agricultural activities on Crown land, permissible activities will be dictated by the disposition type (most relevant to agricultural activities are grazing dispositions, farm development leases and cultivation permits). The Crown land may also be subject to other dispositions – such as timber dispositions or mineral surface leases – that influence or reduce agricultural activities.

Aside from legislative, regulatory and common law impacts on agricultural activities, law and policy can have a significant impact on conservation, conversion and fragmentation of agricultural lands. Planning decisions and instruments impact upon agricultural lands. As well, the approach to taxation and availability of financial tools can impact upon conversion and fragmentation of agricultural lands. A variety of tools aimed at conservation of agricultural lands may be used incorporating voluntary/involuntary and compensatory/non-compensatory approaches.

In Alberta, regional planning is enabled by ALSA and could be used to facilitate a comprehensive approach to agricultural land conservation. In particular, regional “zoning” and conservation directives via regional plans could be used to establish an agricultural green-belt. However, much of the provincial regional

planning is still incomplete and the two completed plans do not set such an agricultural green-belt. Alternatively, the provincial government could pass dedicated legislation that provides for a green-belt (as has been done in Ontario and British Columbia).

Pursuant to ALSA, land stewardship tools are available to facilitate the conservation of agricultural lands. However, aside from conservation easements, the tools remain relatively unused. There is a need for the development of policy and regulation for these tools (especially conservation off-sets and stewardship units). It is noted that ALSA currently provides no definition of agricultural land or land for agricultural purposes. It is noteworthy that no other legislation or regulation in Alberta provides such a definition.

In the absence of provincial direction, the continued conversion and loss of agricultural lands falls squarely in the jurisdiction of municipalities. With their extensive planning and development powers, municipalities can exert significant control over urban encroachment onto agricultural lands. Within a municipality, zoning and other planning decisions can be made that directly impact upon agricultural lands. Municipalities are capable of holding land in fee simple, holding conservation easements, and using TDC schemes to redirect development activities. The impacts of municipal planning and development powers can be enhanced by the new intermunicipal planning provisions within the MGA. While there is no direct reference to agricultural lands in the intermunicipal provisions, intermunicipal development clearly has implications for infrastructure and long term sustainability of our communities.

Access to water can also have meaningful consequences for conversion and fragmentation of agricultural lands. For agricultural operations located in the Bow, Oldman, or South Saskatchewan river basins, the closure of those basins to new allocations is particularly noteworthy for new agricultural users, those who

wish to increase their diversion volume, and exempt agricultural users. A recommendation made by Sandeep Agrawal is that the “provincial government should consider using water as a tool to manage regional growth across the province and integrate it with the “efficient use of land” strategy in the Land Use Framework.”²⁴⁰ Agrawal asserts that regulating water could emerge as an important tool to manage growth, decrease waste and consumption.

Tax structures are certainly a factor in the drive to conserve or convert agricultural lands. However, these structures are at interplay with market forces, local demands and individual choices. Incentives to conserve offered through tax schemes must outweigh the benefit of converting land for development. Further, local demands at the municipal level for a strong tax base must also be addressed. Taxation schemes need to be designed to work in concert with other land planning and management tools as one piece of a larger puzzle.

Financial tools designed to help farmers weather the ups and downs of agricultural operations can lead to enhanced continuity of agricultural operations thereby assisting with keeping agricultural lands in use for that purpose. In terms of the impact of market value on agricultural lands conversion and fragmentation, this may be an area in which information and understanding could be improved. One recommendation made by the Senate Standing Committee on Agriculture and Forestry is to enhance tracking land transfer information.²⁴¹ With improved information in this regard, incentives to conserve land can be better designed (including taxation schemes).

²⁴⁰ Agrawal, *supra* note 70 at 4.

²⁴¹ Standing Senate Committee on Agriculture and Forestry, *supra* note 219.

CONSERVATION TOOL	ENABLING LEGISLATION	SHORTCOMINGS / GAPS	ADVANTAGES
Conservation easements for lands	ALSA	Beneficial tax treatment similar to ecological gifts program is lacking for agricultural lands No current land trusts in Alberta focused solely on agricultural lands and few resources to fund such work	Voluntary tool Binds future landowners and is not readily removed
Conservation offsets	ALSA	Threshold or criteria need to be set (either via regulations or integration into regional plan).	Could be used to require offsets where high valued agricultural land is subject to conversion Provides compensation system to land owner
TDCs	ALSA	Requires Cabinet approval (integration into regional planning may serve as approval) May not meet conservation goals (i.e. need appropriate land use underlay to ensure conservation goals met) No regulations or guidelines have been developed (which would improve adoption and implementation of the tool)	Voluntary system that provides compensation for maintaining lands Allows for municipal planning to drive decisions around agricultural land use (autonomy is maintained)
Stewardship units & exchange	ALSA	No regulations or guidelines have been developed	
Regional “zoning”	ALSA	Requires provincial cabinet approval	Non-compensatory

