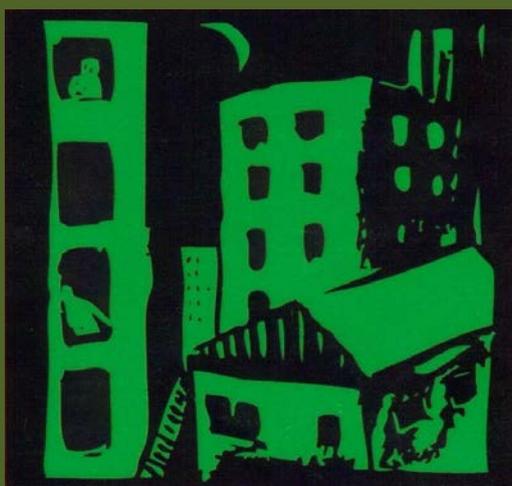


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# Sustainable Development of Oil Sands Projects in Sub-Saharan Africa: Lessons from the Governance Regime for the Alberta Oil Sands

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## 1 INTRODUCTION

While global demand for fossil fuel sources is rising, conventional oil production is on the decline,<sup>1</sup> due principally to three factors: the non-renewability of conventional oil, its natural tendency to deplete, and disruptive responses to the social and environmental risks posed by conventional oil production.<sup>2</sup> Although

<sup>1</sup> International Energy Agency *World Energy Outlook 2016*, Executive Summary 6. Available at <https://www.iea.org/publications/freepublications/publication/WorldEnergyOutlook2016ExecutiveSummaryEnglish.pdf> (accessed 10 July 2017).

<sup>2</sup> Höö M et al “Decline and depletion rates of oil production: a comprehensive investigation”, *Philosophical Transactions of the Royal Society* (2012) 7. Available at <http://rsta.royalsocietypublishing.org/content/roypta/372/2006/20120448.full.pdf> (accessed 10 July 2017).

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some new conventional oil finds have recently been made in a number of countries, such as, Tanzania, Egypt and Senegal, international oil companies are intensely competing for access to unconventional oil sources, such as, oil (or tar) sands and shale oil, despite the technical difficulties of exploiting them and the extremely higher environmental risks they carry.<sup>3</sup> Before the 2014 drop in oil prices, oil sands were “the most commercially” viable unconventional oil resource.<sup>4</sup> They are found in commercial deposits in limited parts of the world, with Canada and Venezuela accounting for a great share of total global deposits.<sup>5</sup> The deposits are present in a number of Sub-Saharan African countries as well, particularly Angola, Madagascar, Nigeria and Republic of Congo, all of which are in the early development planning stages of the exploitation of the resources<sup>6</sup> although reports suggest that development has advanced the most in Madagascar.<sup>7</sup> While the drop in oil prices has led to a number of investment divestments in Alberta, Canada (mainly by foreign companies), the prices are rising gradually and, moreover, even minor profits could mean much for most African countries given their poverty levels. Also, with sustained technological advances, production costs as well as environmental risks might plummet, resulting in renewed investment interest in the oil sands and higher profits for African countries.<sup>8</sup>

Due to the notorious “resource curse” history of oil in Sub-Saharan Africa, concerns have already rent the air regarding the potential human and environmental risks exploitation of the resources poses to local communities in the region.<sup>9</sup> In Alberta, Canada, where oil sands development has been taking place energetically for decades until the investment pull-back following the 2014 price downturn, such investments have also been intensely criticized for their socio-environmental impacts, particularly due to the greenhouse gas (GHG) emissions from oil sands production estimated to be several times higher than those from conventional oil production.<sup>10</sup> When coupled with issues of weak governance prevalent in Sub-Saharan Africa, oil sands development in the region raises even more concerns. This has led to calls for a freeze on oil sands development in Sub-Saharan Africa until its potential socio-environmental risks have

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<sup>3</sup> Wykes S “Locking up the future: Unconventional oil in Africa” (December 2011) 4. Available at [https://foeeurope.org/sites/default/files/publications/foee\\_locking\\_up\\_the\\_future\\_hbs\\_1111.pdf](https://foeeurope.org/sites/default/files/publications/foee_locking_up_the_future_hbs_1111.pdf) (accessed 10 July 2017).

<sup>4</sup> Wykes (2011) 4.

<sup>5</sup> Meyer RF, Attanasi ED & Freeman PA “Heavy oil and natural bitumen resources in geological basins of the world”, USGS Open File-Report 2007–1084 2. Available at <https://pubs.usgs.gov/of/2007/1084/OF2007-1084v1.pdf> (accessed 10 July 2017).

<sup>6</sup> Wykes (2011) 5.

<sup>7</sup> Heinrich Böll Foundation & Friends of the Earth Europe “Marginal oil: what is driving oil companies dirtier and deeper?” (2012) 7. Available at [http://www.mtvsh.hu/dynamic/marginal\\_oil\\_2011.pdf](http://www.mtvsh.hu/dynamic/marginal_oil_2011.pdf) (accessed 10 July 2017).

<sup>8</sup> Nwapi C & Nliam O “EIA legislation and sustainable development of oil sands projects in Madagascar: a critical assessment” (2017) 35(4) *Journal of Energy and Natural Resources Law* 2.

<sup>9</sup> See, eg, Heinrich Böll Foundation, “Energy futures: ENI’s investments in tar sands and palm oil in the Congo Basin” (2009) 3. Available at [https://www.boell.de/sites/default/files/091109\\_Energy\\_Futures\\_Congo\\_Oil.pdf](https://www.boell.de/sites/default/files/091109_Energy_Futures_Congo_Oil.pdf) (accessed 10 July 2017).

<sup>10</sup> See Nwapi C “A review of environmental enforcement culture in Alberta in relation to the oil sands”, CIRL Occasional Paper #40, March 2013, 1. Available at <http://dspace.ucalgary.ca/bitstream/1880/49462/1/EnforcementOP40w.pdf> (accessed 12 July 2017).

been fully assessed.<sup>11</sup> Given Alberta's decades-old experience with oil sands development, it would be proper for Sub-Saharan African countries to consider what lessons they can learn from Alberta to promote the sustainable development of the resource and reduce its negative socio-environmental impacts. This article seeks to identify key features of the oil sands governance regime in Alberta that can be taken as lessons for Sub-Saharan Africa.

By "governance" is meant "the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity ... manages its common affairs".<sup>12</sup> Governance is thus different from government although the government also participates in governance and in fact co-ordinates the system of governance – the relationships among the different societal actors. Writing recently about oil and gas development in Alberta, Wanvik notes the existence of "governance innovations" constructed around three interconnected developments: governance as: a multi-stakeholder approach, a "pragmatic" and "consensus-seeking" approach, and a "parallel emergence of corporate social responsibility as stakeholder management".<sup>13</sup> The takeaway from his analyses is that governance in the oil and gas sector in Alberta has evolved towards the creation of instruments to manage the complex relationships among the multiple stakeholders in the industry. At the most basic level, those stakeholders are the government, industry and Aboriginal people (or the public). Wanvik identifies three governance instruments adopted in Alberta: duty to consult Aboriginal peoples, environmental impact assessments (EIAs) and impact benefit agreements (IBAs).

Wanvik's approach is useful but too narrow for the purposes of this article. While I recognize the existence of the "governance innovations" he highlights, my approach will focus on the broader features of the governance instruments rather than only on how those instruments promote communication and deliberation among stakeholders, which, however, will also be apparent in my analysis of the instruments. Also, I will consider an additional governance feature of oil sands development in Alberta without which sustainable development of the oil sands would remain a mere wishful expression – environmental enforcement. My principal argument is that these four governance features of oil sands development in Alberta (ie, EIAs, duty to consult, IBAs, and environmental enforcement) contain lessons that Sub-Saharan African governments can adapt to their own local circumstances for the sustainable development of oil sands projects in their respective countries.

The balance of this article is divided as follows. Section 2 examines legal transplant theory to ascertain the transplantability of Alberta's governance regime for oil sands development into Sub-Saharan Africa. Section 3 sets forth the governance

<sup>11</sup> Heinrich Böll Foundation (2009) 4. Similar calls have since been issued in Alberta. See Magill B "Scientists call for halt to Canada's oil sands growth" *Scientific American* (10 June 2015). Available at <https://www.scientificamerican.com/article/scientists-call-for-halt-to-canada-s-oil-sands-growth/> (accessed 12 July 2017).

<sup>12</sup> Ruggie J "Global governance and 'new governance theory': lessons from business and human rights" (2014) 20 *Global Governance* 5.

<sup>13</sup> Wanvik TI "Governance transformed into corporate social responsibility (CSR): new governance innovations in the Canadian oil sands" (2016) 3 *EIS* 521.

architecture for oil sands development in Alberta as established under the Canadian Constitution, with a view to identifying the various levels of governance relevant to oil sands development in Alberta and the extent of authority the Alberta government has to formulate strategies to promote sustainable development of the oil sands. Section 4 then explains Alberta's sustainable development strategy for the oil sands. Section 5 analyses the four governance features of oil sands development in Alberta identified above, while Section 6 examines the transplantability of Alberta's governance regime in Sub-Saharan Africa. Section 7 concludes the discussion. The principal thesis of this article is twofold: (1) Alberta's governance regime for oil sands development holds vast lessons for Sub-Saharan African countries with oil sands deposits; and (2) while there are significant socio-economic and political differences between Alberta and Sub-Saharan African countries, a successful legal transplant of the Alberta governance regime to Sub-Saharan Africa is very possible.

## 2 LEGAL TRANSPLANT THEORY

According to the *Oxford English Dictionary*, "to transplant" means to "remove and displace", to "transport to another country or place of residence". From a legal perspective, the transplant occurs across legal jurisdictions. As defined by Watson, legal transplant is "the moving of a rule ... from one country to another, or from one people to another".<sup>14</sup> Watson believes that this is "socially easy"<sup>15</sup> because there is no meaningful connection between rules and "historical factors and habits of thought".<sup>16</sup> Since Watson's pioneering work, different views on legal transplant have emerged in the discourse, some scholars, such as Legrand, denying the possibility of legal transplant altogether,<sup>17</sup> while others offer different views of it. Ewald, for instance, divides Watson's theory into "strong Watson" and "weak Watson", strong Watson being wholly unconnected with society while weak Watson retains some cultural connection.<sup>18</sup> Drawing on observations from Montesquieu, Kahn-Freund argues that using foreign law as a model for local law "becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law".<sup>19</sup> For him, it is expedient to consider "how far" the legal rule to be imported "owes its existence or its continued existence to a distribution of power" in its home jurisdiction which the importing jurisdiction does not share.<sup>20</sup> Legrand, however, believes that for a legal transplant to be successful, the transplanted rule must function in exactly the same way in the importing jurisdiction as in the exporting jurisdiction; since this is not possible due to cultural and legal infrastructural differences, legal transplant is impossible.<sup>21</sup>

<sup>14</sup> Watson A *Legal transplants*, 2 ed (Athens GA: University of Georgia Press 1993) 21.

<sup>15</sup> Watson (1993) 95.

<sup>16</sup> Watson (1993) 97.

<sup>17</sup> Legrand P "The impossibility of 'legal transplants'" (1997) 4 *MJECL* 114.

<sup>18</sup> Ewald W "Comparative jurisprudence (II): The logic of legal transplants" (1995) 43 *AJCL* 491-492.