CONSERVATION TOOL	ENABLING LEGISLATION	SHORTCOMINGS / GAPS	ADVANTAGES
		Likely subject to significant political lobbying or opposition	Can dictate a zoning process for municipalities, i.e. flexibility exists
Conservation directives	ALSA	<p>Imposed by provincial government and hence politically volatile</p> <p>Must be done within a regional plan</p> <p>Compensation is payable (and resources in this regard may be limited)</p> <p>Limits municipal autonomy on planning (because planning decisions tied to degree have to abide by conservation directive)</p>	<p>Limits municipal flexibility to convert high valued lands</p> <p>Enforceable by government</p>
Municipal planning	MGA	Requirements for statutory planning but not binding	Municipal planning decisions are very influential in terms of determining level of development
Taxation – federal Ecological gifts Capital Gains Exemptions Drought and excessive moisture	Income Tax Act	Ecological gifts program is not focused on agricultural lands conservation so may have limited applicability	<p>Voluntary</p> <p>Provides some compensation to conservation actions</p>

CONSERVATION TOOL	ENABLING LEGISLATION	SHORTCOMINGS / GAPS	ADVANTAGES
Farm equipment			
Taxation – provincial Farm fuel benefit	Alberta Personal Income Tax Act	Not directly relevant to conservation of agricultural lands	Not directly relevant to conservation of agricultural lands
Taxation - municipal	MGA		
Payments for Ecological Goods and Service		Need funding	Successful example SARPAL program which uses s.11 agreements to conserve critical habitat on agricultural lands
Certification and Labelling schemes		<p>May require legislative and regulatory framework to be developed</p> <p>If voluntary, may be limited adoption</p> <p>May raise issues of access to information and privacy</p>	Encourage and incentivize sustainable agricultural practices



Gap Analysis

Despite the significant amount of legislation regulating agricultural activities and impacting upon agricultural land conversion and fragmentation, a coherent and comprehensive agricultural policy is missing in Alberta. By filling this gap, land planning and development – at both the regional level under ALSA and the municipal level under the MGA – could be directed with a clear view toward avoiding agricultural land conversion and fragmentation. Provincial policy needs to set priorities, address conflicts (between agricultural and urban activities, as well as conflicting agricultural activities such as conversion of rangelands to cultivated lands), and set objectives. Objectives should address matters of food security, sustainability of agricultural practices, preservation of ecological goods and services, and conservation of agricultural lands.

As noted by Haarsma et al.,²⁴² a major issue with planning in Alberta is disconnect between goals and directives set out in policy versus actual decision-making. They suggest that implementation may be more consistent if the provincial government outlined specific steps to be adopted by municipalities for agricultural land preservation. Haarsma et al. recommend that policy should address issues beyond right-to-farm legislation and preferential tax assessments, and should provide greater emphasis on zoning, agricultural districts, cluster zoning, urban growth boundaries, the purchase of conservation easements, and more comprehensive planning.²⁴³ They stress the importance of multiple policy instruments with vertical and horizontal coordination.

In addition to providing direction through policy, there must be support provided with appropriate legislative tools and funding. Some tools are already enabled in legislation – such as the ALSA stewardship tools and intermunicipal planning – however, there is a need for additional regulation to effectively implement and enforce these tools. Furthermore, financial support is needed to fund stewardship programs (for example: conservation easements, payment for ecological goods and services).

Finally, it may be appropriate to look at non-regulatory mechanisms to address the issue of agricultural land conversion and fragmentation. These might be in the nature of voluntary programs, market-driven incentives, or both.

²⁴² Darren Haarsma, Claire Doll, Angel Bentley, Feng Quinn and Scott Jeffrey, *Agricultural Land Conversion and Fragmentation in Alberta: A Review of Land Cover Patterns 2000-2012 and Land Use Policy* (Edmonton: Alberta Land Institute, n/d).

²⁴³ *Ibid.*



A Path Forward

This report has provided an introduction to the laws and policies which apply to Alberta's agricultural lands and a canvassing of the existing legal tools which impact on the conversion and fragmentation of agricultural lands. In our subsequent report we will:

- provide a gap analysis of Alberta's laws and policies to identify the legal challenges of moving from conversion to conservation of agricultural lands;
- look at other jurisdictions for alternative approaches to minimizing agricultural land fragmentation and loss and ensuring sustainable agriculture which could be adopted in Alberta; and
- make recommendations for legal and policy reform.

The ELC would like to see clear policy direction at the provincial level which supports the conservation of agricultural land guided by environmental principles; sustainable agricultural within the framing of sustainable development. The challenges and opportunities for conservation of agricultural lands need to be identified to ensure coordinated, synergistic use of existing regulatory tools. This requires analysis of the application and effectiveness of regulatory and non-regulatory tools, including market-based tools and taxation (as means of conservation and compensation), the use of zoning and provincial designations, and other tools as they may apply. Furthermore, lessons can be learned from the experiences in other jurisdictions – which may have additional or alternative approaches to the conservation of agricultural lands – and can be used to inform Alberta's laws and policies.