<sup>19</sup> Kahn-Freund O "On uses and misuses of comparative law" (1974) 37 *MLR* 27.

<sup>20</sup> Kahn-Freund (1974) 12.

<sup>21</sup> Legrand (1997) 115-117.

Under Watson's theory, it is only a question of whether the transplanted rule "functions in a manner that is socially useful in the recipient country".<sup>22</sup> His theory thus suggests that it is possible to transfer Alberta's governance regime for oil sands development to Sub-Saharan Africa regardless of any institutional, sociological, political and other differences that may exist between Alberta and Sub-Saharan Africa. On the other hand, Kahn-Freund's theory compels us to ask how far the Alberta governance regime for oil sands development owes its existence or continued existence to Alberta which Sub-Saharan Africa does not share. Apparently, while knowledge of the socio-political context in the foreign jurisdiction is unimportant to Watson, it is important to Kahn-Freund.

Today, the dominant view recognizes the occurrence – nay, prevalence – of legal transplants, but acknowledges that there is not a one-size-fits-all approach to legal transplants. Most modern views acknowledge that "the adopting legal system will likely interpret, apply, and enforce transplanted rules differently".<sup>23</sup> It is a question of identifying the conditions for a successful transplant. Although scholars have considered the matter differently, the bottom line is that the more the two jurisdictions have in common the more successful a transplant is likely to be.<sup>24</sup> Much depends, however, on "the intended purpose of the transplant" and how well the imported law is adapted to local conditions.<sup>25</sup>

There are grounds to believe that a successful transplant of the governance regime for oil sands development in Alberta into Sub-Saharan Africa is possible. First, Alberta is by far the most experienced jurisdiction in the world in terms of oil sands development – in fact, it is the only jurisdiction with substantial oil sands experience – which makes it appropriate to say that its governance regime should at least be considered regardless of any differences that may exist between Alberta and Sub-Saharan Africa. Certainly, there are critical differences. Alberta is a province in a federation whereas each of the Sub-Saharan African jurisdictions with oil sands deposits is a country. Naturally, the institutional arrangements in Alberta would be influenced by the political arrangement of Canada as a federation. The regulatory and governance structures function within this political arrangement, which may not necessarily be shared by Sub-Saharan African countries. However, the environmental impacts of oil sands development are likely to be generally comparable across jurisdictions. Moreover, as Odumosu has argued in the context of the transferability of Alberta's gas flaring reduction framework to Nigeria, even if Alberta's regulatory and governance structures are not transferable to Sub-Saharan Africa, Sub-Saharan Africa can learn from the experience of Alberta, even if only learning of the types of problems that arise in oil sands development, the mechanisms that Alberta has utilized to tackle them, the reasons they are utilizing those mechanisms, and how those mechanisms are

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<sup>22</sup> Bitas BC "Comparative theory, judges and legal transplants: a practical lesson from Singapore and its relevance to transnational convergence" (2014) 26 *SALJ* 53.

<sup>23</sup> Morin J-F & Gold ER "An integrated model of legal transplantation: the diffusion of intellectual property law in developing countries" (2014) 58 *ISQ* 782.

<sup>24</sup> Odumosu IT "Transferring Alberta's gas flaring reduction regulatory framework to Nigeria: potentials and limitations" (2007) 44 *ALR* 872.

<sup>25</sup> Odumosu (2007) 872.

working.<sup>26</sup> The fact that Sub-Saharan African countries with oil sands deposits are still at very early stages in their exploitation of the resources, combined with the strong opposition to oil sands development by environmental activists, makes looking to jurisdictions like Alberta both prudent and expedient. A study such as this can therefore not “be an exercise in futility for, if nothing else, [Sub-Saharan Africa] would have acquired added information on mechanisms that could work within its system and those that simply cannot be incorporated”.<sup>27</sup>

It must be pointed out that each of the Sub-Saharan African countries with oil sands deposits has its own socio-political history which can be more or less similar to Alberta’s. Nigeria, for instance, operates a federal system of government with a constitutional allocation of regulatory powers between the national and subnational governments. Angola, Madagascar and the Republic of Congo, however, operate unitary systems of government. This suggests that Nigeria likely has the closest similarity to Alberta and, therefore, it would be relatively easier for it than the other three countries to transplant the Alberta governance regime. As noted, however, much depends on the purpose of a legal transplant and how well a jurisdiction is able and ready to adapt the transplanted law to its own local conditions.

### **3 THE GOVERNANCE ARCHITECTURE FOR OIL SANDS DEVELOPMENT IN ALBERTA**

The regulation of oil sands development in Alberta is governed mainly by a combination of federal and provincial laws and regulations in accordance with the Constitution Act 1867, which provides for “heads of power” allocated between the federal and the provincial governments. However, there is considerable overlap between the powers allocated to both levels of government, resulting in both levels having conflicting authority over some matters. Canadian courts resolve such conflicts by either (1) examining the “pith and substance” of the law to determine where enacting authority over the subject matter resides;<sup>28</sup> or (2) determining that enacting authority is shared and, applying the “double aspect” doctrine, holding that both levels of government have authority over certain aspects of the matter, provided the doctrine of paramountcy will apply in favour of federal law where there is a conflict.<sup>29</sup> However, the federal government is conferred with jurisdiction over residual matters where the Constitution provides neither exclusive nor shared jurisdiction over the subject matter.<sup>30</sup>

International and interprovincial matters are generally under federal jurisdiction while matters considered local to a province are under provincial jurisdiction.<sup>31</sup> Authority in respect of exploration for, and conservation and management of, non-renewable natural resources resides with the province where the resources are

<sup>26</sup> Odumosu (2007) 872.

<sup>27</sup> Odumosu (2007) 872.

<sup>28</sup> *Canadian Western Bank v Alberta* [2007] 2 SCR 3.

<sup>29</sup> *Reference re Securities Act* [2011] 3SCR 873; *Rothmans, Benson & Hedges Inc v Saskatchewan* [2005] 1 SCR 188.

<sup>30</sup> *Constitution Act, 1867* s 91 (the “peace, order and good government” clause).

<sup>31</sup> *Constitution Act, 1867* s 19(13).

located.<sup>32</sup> Apparently, ownership and disposition of oil sands falls squarely under this head of power. This does not mean, however, that the federal government has nothing to do with oil sands development taking place in Alberta. Section 91(24) of the Constitution Act, 1867 gives the federal parliament authority over matters relating to “Indians, and lands reserved for Indians”, under which head of power the federal government can get involved in decisions regarding whether oil sands projects in Alberta that affect Aboriginal interests can proceed and under what conditions.

However, the constitutional allocation of power is not exhaustive. One area of responsibility which is not allocated to any level of government is environmental protection. The Canadian Supreme Court has, however, held that environmental regulatory authority is shared by both federal and provincial governments provided each level of government’s exercise of power is related to a head of power clearly assigned to it under the Constitution Act, 1867.<sup>33</sup> Several heads of power have been identified as allowing federal involvement in environmental protection. They include federal criminal law power under section 91(27) of the Constitution Act, 1867, the federal coast and inland fisheries power under section 91, and the peace, order and good government clause.<sup>34</sup> These powers have enabled the federal government to get involved in regulating the environmental aspects of oil sands development in Alberta.

Furthermore, there is a third level of governance in oil sands development in Alberta: the municipal (or local) governments. Although little attention has been paid to their role in oil and gas decision-making in Alberta, municipal governments are assuming increasing visibility. Their visibility is driven by provincial acknowledgement that many of the negative impacts of oil and gas development are borne mostly at the municipal level – by landowners and other land users.<sup>35</sup> As the level of government “closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity”,<sup>36</sup> municipal governments “are often on the frontlines in dealing with landowner discontent”.<sup>37</sup>

A municipality is a creature of the provincial legislature and is defined under the Municipal Government Act (MGA)<sup>38</sup> as “a city, town, village, summer village, municipal district or specialized municipality”. A municipality is used synonymously with “local authority” and “local government”.<sup>39</sup> A municipality has the power to enact bylaws to regulate a variety of matters within its territory, including matters affecting public health and safety, the protection of property, business activities within the territory, public utilities, the use and development of private and municipal lands, and (in some cases) public lands.<sup>40</sup> Although municipal bylaws are not binding on the provincial Crown, where Crown land is leased to a private person, say, for oil and gas purposes, the

<sup>32</sup> *Constitution Act, 1867* s 92A(1).

<sup>33</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3; *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401.

<sup>34</sup> See Hogg PW “Constitutional authority over greenhouse gas emissions” (2009) 46(2) *ALR* 511.

<sup>35</sup> Vlavianos N & Thompson C “Alberta’s approach to local governance in oil and gas development” (2010) 48:1 *ALR* 65–57.

<sup>36</sup> *114957 Canada Ltée (Sraytech Société d’arrosage) v Hudson (Town of)* [2002] 2 SCR 241 para 3.

<sup>37</sup> Vlavianos & Thompson (2010) 57.

<sup>38</sup> *RSA 2000 c M-26* s 1(1).

<sup>39</sup> *MGA* s 1(1).

<sup>40</sup> *MGA* s 7 & Part 17.

MGA will apply to that private person except where the Crown claims immunity either under the lease or by some other means.<sup>41</sup>

The authority of municipalities to regulate oil and gas development taking place on their territory is, however, very limited and is based on their power to control the use and development of certain land within their territory. For instance, an operator must notify an affected municipal authority before it can carry out a seismic exploration on municipal land and before the operator can apply to the Alberta Energy Regulator (AER) for a licence.<sup>42</sup> Also, municipalities have the authority to protect “the public within its area of jurisdiction” in the context of oil and gas development through a declaration of a state of emergency within their territory pursuant to Alberta’s Emergency Management Act, except where the provincial “Government assumes direction and control”.<sup>43</sup>

In spite of their limited authority, municipalities are proactive in letting their voice be heard during oil and gas project approval processes by filing applications asking that projects be suspended or delayed to allow time for municipalities to “catch up” to address the projects’ adverse socio-environmental impacts.<sup>44</sup> Several municipalities have developed protocols with which oil and gas operators are to comply – protocols dealing with wildlife protection, land reclamation, noise pollution, emergency preparedness, etc, and protocols providing additional public notification and consultation requirements for oil and gas operators.<sup>45</sup> In 2008 one municipality enacted a bylaw requiring its review and approval of emergency response plans for industrial activities.<sup>46</sup> However, when provincial agencies raised questions about potential overlap with provincial regulations, the municipality rescinded the bylaw as a measure of “good faith and commitment by all parties to go forward and improve existing processes to address the County’s concerns”.<sup>47</sup> Thus, even though municipalities do not have explicit and direct authority to regulate oil and gas development in Alberta, their proactive approach to protect the welfare of their residents influences how oil and gas development is governed in the province. At the minimum, it promotes a culture of

<sup>41</sup> Laux FA *Planning law and practice in Alberta*, 3 ed (Edmonton: Juriliber 2005) §§ 4.1(5)(b)–(c).

<sup>42</sup> Alberta Environment and Parks, *Exploration Directive 2006-06: Application for Exploration Approval* (2006). Available at <http://aep.alberta.ca/forms-maps-services/directives/documents/ED-ApplicationExplorationApproval-Dec01-2013.pdf> (accessed 20 July 2017). Strathcona County, *The Strathcona County Protocol for Seismic Surveying, Drilling, Construction and Operation of Oil and Gas Facilities in Strathcona County*, Revised: January 2017, Appendix 2 at 24. Available at <http://www.strathcona.ca/files/files/at-pds-strathcoprotocol2017.pdf> (accessed 12 July 2017). See, also, Kenyon D & Way N *Landowner’s guide to oil and gas development* 3 ed (Calgary: Pembina Institute 2016) 3–17. Available at <https://www.pembina.org/reports/landowners-guide-2016.pdf> (accessed 12 July 2017).

<sup>43</sup> Emergency Management Act RSA 2000 Cap E-6.8 s 11; *Canadian 88 Energy Corp: Application to Drill a Level 4 Critical Sour Gas Well in the Lochend Field*, Decision Summary, EUB Decision 99-16 7 July 1999 14. Available at <https://www.aer.ca/documents/decisions/1999/d99-16.pdf> (accessed 12 July 2017).

<sup>44</sup> See, e.g., *Imperial Oil Resources Ventures Ltd: Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area, Joint Panel Report, EUB Decision 2007-013 (27 February 2007)*. See, also, Vlavianos & Thompson (2010) 7.

<sup>45</sup> See, eg, Strathcona County (2017).

<sup>46</sup> Parkland County, Bylaw No 60-2008, Industrial Activity Emergency Response Plan Review and Approval Bylaw (9 December 2008).

<sup>47</sup> Parkland County, Bylaw No 27-2009, a bylaw to rescind the Industrial Activity Emergency Response Plan Review and Approval Bylaw 60-2008 (6 June 2009).

inter-governmental consultation on how oil and gas projects are to be carried out, which in turn promotes an integrated approach to provincial growth.

In sum, the governance architecture for oil sands development in Alberta consists of three levels: the federal, provincial, and municipal levels. The heart of governance activity is the provincial level where most of the regulatory decisions are made. Whether the federal government would be involved in the regulation of oil sands development in Alberta depends on the specific location of the project and/or on the scope of the project's environmental impacts.

#### 4 ALBERTA'S SUSTAINABLE DEVELOPMENT STRATEGY FOR THE OIL SANDS

As famously defined by the World Commission on Environment and Development (WCED), sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".<sup>48</sup> Accordingly, in the pursuit of economic development, there is need to confine development activities to the "carrying capacity" of the earth and to manage natural resources in a manner that serves both current demand and the needs of future generations.<sup>49</sup> At the heart of the concept, therefore, are ideas of intra-generational equity and intergenerational equity. Intra-generational equity relates to development and is a pre-condition for its achievement, while intergenerational equity relates to sustainability and is a pre-condition for its achievement.<sup>50</sup> Scholarly engagement with the concept has led to multiple interpretations of it, the most popular being the identification of three core components of the concept (otherwise known as the triple bottom line): the economic component, the environmental component and the social component.<sup>51</sup> This means that for development to be considered sustainable, it must contribute positively to the surrounding economic system, must allow the preservation of the natural environment for future generations, and must contribute positively to the surrounding social system, ie, to the development of the community where the development takes place.<sup>52</sup>

Despite the above basic idea of sustainable development there is seemingly unending debate about how to advance sustainability. An important by-product of this debate is an increase in cross-disciplinary communication especially between scientists and social scientists, with attendant shifts in the research methods utilized to understand sustainability issues. The concept of "socio-ecological systems" (SES) is, for

<sup>48</sup> World Commission on Environment and Development (WCED) *Report of the World Commission on Environment and Development: our common future* (1987) 43. Available at [www.un-documents.net/our-common-future.pdf](http://www.un-documents.net/our-common-future.pdf) (accessed 12 July 2017).

<sup>49</sup> IUCN/UNEP/WWF *Caring for the earth: A strategy for sustainable living* (Gland (Switzerland): IUCN/UNEP/WWF 1991) 10. Available at <https://portals.iucn.org/library/efiles/documents/CFE-003.pdf> (accessed 12 July 2017).

<sup>50</sup> George C "Testing for sustainable development through environmental assessment" (1999) 19(2) *EIAR* 178.

<sup>51</sup> Elkington J *Cannibals with forks: the triple bottom line of 21<sup>st</sup> century business* (Capstone 1998); Barkemeyer R et al "What happened to the 'development' in sustainable development? Business guidelines two decades after Brundtland" (2014) 22(1) *Sustainable Development* 17.

<sup>52</sup> See Alhaddi H "Triple bottom line and sustainability: a literature review" (2015) 1:2 *Business & Management Studies* 8; Jackson A et al "Sustainability and triple bottom line reporting – what is it all about?" (2011) 1(3) *IJBHT* 58.

instance, being explored to understand and explain the drivers of change in our ecosystem.<sup>53</sup> Building on the ideas of Elinor Ostrom, SES scholars explore the complex interaction between science and society. The goal is to find solutions to the sustainability crisis in the age of the Anthropocene, i.e., the time during which human activities so outpace geophysical processes that “[h]umanity itself has become a global geophysical force”.<sup>54</sup> Governance systems addressing sustainability could also be built around this cross-disciplinary communication to identify what actions should be taken, and to establish mechanisms to ensure that those actions are taken by those charged with them. This requires the articulation of a clear sustainable development strategy and action plan to pursue it.

Alberta’s *Provincial Energy Strategy* recognizes that together with conventional energy resources, renewable and alternative energy resources will play an increasing role in guaranteeing Alberta’s energy future and that the oil sands will play a significant role in transforming Alberta’s economy and in meeting global energy demand.<sup>55</sup> Alberta’s sustainable development strategy for the development of its oil sands is articulated in *Responsible Actions: A Plan for Alberta’s Oil Sands*.<sup>56</sup> The government’s vision for the oil sands, which is that “development occurs responsibly, sustains growth for industry and the province over the long term, and is done in a manner that enhances Albertans’ quality of life”,<sup>57</sup> is the foundation for this strategic plan. The plan was informed by four core principles: (1) healthy environment and communities; (2) balanced growth; (3) collaboration; and (4) public interest and accountability.<sup>58</sup> Its projected outcomes are optimized economic growth, reduced environmental footprint, and increased quality of life for present and future generations of Albertans.<sup>59</sup>

The plan identifies six strategies: (1) develop the oil sands in an environmentally responsible manner; (2) nurture healthy communities and a quality of life in Alberta that attract and retain people and businesses; (3) maximize the long-term value of oil sands development for all Albertans; (4) strengthen the government’s relationship with Aboriginal peoples, through appropriate consultations, to reconcile divergent interests; (5) increase investments in research and innovation to improve access to oil sands deposits, reduce development costs and minimize environmental impacts; and (6) address challenges in communicating information about oil sands development to the

<sup>53</sup> See Hall DM “Social-ecological system resonance: a theoretical framework for brokering sustainable solutions” (2017) 12(3) *Sustainability Science* 381–392; Partelow S “Coevolving Ostrom’s social–ecological systems (SES) framework and sustainability science: four key co-benefits” (2015) 11(3) *Sustainability Science* DOI: 10.1007/s11625-015-0351-3; Steffen W et al “The anthropocene: from global change to planetary stewardship (2011) 40(7) *Ambio* 739–761.

<sup>54</sup> Steffen (2011) 741.

<sup>55</sup> Government of Alberta, *Launching Alberta’s Energy Future: The Provincial Strategy* (December 2008). Available at <https://open.alberta.ca/dataset/6f220382-b4ae-43f8-b3f9-7c1230e6700e/resource/e7c2f3d2-7e0d-4774-a463-c54c5450a04e/download/4256197-2009-Launching-Albertas-Energy-Future-Provincial-Enregy-Strategy-2009-08-27.pdf> (accessed 12 July 2017).

<sup>56</sup> Government of Alberta, *Responsible actions: a plan for Alberta’s oil sands* (February 2009) 4. Available at [http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions\\_web.pdf](http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions_web.pdf) (accessed 12 July 2017).

<sup>57</sup> Government of Alberta (2009) 4.

<sup>58</sup> Government of Alberta (2009) 9.

<sup>59</sup> Government of Alberta (2009) 10.

public and in ensuring accountability in the management of the resources.<sup>60</sup> There are four key success factors for the achievement of the strategies: (1) a “well-defined and stable regulatory” environment; (2) investments by governments and industry; (3) partnership among stakeholders and all governmental levels; and (4) research and technological innovation.<sup>61</sup>

The Alberta government has already taken several significant steps to achieve its strategic plan. Those steps include the development of a gas flaring reduction framework,<sup>62</sup> a *Land-use Framework* to manage the cumulative effects of oil sands development on each region of the province,<sup>63</sup> a climate change strategy to meet Alberta’s GHG reduction goals,<sup>64</sup> a *Water for Life* strategy to improve water management in Alberta,<sup>65</sup> and an enhanced enforcement of environmental laws and regulations.<sup>66</sup> Alberta’s gas flaring reduction framework, which uses a combination of regulatory and non-regulatory measures, is viewed by the World Bank as a global best practice model for gas flaring reduction and as “the most comprehensive and transparent gas flaring and venting regulatory regime”.<sup>67</sup> Although public concern exists regarding the extent of gas flared in Alberta, scholars acknowledge that the province has significantly curbed gas flaring.<sup>68</sup> Between 2008 and 2012, for instance, nearly 96 per cent of all solution gas was conserved rather than flared or vented.<sup>69</sup>

It is with the AER that responsibility for implementing the Alberta sustainable development strategy relating to the oil sands essentially rests. The agency seems to have shown a commitment to transparency and to continuous improvement through investments in research and development. Its annual reports show not only what progress it has made since its inception but also how it is working towards meeting its goals, where it has fallen short and what challenges are responsible for that, and what measures it intends to take to overcome those challenges in the future.<sup>70</sup> Immediately after its establishment in 2013, it established a Core Research Centre, which provides

<sup>60</sup> Government of Alberta (2009) 16–38.

<sup>61</sup> Government of Alberta (2009) 40–41.

<sup>62</sup> Alberta Energy Regulator (AER) *Directive 060: Upstream petroleum industry flaring, incinerating, and venting*, (22 March 2016). Available at <https://www.aer.ca/documents/directives/Directive060.pdf> (accessed 13 July 2017).

<sup>63</sup> Government of Alberta *Land-use framework* (2008). Available at <https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%202008-12.pdf> (accessed 13 July 2017).

<sup>64</sup> Government of Alberta *Climate Leadership – Report to Minister* (November 2015). Available at <https://www.alberta.ca/documents/climate/climate-leadership-report-to-minister.pdf> (accessed 13 July 2017).

<sup>65</sup> Government of Alberta *Water for life: Alberta’s strategy for sustainability* (November 2003). Available at <http://aep.alberta.ca/water/programs-and-services/water-for-life/strategy/documents/WaterForLife-Strategy-Nov2003.pdf> (accessed 13 July 2017).

<sup>66</sup> See Nwapi (2013).

<sup>67</sup> World Bank Group *Regulation of associated gas flaring and venting: a global overview and lessons from international experience*, Report #3 5. Available at <http://documents.worldbank.org/curated/en/590561468765565919/pdf/295540RegulationofGasFlaring0no10301public1.pdf> (accessed 13 July 2017).

<sup>68</sup> See eg, Odumosu (2007) 865; Oriji Onuma, “Mainstreaming sustainability: An evaluation of Alberta’s legal and regulatory regime for gas flaring” (2015) 116 *Resources* 8.

<sup>69</sup> Onuma (2015) 8.

<sup>70</sup> See eg, AER *2016/2017 Annual Report*. Available at <http://www1.aer.ca/annualreport/media/AER2016-17AnnualReport.pdf> (accessed 11 December 2017).

access to a variety of data and information about the energy industry, including drill cutting samples and daily well drilling reports.<sup>71</sup> It has piloted a number of projects to test its regulatory models and has developed new rules, directives and industry performance programs to strengthen its regulatory effectiveness.<sup>72</sup> The industry performance program establishes the standard for measuring and reporting on energy development activities. It is aimed at going beyond compliance to enhancing operator performance with a view to ensuring that energy development is carried out in a safe and responsible manner.<sup>73</sup> In 2016, it achieved a 3 per cent reduction in energy pipeline incidents.<sup>74</sup> In the same year, it established the International Centre of Regulatory Excellence – a not-for-profit institution – to help regulators around the world to train, collaborate and innovate to address regulatory challenges faced in the energy sector.<sup>75</sup> A 2017 survey showed that 82 per cent of Albertans and 77 per cent of stakeholders expressed confidence in its performance.<sup>76</sup>

In sum, Alberta's sustainable development strategy reflects a commitment to minimizing the socio-environmental impacts of economic development as well as maximizing the efficient use of natural resources. One of the strategy's major strengths, however, is that it is specifically attuned to the development of the oil sands. One of its weaknesses, however, may be the absence of a legal framework establishing the strategy. This can be contrasted with the federal sustainable development strategy which is enacted under the Federal Sustainable Development Act (FSDA) under which the Canadian government "accepts the basic principle that sustainable development is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government".<sup>77</sup> The Act establishes mechanisms for implementing the strategy and for monitoring progress.<sup>78</sup> The value of a legal framework is that it raises the degree of importance attached to the strategy and gives a certain degree of assurance that the strategy will be followed through.

## 5 KEY FEATURES OF ALBERTA'S GOVERNANCE REGIME FOR SUSTAINABLE OIL SANDS DEVELOPMENT

Before considering the key features of the governance regime for oil sands development in Alberta, it is important to point out that oil sands development in Alberta is regulated by the Responsible Energy Development Act, 2012 (REDA),<sup>79</sup> the same legislation that

<sup>71</sup> AER Core Research Centre. Available at <https://www.aer.ca/about-aer/contact-us/core-research-centre> (accessed 11 December 2017).

<sup>72</sup> AER 2016/2017 Annual Report 12.

<sup>73</sup> AER "Industry Performance Program". Available at <https://www.aer.ca/data-and-publications/industry-performance-program> (accessed 11 December 2017).

<sup>74</sup> AER 2016/2017 Annual Report 12.

<sup>75</sup> See International Centre of Regulatory Excellence Available at <http://icoreglobal.ca/about-icore> (accessed 11 December 2017).

<sup>76</sup> AER 2016/2017 Annual Report 12.

<sup>77</sup> SC 2008 c 33 s 5.

<sup>78</sup> FSDA s 7(1).

<sup>79</sup> SA 2012 c R-17.3.

regulates conventional oil development. This contrasts with the situation in most countries where oil sands development is regulated by mining legislation. However, while oil sands development is generally governed by the same legislation governing conventional oil development in Alberta, there is also separate legislation governing certain aspects of oil sands development,<sup>80</sup> indicating recognition by the Alberta government that even though oil sands development can be integrated into conventional oil regulation, oil sands development has unique features that warrant additional legislation. The discussion that follows analyses five key features of oil sands governance in Alberta: energy regulatory policy, EIAs, Aboriginal/public consultation, impact benefit agreements, and environmental enforcement.

### 5.1. Energy Regulatory Policy in Alberta

Energy regulators operate in an increasingly complex system where public and private interests clash and international competition gets stiffer due mainly to increasing energy demand and depleting conventional oil resources. Balancing the multiple interests while ensuring that a jurisdiction remains competitive in terms of attracting investments is essential for the sustainability of the jurisdiction's energy industry. A Regulatory Enhancement Task Force established by the Alberta government in 2010 to seek stakeholder opinions regarding the existing regulatory regime identified a desire for a simplified, more transparent and accountable system that uses a single, consistent set of processes instead of different processes across different regulatory bodies.<sup>81</sup> The task force also noted a desire by Albertans for clear public engagement processes that enable Albertans to participate effectively during the policy development stages of energy resources in the province.<sup>82</sup> These findings led to a major shift in the energy regulatory system in Alberta through the enactment of the REDA in 2012.

The REDA brought together already existing regulatory bodies (the Energy Resource Conservation Board and the Environment and Sustainable Resource Development) to form the AER, an independent agency established as a corporation (not an agent of the Crown), with quasi-judicial functions.<sup>83</sup> The goal was to create a single energy regulator – a one-stop shop for energy regulation. This means that energy companies will deal with only one regulator – the AER – when proposing energy projects in Alberta.<sup>84</sup> This allows for an integrated approach to energy regulation. AER's authority is, however, limited to oil, bitumen, natural gas and coal, and does not extend to electricity generation and distribution, gasoline (or any other refined petroleum products) and oil and gas pipelines crossing provincial or international borders (which

<sup>80</sup> An example is the Oil Sands Conservation Act RSA 2000 c O-7, whose main objective is “to effect conservation and prevent waste of the oil sands resources of Alberta” (s 3(a)).

<sup>81</sup> Government of Alberta “Enhancing assurance: developing an integrated energy resource regulator”, A Discussion Document, May 2011 3. Available at <http://www.energy.alberta.ca/Org/pdfs/REPEnhancingAssuranceIntegratedRegulator.pdf> (accessed 28 June 2017).

<sup>82</sup> Government of Alberta (2011) 4.

<sup>83</sup> REDA ss 3–4.

<sup>84</sup> AER *Alberta Energy Regulator 2015/2016 annual report*, Executive Summary, 1. Available at <https://www.aer.ca/documents/reports/AER2015-16AnnualReportExecutiveSummary.pdf> (accessed 28 June 2017).

are regulator by a federal agency, the National Energy Board).<sup>85</sup> As an independent quasi-judicial regulatory body, the AER exercises regulatory, approval, policy-making, adjudicatory and advisory functions and its decisions are appealable to the Alberta Court of Appeal.<sup>86</sup> The AER aspires to become a “best-in-class regulator”<sup>87</sup> and its idea of “regulatory excellence” is anchored in the framework for regulatory excellence developed by the renowned Penn Program on Regulation in the University of Pennsylvania Law School, which identifies the following tenets: fidelity to law, respect for democracy, commitment to public interest, even-handedness with all interests, listening to the interested public, responsiveness, analytical capability, instrumental capacity, and high performance.<sup>88</sup>

The second key feature of regulatory policy in Alberta is the adoption of an “Area-Based Regulation” (ABR) approach, which establishes rules and practices that are “geographically-specific” to address the energy resources and unique environmental conditions in a defined area, in partnership with the community in that area.<sup>89</sup> Before the adoption of ABR, the AER considered adopting a “Play-Based” Regulatory (PBR) system, which allows applications for multiple energy development activities, such as wells, pipelines, access roads and water use, to be submitted as one application rather than having a separate application for each activity.<sup>90</sup> While all proposed activities will require one application, each activity will undergo a strict “technical review” of all its aspects.<sup>91</sup> The move to ABR was driven by the AER’s deeper recognition of the scale and complexity of energy projects, a renewed emphasis on the cumulative effects of energy projects, and the increasing public expectations for involvement and participation in energy development decisions and the consequent need to build trust with Albertans.<sup>92</sup> There are three major components to the ABR: integrated area assessment, collaborative engagement, and the development of practices and requirements for undertaking energy development in defined areas.<sup>93</sup> The ABR approach enables local conditions to be understood, shared and addressed, and that decisions are integrated to account for local conditions and cumulative impacts.

Another key feature of the paradigm shift in energy resource policy in Alberta is regional planning. Regional planning is premised on the recognition that all industrial activities produce effects on Alberta’s environment. Regional planning therefore aims to

<sup>85</sup> AER (2015/2016) 1.

<sup>86</sup> REDA s 45.

<sup>87</sup> AER “The road to becoming best in class”, *AER Focus*, February 2016. Available at [https://www.aer.ca/documents/atb/AERFocus\\_February2016.pdf](https://www.aer.ca/documents/atb/AERFocus_February2016.pdf) (accessed 28 June 2017).

<sup>88</sup> Cary Coglianese *Listening, learning, leading: A framework for regulatory excellence*, Penn Program on Regulation, (2015) iii. Available at [http://aer.ca/documents/about-us/UPenn\\_Final\\_Report\\_Regulatory\\_Excellence.pdf](http://aer.ca/documents/about-us/UPenn_Final_Report_Regulatory_Excellence.pdf) (accessed 28 June 2017).

<sup>89</sup> AER *Enabling the use of alternatives to high-quality non-saline water by the oil and gas sector in the MD Greenview – Recommendations to the Alberta Energy Regulator and Alberta Environment and Parks from the multi-stakeholder panel for the area-based regulation pilot project*, 21 June 2017, 1. Available at [http://aer.ca/documents/reports/AreaBasedRegulation\\_RecommendationReport.pdf](http://aer.ca/documents/reports/AreaBasedRegulation_RecommendationReport.pdf) (accessed 12 December 2017).

<sup>90</sup> AER “Play-based regulation: piloting a new approach to oil and gas development”, January 2015 1. Available at [https://www.aer.ca/documents/about-us/PBR\\_Brochure.PDF](https://www.aer.ca/documents/about-us/PBR_Brochure.PDF) (accessed 28 June 2017).

<sup>91</sup> AER (2015) 2.

<sup>92</sup> AER (2017) 1.

<sup>93</sup> AER (2017) 1

create approval processes and standards that apply to an entire region as against piecemeal approval processes. An important aspect of this is the introduction of major changes to land use in Alberta through the creation of a framework to develop regional land use plans under the Alberta Land Stewardship Act, 2009 (ALSA).<sup>94</sup> The REDA requires the AER to “act in accordance with ... ALSA regional plans” and establishes administrative penalties for breach of a regional plan.<sup>95</sup> Each regional plan will set the context for all land use decision-making in a region and will have the force of law after the plan is approved and gazetted by the government, such that any regulations, municipal bylaws, government policies and codes of practice inconsistent with the plan are void.<sup>96</sup> The first land use plan (called the Lower Athabasca Regional Plan, which covers the area in which the oil sands are located) was developed in 2012 following years of consultation with residents of the area and experts regarding the socio-economic and environmental impacts of the plan.<sup>97</sup>

In sum, energy regulation in Alberta is characterized by three key policies: the creation of a single energy regulator, an “Area-Based” system of regulation, and regional planning. Two key ingredients are remarkable about Alberta’s energy policy: (1) the recognition of the importance of mustering local support for energy projects and (2) the involvement of the public in the very process of formulating the policies. The independent agency approach to regulation has been a “permanent feature” of oil and gas regulation in Alberta for a long time.<sup>98</sup> By separating the regulator from the political organs of government, the Alberta government seeks to ensure that approval decisions are not subject to political biases but based on an objective assessment of project proposals and the views of the affected public.

## 5.2. Environmental Impact Assessments (EIAs)

A key feature of the governance regime for achieving sustainable oil sands development in Alberta is the requirement that oil sands projects be preceded by an assessment of their environmental impacts. An EIA is “the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made”.<sup>99</sup> Since the federal and provincial governments in Canada both share environmental protection authority, the EIA process for oil sands projects in Alberta is regulated by both federal and provincial laws. Federal involvement is required whenever a federal authority: (1) proposes a project; (2) provides financial assistance for a project; (3) transfers control of federal lands to enable a project to be undertaken; (4) exercises a regulatory authority (such as providing a permit, licence or approval) specified in the Law List

<sup>94</sup> SA 2009 c A-26.8.

<sup>95</sup> REDA ss 20 and 70.

<sup>96</sup> Ingelson A & Nwapi C “Planning for the future: the development of new corridors for energy infrastructure in Alberta, Canada” (2014) 1(2) *UPES L Rev* 191–192.

<sup>97</sup> Government of Alberta *Lower Athabasca regional plan 2012–2022*. Available at <https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf> (accessed 28 June 2017).

<sup>98</sup> Odumosu (2007) 878.

<sup>99</sup> IAIA/Institute of Environmental Assessment “Principles of environmental impact assessment best practice” (January 1999) 2. Available at [https://www.iaia.org/uploads/pdf/principlesEA\\_1.pdf](https://www.iaia.org/uploads/pdf/principlesEA_1.pdf) (accessed 18 July 2017).

Regulations, SOR/94-636 that enables a project to be carried out; or (5) if a project has trans-boundary or international effects.<sup>100</sup> Since my focus is on the governance regime in Alberta, however – and due also to space constraints – I will focus on the EIA regime in Alberta and will introduce the federal process only to explain how overlaps between it and the provincial process can affect the operation of the EIA process in Alberta.

In Alberta, the principal EIA statute is the Environmental Protection and Enhancement Act, 2000 (EPEA)<sup>101</sup> and its accompanying regulations<sup>102</sup> and guidelines.<sup>103</sup> One of the key features of the EPEA is the adoption of a project-list approach to the determination of whether an EIA would be carried out.<sup>104</sup> This approach establishes three categories of projects relating to EIAs: a mandatory list (under which an EIA must be carried out); a discretionary list (under which the Director decides whether an EIA is required ) and an exempt list (containing projects exempted from EIAs). Rather than analysing the substantive elements of the EIA process in Alberta, it is more useful for the purposes of this article to focus on current debates on the EIA process. Current debates centre mainly around the adequacy of opportunities for public participation, how to address overlaps between federal and provincial jurisdiction, the development of monitoring programs as part of the EIA process (especially for oil sands projects), and the consideration of cumulative effects. Public participation and inter-jurisdictional overlaps are more concerned than the last two issues with the legal structures of the EIA process and therefore will be my focus. Moreover, to avoid duplicating the discussion more appropriately reserved for the section on Aboriginal consultation, I will deal with public participation here very briefly.

Opportunities for public participation promote a “deliberative and collaborative approach to planning” and highlight “the importance of communication as a means of negotiating consensus solutions that capture the values of those participants,” by bringing stakeholders into decision-making processes.<sup>105</sup> There is a range of publics entitled to participate in decisions concerning oil sands development: Aboriginal peoples (whose participatory rights are traced to the Constitution), landowners, local citizens who meet statutory standing requirements, and Non-Governmental Organisations (NGOs) that meet “public-interest discretionary standing” requirements.<sup>106</sup> To support full and effective participation of citizens, the Alberta government has established participant funding schemes for financially challenged

<sup>100</sup> Environmental Law Centre “Fact sheet: Environmental assessments” (2007) 2–3. Available at [http://elc.ab.ca/Content\\_Files/Files/EnvironmentalAssessments.pdf](http://elc.ab.ca/Content_Files/Files/EnvironmentalAssessments.pdf) (accessed 18 July 2017).

<sup>101</sup> RSA 2000 c E-12 [EPEA].

<sup>102</sup> Environmental Assessment (Mandatory and Exempted Activities) Regulation Alta. Reg. 111/93.

<sup>103</sup> *The Government of Alberta's Guidelines on Consultations with First Nations on Land and Natural Resource Management*, 28 July 2014. Available at [http://indigenous.alberta.ca/documents/First\\_Nations\\_Consultation\\_Guidelines\\_LNRD.pdf](http://indigenous.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf) (accessed 18 July 2017).

<sup>104</sup> See Regulations Designating Physical Activities SOR/2012-147 6 July 2012.

<sup>105</sup> Wanvik (2016) 522.

<sup>106</sup> Lucas A “Canadian participatory rights in mining and energy resource development: the bridges to empowerment?” in Zillman D Lucas A & Pring G-R (eds) *Human rights in natural resource development: public participation in the sustainable development of mining and energy resources* (New York: Oxford University Press 2002) 307–308.

affected publics.<sup>107</sup> Such schemes enhance the public's access to justice and promote the acceptability of decisions.

Overlap and divergence between federal and provincial EIA processes sometimes lead to duplication, inter-jurisdictional conflicts, and litigation, which in turn produce costly and time-consuming project approval processes.<sup>108</sup> The classical Canadian approach to resolving interjurisdictional conflicts is founded on the principle of "cooperative federalism".<sup>109</sup> The co-operation techniques employed include the creation of federal-provincial agreements, the use of joint assessment panels, and delegation. While a joint panel allows the federal and provincial governments to coordinate the EIA process jointly, delegation allows one government to delegate the authority to carry out the assessment to the other government.<sup>110</sup> The federal government's current attitude is to promote investment through expediting project approval processes,<sup>111</sup> even if it means reducing federal involvement in EIA processes. This is achieved through the adoption of two principles: substitution and equivalency.

Substitution occurs when an EIA process, or an aspect thereof (such as public hearings), is replaced by another EIA process.<sup>112</sup> Schematically, it occurs "where a law or process of one jurisdiction or agency 'A' is substituted for a law or process of jurisdiction or agency 'B' such that the application of A's law or process is deemed to be an application of B's law or process".<sup>113</sup> Substitution thus allows one regime's process to replace another regime's process. Section 32(1) of CEEA 2012 allows for substitution of provincial processes for federal processes if the Minister considers a provincial process "an appropriate substitute".<sup>114</sup> The Minister, however, shall act only upon a request for substitution by a province.<sup>115</sup>

Equivalency occurs where the two legal regimes are deemed equivalent (ie, alike or comparable) to each other. The difference between substitution and equivalency is that under substitution, the application of the substituting law is deemed the application of the substituted law whereas no such deeming takes place under equivalency.<sup>116</sup> Moreover, there is no need, under substitution, for the two regimes or processes to be equivalent to each other.<sup>117</sup> Where the provincial process is considered by the federal Minister to be equivalent to the federal process, the federal process will

<sup>107</sup> Aboriginal Consultation Levy Act 2013 c A-1.2 s 4.

<sup>108</sup> Hickey GM, Brunet N & Allan N "A constant comparison of the environmental assessment legislation in Canada" (2010) 12(3) *JEPP* 316.

<sup>109</sup> *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6 paras 24 & 25.

<sup>110</sup> See Canadian Environmental Assessment Act 2012 (CEEA) ss 26(1) & 40.

<sup>111</sup> Ingelson I "The new Canadian Environmental Assessment Act", Paper presented at the 2013 International Association for Impact Assessment (IAIA) Conference, "Impact assessment: the Next Generation", Calgary, Canada, 13–16 May 2013 2. Available at

<http://conferences.iaia.org/2013/pdf/Final%20papers%20review%20process%2013/The%20New%20Canadian%20Environmental%20Assessment%20Act.pdf> (accessed 18 July 2017).

<sup>112</sup> Sinclair AJ, Schneider G & Mitchell L "Environmental impact assessment process substitution: experiences of public participants" (2012) 30(2) *IAPA* 85.

<sup>113</sup> Kwasniak A "Environmental assessment, overlap, duplication, harmonization, equivalency, and substitution: Interpretation, misinterpretation, and a path forward" (2009) 20(1) *JELP* 72.

<sup>114</sup> CEEA 2012 s 32(1).

<sup>115</sup> CEEA 2012 s 32(1).

<sup>116</sup> Kwasniak (2009) 72.

<sup>117</sup> Kwasniak (2009) 72.

not apply, whereas it does to an extent under substitution in that the Minister remains responsible for determining the likelihood of significant adverse environmental effects, using the EIA report prepared by the substituting provincial jurisdiction.<sup>118</sup>

Many Canadian commentators believe that the federal process is more stringent than the Alberta process and that substitution and equivalency would promote a situation whereby only the Alberta process would apply, thus resulting in the application of a less stringent process.<sup>119</sup> The problem with substitution and equivalency is that they seem to ignore the divergent mandates and areas of interest of different jurisdictional authorities.<sup>120</sup> Provincial environmental and economic interests will, for instance, not always correspond to federal ones. Determining whether it is appropriate to substitute a provincial EIA process for a federal one where such a divergence exists would be difficult and may undermine the effectiveness of the process.<sup>121</sup> Such divergences may prove significant for the outcome of the substitution or equivalency process and may lead to a lowering of standards.

### 5.3. Duty to Consult Aboriginal Peoples

One of the most significant developments in energy regulation in Canada over the past decade is arguably the evolution of the duty to consult Aboriginal people in energy development. The duty to consult is founded on the Crown's fiduciary relationship with Aboriginal people and in "the honour of the Crown" which arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people".<sup>122</sup> The assertion of sovereignty gives rise to "an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."<sup>123</sup> The duty is also linked to the rights enshrined in section 35 of the Constitution Act, 1982, which recognizes and affirms "the existing aboriginal and treaty rights of aboriginal people in Canada".<sup>124</sup> The principal purpose of the duty is "to advance the objective of reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty".<sup>125</sup> Its substantive component is "the duty to accommodate", ie, to "seriously consider" and "demonstrably integrate" Aboriginal concerns into a proposed decision or plan of action that may impact on Aboriginal rights or titles.<sup>126</sup> The duty is triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it".<sup>127</sup> The basic test to be satisfied

<sup>118</sup> CEAA 2012 s 37(1).

<sup>119</sup> See eg, Kwasniak (2009) 72.

<sup>120</sup> Fitzpatrick P & Sinclair AJ "Multi-jurisdictional environmental impact assessment: Canadian experiences" (2009) 29 *EIAR* 258.

<sup>121</sup> Sinclair, Schneider & Mitchell (2012) 87–91 have highlighted the divergence of approach to hearing proceedings by different regulatory bodies during EIAs.

<sup>122</sup> *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 para 32.

<sup>123</sup> *Mitchell v MNR* [2001] 1 SCR 911 para. 9.

<sup>124</sup> *Behn v Moulton Contracting Company* 2013 SCC 26 para 26.

<sup>125</sup> Laidlaw D & Passelac-Ross M *Alberta First Nations consultation and accommodation handbook*, CIRL Occasional Paper #44 (March 2014) 4. Available at <http://www.cirl.ca/files/cirl/consultationhandbookop44w.pdf> (accessed 18 July 2017).

<sup>126</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 para 64.

<sup>127</sup> *Haida* para 35.

is whether Aboriginal interests would be infringed upon. Once this test is met, the AER must carry out Aboriginal consultation.

The Canadian Supreme Court has made it clear time and again that the duty to consult Aboriginal peoples applies not only where regulatory decision-making may affect a recognized or existing Aboriginal right, but also where the affected right is merely inchoate in the sense of having not yet been recognized.<sup>128</sup> Those rights are “collective” in nature.<sup>129</sup> However, an Aboriginal group can “authorize” a person to assert those rights on its behalf. In the absence of such an authorization an energy regulator must identify the affected Aboriginal group for the purpose of engaging in consultation. Given that identifying the affected Aboriginal people may be complicated where there are overlapping or disputed rights and claims between two or more Aboriginal peoples, regulators are encouraged to develop detailed policies and methodologies for consultation with Aboriginal peoples.<sup>130</sup> Regulators are also encouraged to recognize that the duty to consult may not be fulfilled by merely granting affected Aboriginal peoples equal access to participate at any required hearings as is granted to non-Aboriginal parties, and that “individualized and specially tailored forms of consultation” may be required for Aboriginal peoples.<sup>131</sup>

To the above ends the Alberta government has developed guidelines to “clarify the expectations of all parties engaged in consultation”, to establish procedures to be followed in the consultation process, and to demonstrate how the Alberta government intends to fulfil its duty to consult Aboriginal peoples.<sup>132</sup> The duty to carry out the procedural aspects of the consultation is in most cases delegated to project proponents – usually private companies.<sup>133</sup> Studies show that this delegation is preferred by local stakeholders who would rather negotiate with companies than with governments due to a historical distrust they have for governments.<sup>134</sup> This delegation of consultation responsibility is part of the governance innovation that grants an increased role to the private sector. The development of Alberta’s Aboriginal consultation guidelines has, however, been criticized for involving very minimal engagement with Aboriginal peoples.<sup>135</sup> While policy documents are not legislation, they do influence judicial interpretation of existing legislation.

Although the duty to consult Aboriginal peoples before development projects affecting them are undertaken does not give Aboriginal peoples the power to veto projects,<sup>136</sup> Aboriginal organizations are a powerful force in oil sands development in Alberta. Their discontent with any proposed project can lead to lengthy litigation that

<sup>128</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 168.

<sup>129</sup> *Haida* 62.

<sup>130</sup> Mullan DJ “Regulators and the courts: a ten year perspective” (2013) 1 *Energy Regulation Quarterly* 41.

<sup>131</sup> Mullan (2013) 41.

<sup>132</sup> Government of Alberta “The Government of Alberta’s Policy on Consultation with First Nations on Land and Natural Resources Management”, 28 July 2014 1. Available at [http://indigenous.alberta.ca/documents/First\\_Nations\\_Consultation\\_Guidelines\\_LNRD.pdf](http://indigenous.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf) (accessed 24 July 2017).

<sup>133</sup> Government of Alberta (2014) 6.

<sup>134</sup> Wanvik (2016) 521.

<sup>135</sup> Laidlaw & Passelac-Ross (2014) 21–23.

<sup>136</sup> *Haida* para 48.

can significantly delay the take-off of projects, if not stop them altogether.<sup>137</sup> They have utilized their constitutionalized rights to redesign the legal landscape for energy development in Alberta and across Canada and gain some measure of control over what takes place on their traditional lands through a long series of judicial victories. Governments and the private sector are forced to find ways to adapt to the new legal realities created by each judicial victory. To enhance their capacity to consult with Aboriginal people and avoid disruptions with their projects most oil and gas companies in Alberta have established Aboriginal relations departments staffed by highly trained personnel to address Aboriginal issues and to monitor and track new legal and policy developments affecting Aboriginal people. Many have developed their own best-practice practical guidelines for working with Aboriginal communities. The impact of these developments on Aboriginal people has been government and private sector support for Aboriginal entrepreneurship, job creation and other business opportunities for members of Aboriginal communities.<sup>138</sup> These are established through impact-benefit agreements between Aboriginal communities and companies.

A major challenge to the implementation of the duty to consult in Alberta (and across Canada) is the achievement of what can be regarded as “meaningful consultation” – a term that defies definition – with a view to improving the relationship between the Alberta government and Aboriginal peoples. For the AER, which carries out the consultation process, the bottom line is to understand the varied ways that Aboriginal cultures and western cultures look at issues surrounding energy development and to see how the two world views can cohabit. While this remains difficult to achieve, there is evidence that progress has been made towards finding a connection between two different knowledge systems, which enables the AER to approach decision-making discussions with an improved understanding of how to create ethical spaces for the knowledge systems to thrive.<sup>139</sup>

#### 5.4. Impact Benefit Agreements (IBAs)

IBAs are agreements made between Aboriginal communities and companies to establish a formal relationship between them to reduce the potential impacts of oil sands operations and to secure socio-economic benefits for the Aboriginal communities.<sup>140</sup> Provisions that could be negotiated in IBAs commonly include: recognition of Aboriginal rights; payments to Aboriginal communities, opportunities for employment and training of members of Aboriginal communities, opportunities for economic development of Aboriginal communities; and environmental and cultural protection measures for

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<sup>137</sup> Coates K “First Nations engagement in the energy sector in western Canada”, Paper prepared for the Indian Resource Council (June 2016) 17. Available at <http://www.irccanada.ca/sites/default/files/First%20Nations%20Engagement%20in%20the%20Energy%20Sector%20in%20Western%20Canada.pdf> (accessed 24 July 2017).

<sup>138</sup> Coates (2016) 10.

<sup>139</sup> See AER *Voices of understanding: Looking through the window*, 2 ed Calgary (November 2017). Available at [https://www.aer.ca/documents/about-us/VoiceOfUnderstanding\\_Report.pdf](https://www.aer.ca/documents/about-us/VoiceOfUnderstanding_Report.pdf) (accessed 13 December 2017).

<sup>140</sup> Fidler C & Hitch M “Impact and benefit agreements: a contentious issue for environmental and Aboriginal justice” (2007) 35(2) *EJ* 50.

Aboriginal communities.<sup>141</sup> From the corporate perspective, the purpose of IBAs is “to secure long-term local support” for projects;<sup>142</sup> thus, to enable the company to obtain the social licence to operate.<sup>143</sup> IBAs are relatively new in Canada and “they illustrate that several types of agreements exist within the investment law regime that transcend the prominent state-investor contract and investment treaty models”<sup>144</sup> and shift an important aspect of governance to the hands of communities and the private sector while the government plays the role only of facilitator.

In Alberta, although IBAs have become institutionalized in the oil and gas sector, they are mostly a voluntary arrangement between companies and Aboriginal communities without any legal foundation. The only exception relates to Métis lands. Although the government retains ownership of minerals, under an accord reached with the Métis people, it committed to promote Métis self-governance over Métis lands and shall not grant mineral rights to proponents until the developers have negotiated a development agreement with the Métis Settlements.<sup>145</sup> Also, under section 8 of the Aboriginal Consultation Levy Act (ACLA), the Minister is authorised to require a project proponent to disclose information about an IBA it has entered into with any Aboriginal community. One of the purposes of this disclosure is to assist the government in determining the amount of grants to be provided to Aboriginal communities. Section 4 of ACLA also establishes a consultation levy fund to support Aboriginal communities to participate in consultation.

Although IBAs are believed to be increasingly popular in Alberta, the number of publicly known IBAs is negligible. A 2013 survey showed that only two IBAs were publicly known in Alberta, compared to 101 in Ontario, 37 in Saskatchewan, and 35 in British Columbia.<sup>146</sup> While these numbers do not reflect the actual number of IBAs being negotiated, they send a negative message regarding transparency. The above survey noted that much development is occurring in the oil and gas industry in Alberta, but that the lack of legal requirements to disclose IBAs makes it difficult to track them.<sup>147</sup> The lack of legislative mandates to negotiate them in the first place may also be influencing the willingness of parties to voluntarily disclose them.

Empirical studies on the effectiveness of IBAs are very limited. One study, which considered the effectiveness of 14 IBAs signed in the Northwest Territories of Canada, found that IBAs have “contributed to relationship-building, delivered benefits,

<sup>141</sup> Prno J, Bradshaw B & Lapierre D “Impact and benefit agreements: are they working?” (2010) 3. Available at [http://www.impactandbenefit.com/UserFiles/Servers/Server\\_625664/File/IBA%20PDF/CIM%202010%20Paper%20-%20Prno,%20Bradshaw%20and%20Lapierre.pdf](http://www.impactandbenefit.com/UserFiles/Servers/Server_625664/File/IBA%20PDF/CIM%202010%20Paper%20-%20Prno,%20Bradshaw%20and%20Lapierre.pdf) (accessed 18 July 2017).

<sup>142</sup> Northern Development Ministers Forum (NDMF) *Priority project on sustainable resource development: Benefits agreements in Canada’s north* (August 2013). Available at <http://www.nadc.gov.ab.ca/Docs/benefit-agreements-2013.pdf> (accessed 18 July 2017).

<sup>143</sup> Nwapi C “Legal and institutional frameworks for community development agreements in the mining sector in Africa” (2017) 4 *EIS* 203.

<sup>144</sup> Odumosu-Ayanu IT “Governments, investors and local communities: analysis of a multi-actor investment contract framework” (2014) 15(2) *MJIL* 473.

<sup>145</sup> See NDMF (2013) 13.

<sup>146</sup> NDMF (2013) 21.

<sup>147</sup> NDMF (2013) 21.

contributed to capacity building, and enabled follow up in a way never afforded by [instruments like EIAs]”.<sup>148</sup> The study noted that not all IBA objectives were fully met due in large part to shortcomings in their negotiation and implementation and in managing community expectations.<sup>149</sup>

In sum, although IBAs are often regarded as private contracts between the resource proponents and communities, when they are made a precondition to the granting of mineral rights, they become regulatory tools rather than mere private contracts. Legislatively mandated IBAs may have a greater potential to achieve the objectives of IBAs because they provide a greater assurance not only that IBAs will be negotiated but also that parties will abide by their pledges.

### 5.5. Environmental Enforcement

Numerous environmental offences arise from operations in the Alberta oil sands where substances that are harmful to the environment when improperly handled are frequently used. Enforcement of the offences is conducted under both federal and provincial laws, reflecting the shared environmental protection jurisdiction of both levels of government.<sup>150</sup> Those laws contain both criminal and administrative penalties for violators. The violators range from small-size corporations to well-resourced multinational corporations, other organizations and individuals.<sup>151</sup>

Most environmental offences in Alberta are described as “regulatory offences”, “quasi-crimes” or “public welfare offences” which do not require proof of a criminal intent on the part of the accused.<sup>152</sup> The main reason for creating such offences is not so much to punish the conduct in question as it is to promote compliance with the standard of conduct that the legislation or regulation seeks to uphold.<sup>153</sup> Although such offences do not require fault on the part of the accused, a due diligence defence, which is to be established on a balance of probabilities, is always available to the accused.<sup>154</sup> Such offences include commencing or continuing an activity without approval where an approval is required, release of substances without approval or in excess of what is permitted, lack of or inadequate clean-up of contaminated sites, failure to report violations, etc.<sup>155</sup>

Alberta’s environmental enforcement standards are said to be among the strictest in the world.<sup>156</sup> Its method of enforcement takes four forms: administrative penalties, warnings, orders and criminal prosecution. Administrative penalties are

<sup>148</sup> Prno, Bradshaw & Lapierre (2010) 9.

<sup>149</sup> Prno, Bradshaw & Lapierre (2010) 9.

<sup>150</sup> At the federal level, the principal statutes are the *Environmental Enforcement Act* SC 2009 c 14, the *Fisheries Act* RSC 1985 c F-14, and the *Migratory Birds Convention Act* SC 1994 c 22. At the provincial level the principal statutes are the EPEA and the *Water Act* RSA 2000 c W-3.

<sup>151</sup> Nwapi (2013) 7.

<sup>152</sup> *R v Sault Ste Marie (City)* [1978] 2 SCR 1299 1303.

<sup>153</sup> Nwapi (2013)7.

<sup>154</sup> EPEA s 229.

<sup>155</sup> Nwapi C “Environmental sentencing policy in Alberta: a critical review”, CIRL Occasional Paper #46, January 2015 1.

<sup>156</sup> Hudec AJ & Paulus JR “Current environmental regulations of the Alberta oil and gas industry and emerging issues” (1990) 20 *ALR* 173.

monetary penalties that are assessed and imposed on a person by an environmental regulator without having recourse to the judicial process. They are used to address minor infractions with minimal impacts and they cannot be combined with criminal prosecution.<sup>157</sup> The advantage is that they are a fast and cheap way of dealing with minor environmental infractions. Warnings, on the other hand, are issued to persons who violate environmental statutes or regulations to prompt compliance with the statutes or regulations. They form part of the compliance history of such a person.<sup>158</sup> The infractions requiring warnings must be more minor than those calling for administrative penalties. When immediate action is required to avoid or stop an adverse environmental effect, orders are issued to the person whose action is required.<sup>159</sup> The last enforcement method is criminal prosecution in a court of competent jurisdiction, which is reserved for more serious infractions.

Studies show that until about a decade ago environmental enforcement in Alberta, particularly through criminal prosecution, “was rather unsystematic”, and that the Alberta government channelled its energies towards defending challenges to its implementation of its statutory environmental obligations by the environmental community.<sup>160</sup> However, things have changed. Between 2008 and 2014, about 62 convictions were recorded from criminal prosecutions while about 197 administrative penalties were issued.<sup>161</sup>

An important aspect of the enforcement culture in Alberta that merits consideration is sentencing. While fines and imprisonment can be imposed in environmental cases, imprisonment is seldom used and is reserved for more serious cases where it is necessary to apprehend the officers of a corporation to more “effectively address the root cause of the offence”.<sup>162</sup> Also, courts believe that in environmental cases the principles for the imposition of fines require a “special approach”.<sup>163</sup> As most environmental offences in Alberta are committed by oil and gas corporations many of which are well resourced, courts are instructed to imposed fines that amount to “more than a licensing fee for illegal activity or the cost of doing business”,<sup>164</sup> presumably to achieve the deterrence goal of sentencing. The maximum fines provided under the EPEA are high; however, the actual fine to be imposed depends on several factors, namely, the seriousness of the damage caused by the offence, the financial capability of the offender, the offender’s degree of culpability, the offender’s criminal history, and the offender’s acceptance or rejection of culpability.<sup>165</sup>

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<sup>157</sup> EPEA 273(3); Jillian Flett, “Administering environmental administrative penalties: Alberta’s experience” (2000) 15(1) *News Brief*. Available at [http://elc.ab.ca/Content\\_Files/Files/NewsBriefs/Vol.15No.12000.pdf](http://elc.ab.ca/Content_Files/Files/NewsBriefs/Vol.15No.12000.pdf) (accessed 19 July 2017).

<sup>158</sup> Nwapi (2013) 15.

<sup>159</sup> Nwapi (2013) 16.

<sup>160</sup> Nwapi (2013) 16.

<sup>161</sup> Nwapi (2015) 14.

<sup>162</sup> Nwapi (2015) 12.

<sup>163</sup> *R v Kenaston Drilling (Arctic) Ltd* (1973) 41 DLR (3d) 252.

<sup>164</sup> *Terreco* para 60.

<sup>165</sup> See *R v Chem-Security (Alberta) Ltd*, 1998 ABPC 96; *R v Lefebvre*, 1999 ABQB 523; *R v Terroco Industries Ltd*, 2005 ABCA 141.

Studies show a growing policy and legislative trend towards increased sentences in environmental cases.<sup>166</sup> The federal Environmental Enforcement Act (EEA), enacted in 2009, established a minimum fine structure for serious environmental offences, increased the maximum payable for all offences, established a separate fine scheme for individuals, corporations and vessels, and provided for the doubling of fines for repeat offenders.<sup>167</sup> The federal fine scheme is much higher than that under Alberta's EPEA. For instance, the EEA imposes a minimum fine of \$15,000 on individuals that commit more serious offences and a maximum fine of \$1 million (and/or imprisonment) whereas EPEA imposes a maximum fine of \$100,000 (and/or imprisonment) for comparable offences and does not establish any minimum. For large corporations indicted for more serious offences, the EEA creates a minimum fine of \$500,000 and a maximum fine of \$6 million whereas the EPEA creates a maximum fine of \$1 million for similar offences without establishing any minimum. However, even though the provincial fines are lower, the sentencing trend is increasingly towards moving closer to the maximum fines allowed – a race to the top rather than to the bottom.<sup>168</sup>

In addition, instead of requiring that convicted offenders pay fines that go into government coffers, Alberta courts have adopted a creative approach that allows the court to order that fines be channelled to some cause that will be beneficial to the community, such as funding research projects dedicated to finding ways to improve the environment or to improve industry compliance with environmental regulations, or that the offender perform some service that can in some way correct the damage caused by the offence.<sup>169</sup> This approach to sentencing is termed “creative sentencing”. It is justified on several grounds: to let some good come from bad, to give the offender an opportunity to help others in the same industry to avoid committing the offence, rehabilitation of the damaged environment, desire for compassionate punishment, prison congestion, and “do-goodism”.<sup>170</sup> Creative sentencing was introduced in Alberta in 1993 under section 234(1) of the EPEA. Since then, it has become “a major insignia of sentencing policy in Alberta”.<sup>171</sup> Between 1996 and 2013, 56 per cent of all penalties in environmental cases were made up of creative sentencing.<sup>172</sup>

For creative sentencing to be ordered, however, it must be clearly authorized by statute.<sup>173</sup> Also, the contents of any proposed creative sentencing agreed between the Crown and the offender requires the approval of the Court, which must determine

<sup>166</sup> See Chambers S & Semenchuk L “Trends in Alberta environmental enforcement: fines, fowl and finger-pointing”, Paper delivered at the NEERLS Summit, Banff (2011) 11. Available at [http://www.cba.org/cba/cle/PDF/ENV11\\_SemenchukChambers\\_Paper.pdf](http://www.cba.org/cba/cle/PDF/ENV11_SemenchukChambers_Paper.pdf) (accessed 21 July 2017).

<sup>167</sup> BecklumbP “Legislative summary: Bill C-16: Environmental Enforcement Act”, Parliamentary Information and Research Service (1 April 2009) 2. Available at <http://www.lop.parl.gc.ca/Content/LOP/LegislativeSummaries/40/2/c16-e.pdf> (accessed 21 July 2017).

<sup>168</sup> Nwapi (2015) 14.

<sup>169</sup> See *R v United Keno Hills Mine Ltd*, (1980) 10 CERL 43 (YTTC); *R v Syncrude Canada Ltd* (2010) ABPC 229; Ingelson A “Creative environmental sentences in the Alberta oil and gas industry”, *The Negotiator* (February 2016) 2–6. Available at [http://landman.ca/wp/wp-content/uploads/2016/02/Feb2016\\_Negotiator.pdf](http://landman.ca/wp/wp-content/uploads/2016/02/Feb2016_Negotiator.pdf) (accessed 21 July 2017).

<sup>170</sup> Cryderman (2010); Czajkoski EH & Wollan LA, Jr “Creative sentencing: a critical analysis” (1986) 3:2 *JQ* 221.

<sup>171</sup> Nwapi (2013) 25.

<sup>172</sup> Nwapi (2015) 25.

<sup>173</sup> *R v Imperial Oil*, 1997 CanLII 952 (ONCA).

whether the agreement is consistent with the purposes of the statute.<sup>174</sup> The sentence could take a variety of forms, such as ordering the offender to publish the facts relating to the offence, an order for community service, ordering the offender to remedy the harm, ordering that fines be channelled to support scientific studies that seek to improve the state of the environment, ordering the offender to finance academic studies intended to promote good corporate behaviour relevant to the offence, etc.<sup>175</sup>

There are established guidelines for issuing creative sentences, among which are the following: (1) the creative sentence must be in combination with the imposition of a traditional fine; (2) there must be a link between the offence and the project which the creative sentence is meant to fund, to enable the sentence to address the harm caused by the offence; (3) the beneficiary of the creative sentence must be the public, and the public within the locality of the offence must be the primary beneficiary; (4) conflict of interest between the offender and the recipient of the fund as well as between the latter and the Crown or investigating officer must be avoided; (5) the fund recipient must be a not-for-profit organization, such as NGOs, universities and research institutes; and (6) the expected result of the project must be “concrete, tangible and measurable”.<sup>176</sup> In addition, in determining the actual amount of a creative sentence, the Court is guided by the “totality principle”, i.e., it must ensure that the cumulative sentence (the creative sentence and all other fines imposed) is not disproportionate to the offence.<sup>177</sup> Ingelson has argued that creative sentencing contributes to a company’s corporate social responsibility and is therefore one of the factors that encourage companies to participate in it.<sup>178</sup>

While the trend towards routine use of creative sentencing is innovative and commendable, its effectiveness in Alberta has suffered some setbacks. The setbacks are caused by several factors, including: inadequate victim participation in the creative sentencing process, which has sometimes led to approval of projects that do not address legitimate victim concerns;<sup>179</sup> sometimes absence of competent experts to design creative sentencing projects; and lack of adequate monitoring of the implementation of creative sentencing projects.<sup>180</sup> Disagreements over the choice of projects to implement creative sentencing have also sometimes led to a compromise that produced projects

<sup>174</sup> McRory & Jenkins (2003).

<sup>175</sup> See EPEA s 234(1); *R v Hillsight Vegetables Inc.*, [2005] AJ No 1916; ESRD, Creative sentencing in Alberta: 2013 Report 11–14. Available at <http://aep.alberta.ca/about-us/compliance-assurance-program/creative-sentencing/documents/CreativeSentencingAlberta-2013.pdf> (accessed 17 July 2017).

<sup>176</sup> Alberta Environment and Sustainable Resource Development & Alberta Justice and Solicitor General, Creative sentencing in Alberta: 2012 Report 3. Available at <https://extranet.gov.ab.ca/env/infocentre/info/library/8831.pdf> (accessed 18 July 2017).

<sup>177</sup> *R v Ewanchuk* 2010 ABCA 298 para 15 (CanLII).

<sup>178</sup> Ingelson A “Creative environmental sentences – the corporate perspective”, A symposium on environment in the courtroom (III): sentencing and environmental offences, environmental education for judges and court practitioners, Dalhousie University, Halifax 21–22 February 2014 14. Available at [http://cirl.ca/files/cirl/allan\\_ingelson-en.pdf](http://cirl.ca/files/cirl/allan_ingelson-en.pdf) (accessed 18 July 2017).

<sup>179</sup> Cryderman K “Paying the price: ‘Creative sentencing’ option angers family of wellsite victim”, *Calgary Herald* (25 June 2010). Available at <http://www.calgaryherald.com/business/PAYING+PRICE+Creative+sentencing+option+angers+family+wellsit e+victim/3098118/story.html> (accessed 18 July 2017).

<sup>180</sup> Hughes EL & Reynolds LA “Creative sentencing and environmental protection” (2009) 19(2) *JELP* 125.

that did not adequately advance the goals of the particular creative sentencing.<sup>181</sup> Studies acknowledge, however, that the environmental prosecution unit of Alberta Justice has stepped up its monitoring and oversight of the implementation of creative sentencing projects.<sup>182</sup>

Overall, environmental enforcement in Alberta reveals the expanded societal goals that the Alberta government seeks to achieve. They can be summarized as promotion of respect for the law, expression of societal disapproval of environmental crimes, and to provide some environmental benefits beyond mere remediation of the damaged environment. The polluter pays principle seems to be the overriding governing principle. The principle ensures that the costs of repairing damage done to the environment is borne by those responsible for the damage and not shifted to taxpayers.

## **6. PROPOSALS FOR TRANSPLANTING ALBERTA'S GOVERNANCE REGIME IN SUB-SAHARAN AFRICA**

### **6.1. Revisiting Legal Transplant Theory**

As noted in Section 2, legal transplant theory does not require that a foreign legal rule or regime be adopted wholesale, without modification. Instead, each importing jurisdiction is free to critically examine the foreign legal rule to determine what might be relevant to its own jurisdiction. This can be deduced from a combination of Watson's and Kahn-Freund's theories and from the modern views of legal transplant. Whether or not there are similarities between the adopting jurisdiction and the foreign jurisdiction, a legal transplant can still be successful if the adopting jurisdiction adopts a pragmatic and inward-looking approach, rather than a "legalistic spirit", that considers the adaptability of the foreign rule to its own local circumstances. Even if the rule "owes its existence...to a distribution of power" in its home jurisdiction unshared by the adopting jurisdiction,<sup>183</sup> there are still lessons for the adopting jurisdiction, even if it is only to learn about the spirit of the rule. I must thus reiterate that socio-political differences between Alberta and Sub-Saharan Africa – which certainly exist – do not render a legal transplant of Alberta's governance regime for oil sands development impossible in Sub-Saharan Africa.

### **6.2. What Can Sub-Saharan Africa Transplant from Alberta?**

The first step is perhaps the development of a sustainable development strategy that accounts for the nature of oil sands development. None of the Sub-Saharan African countries with oil sands deposits mentioned in this article has an official sustainable development strategy, the only likely exceptions, however, being Nigeria and Madagascar. Nigeria's 2009 Vision 20:2020 may be regarded as representing its official sustainable development strategy; however, a look at Vision document reveals that the

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<sup>181</sup> Nwapi (2013) 31.

<sup>182</sup> Nwapi (2013) 31.

<sup>183</sup> Kahn-Freund (1974) 12.

economic aspects of sustainable development are much more strongly emphasised than the socio-environmental aspects. Madagascar has two processes in place that could be regarded as equivalent to a sustainable development strategy: the National Environmental Action Plan, launched operationally in 1991, and the Poverty Reduction Strategy Paper of 2003. Madagascar's strategy, however, was formulated when oil sands development had not yet come into the picture, meaning that the capacity of that strategy to deal with sustainable development issues surrounding oil sands development is called into serious question. A review of that strategy is necessary to update it to the new realities and challenges. The principles informing the Alberta sustainable development strategy can be considered in its development. In addition, Sub-Saharan African countries should consider establishing a legal framework for its sustainable development strategy, which would establish implementation machinery for the strategy, with clear lines of responsibility. The use of a legal framework would give greater assurance that the strategy would be implemented.

Secondly, Alberta's approach to administrative agency regulation is based on two key principles: independence and one-stop shop. This is the very opposite of what obtains in Sub-Saharan Africa. Multiplicity of regulatory agencies creates regulatory murkiness (due to potential overlaps of functions) and investment bottlenecks (due to delays caused by efforts to meet the requirements of each of the regulators and to clear confusions created by functional overlaps) and has been found to be a major obstacle to investment in Sub-Saharan Africa.<sup>184</sup> However, a single-regulator system expedites project approval processes, eliminates waste, and ensures a single-minded approach to regulation – factors that boost investment. The value of an independent regulator “lies in its potential contribution to expertise in regulating oil and gas activities and a clear separation between government's responsibilities as proprietor [of the resources] and as regulator”.<sup>185</sup> By contrast, when a regulator is not independent of the government, it can lead to implementation failure because, given the thinness of the dividing line between the private and public sectors, the economic interests of government officials could easily coincide with those of businesses.<sup>186</sup> This has been identified as a major bane of development in Sub-Saharan Africa, one that goes hand in glove with corruption.<sup>187</sup>

Perhaps the most important lesson to be learnt from the governance regime for oil sands development in Alberta is the adoption of a deliberative and collaborative approach to policy-making, planning and decision-making. This approach is aimed at promoting dialogue not only between resource developers and the public but also with

<sup>184</sup> See eg, USAID “Madagascar environmental threats and opportunities assessment – 2014 update” 72.

Available at [www.usaidgems.org/Documents/FAA&Regs/FAA118119/Madagascar2014.pdf](http://www.usaidgems.org/Documents/FAA&Regs/FAA118119/Madagascar2014.pdf) (accessed 18 July 2017); Ingelson A & Nwapi C “Environmental impact assessment for oil, gas and mining projects in Nigeria: a critical analysis” (2014) 10:1 *LEADJ* 54.

<sup>185</sup> Odumosu (2007) 898.

<sup>186</sup> Ikpeze NI, Soludo CC & Elekwa NN “Nigeria: the political economy of the policy process, policy choice and implementation” in Soludo CC, Ogbu O & Chang H (eds) *The politics of trade and industrial policy in Africa: forced consensus?* (Trenton: Africa World Press 2004) 345.

<sup>187</sup> Nwapi C “Enhancing the effectiveness of transparency in extractive resource governance: a Nigerian case study” (2014) 7(1) *LDR* 38.

the energy regulator, with a view to building consensus on vital issues affecting stakeholders. The major locale of this deliberation is the EIA process. Although Aboriginal consultation in Alberta has a colonial and constitutional history and has followed the evolution of environmental democracy in Canada, it is not entirely alien to the present situation in Sub-Saharan Africa given the presence of legal provisions for public participation in EIA laws for resource projects in Sub-Saharan Africa. However, these provisions are not nearly as developed as in Alberta, particularly regarding Aboriginal consultation which enjoys strong constitutional protection. While there are no Aboriginal (or indigenous) peoples in the Sub-Saharan African countries mentioned in this article – as that term is understood in Canada – the local communities where oil sands development activities occur in those countries may be facing problems akin to those faced by Aboriginal peoples in Canada. Those problems include alienation from their traditional lands and disruption of their traditional means of livelihood. Sub-Saharan Africa can learn from Canada's highly evolved system of Aboriginal consultation to strengthen the participation of local communities impacted by oil sands development. The creation of a participant funding scheme to “level the playing field” for all participants by enhancing the ability of the communities to participate in those processes should be considered, as studies show that this is a major obstacle to effective public participation in most of Sub-Saharan Africa.<sup>188</sup>

Furthermore, there are good reasons for centralised decision-making in oil and gas development. In Sub-Saharan Africa, as in Alberta, where oil and gas resources are owned by the public rather than by individuals or sections of the public, the entire public has a legitimate claim to share in the benefits flowing from the resources and therefore to the collective management of the resources. This ensures consistency of regulatory standards regardless of the location of the resources.<sup>189</sup> It also ensures that local or sectional interests do not trump collective interests. However, some degree of local governance seems appropriate given that the locality where the development activities occur is usually disproportionately impacted by the negative externalities of such activities. Governments at the local level are in a better position than national governments to deal with local concerns.<sup>190</sup> Although local governance of oil and gas resources in Alberta is, from a legal perspective, very limited, my earlier analysis shows that a consciously moulded good faith relationship and commitment, outside the legal sphere, between the provincial government and municipalities would improve project approval processes in a way that gives municipalities a greater voice in oil and gas decision-making. The encouragement of IBAs is one way in which the province ensures that local Aboriginal communities participate in decisions regarding how to address the impacts of oil sands development. This approach is however not foreign to Sub-Saharan Africa, where Community Development Agreements – which are akin to IBAs – are becoming prevalent in mineral development.<sup>191</sup> In Nigeria, they are even mandated by the Minerals and Mining Act, 2007. What will make the difference is how well the

<sup>188</sup> See Nwapi C “Governance considerations relating to social impact assessments for mining development in African communities” (2015) 17(2) *JEAPM* 19.

<sup>189</sup> Vlavianos & Thompson (2010) 56–57.

<sup>190</sup> Vlavianos & Thompson (2010) 56–57.

<sup>191</sup> See Nwapi (2017).

government supports the communities to negotiate such agreements effectively. Alberta's participant funding scheme – which is not popular in Sub-Saharan Africa – might be relevant to Sub-Saharan African countries.

Lastly, Alberta has not only devoted substantial resources to enforcement of environmental laws but has developed a creative approach to environmental sentencing to ensure that some societal good emanates from environmental violations. I do not consider it realistic though that Sub-Saharan African countries would be as stringent in environmental enforcement as Alberta, given that they are developing economies in dire need of foreign direct investment (FDI) while Alberta is a developed economy. As developing economies, they do not possess adequate negotiating power to demand strict compliance with environmental laws while at the same time attracting investment. However, within the negotiating space available to them, they certainly have the capacity to employ the creative approach Alberta is utilizing in environmental sentencing to promote greater environmental stewardship. As their economy grows and reliance on FDI declines, they will correspondingly tighten their environmental enforcement.

## 7. CONCLUSION

The unconventional nature of oil sands development comes with its own governance challenges. Those challenges are likely to be very significant for Sub-Saharan Africa, a region that is still struggling to grapple with the challenges posed by conventional oil development despite several decades of experience. To develop the resources in a sustainable manner, Sub-Saharan Africa must strive to put its governance houses in order before embarking on actual exploitation of the resources. Given its inexperience with oil sands development, it would be judicious for Sub-Saharan African countries to examine other jurisdictions with experience to see what lessons they might draw that might be relevant to their own jurisdictions.

Alberta is the only jurisdiction in the world with substantial experience in oil sands development. Its governance regime for the oil sands can be described as based on six key approaches: (1) the adoption of a clear whole-of-government sustainable development strategy that is attuned to the nature of oil sands development; (2) the adoption of a “single-regulator” framework and the establishment of an independent quasi-judicial regulatory agency to oversee the regulation; (3) the encouragement of dialogue between resource developers and the public through the requirement of Aboriginal consultation in EIAs and project approval processes; (4) a willingness to recognise the importance of local governance of oil and gas resources, and to facilitate processes that give local governments a voice in oil and gas decision-making beyond what is mandated by formal law; (5) the encouragement of IBAs and the provision of participant funding schemes to assist Aboriginal communities in negotiating them; and (6) a willingness to enforce environmental laws based on the polluter pays principle, and a creative approach to doing so. What is most innovative about Alberta's approach is, perhaps, how the government increasingly assumes the role of facilitator of dialogue among private resource developers, the public and the regulatory agency. It is these

governance features that I suggest that Sub-Saharan African countries with oil sands deposits should consider as they prepare to exploit the resources.

However, one cannot assume that the Alberta governance regime can be easily transplanted into Sub-Saharan Africa, given the contextual differences between Alberta and Sub-Saharan African countries. What legal transplant theory tells us, however, is that it is possible for a successful transplant to occur regardless of any institutional, cultural, political and other sociological differences between Alberta and Sub-Saharan Africa. The decisive factor is the willingness of the adopting jurisdiction to identify what would be relevant to it and to adapt the imported rule to its own local condition. Sub-Saharan African countries can do it.