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Urban Oil Wells:
THERE'S OIL IN THEM THAR BURBS[1]

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[1] Title taken from a Maclean's magazine article about the Kaiser well in Calgary (http://www2.macleans.ca/2012/04/17/theres-oil-in-them-thar-burbs/)

ABSTRACT:

This paper reviews the municipal interface with oil and gas development and explores the existing regulatory role of municipalities in oil and gas development. In particular, the paper provides an overview of the recent experiences the City of Calgary has had with an oil and gas developer proposing to drill a well in North West Calgary. In dealing with the issues stemming from the proposed well, The City realized that other Alberta municipalities are struggling with similar issues.

Alberta is one of the world's leading producers of oil and gas. In many ways, Alberta is entirely dependent on oil and gas development. Without the economic advantages created by oil and gas revenues and spin offs, many Alberta municipalities would not even exists or would be drastically different places than they are today. However, there is another side to oil and gas development. There is an increased emphasis on the social, economic and environmental impacts created by oil and gas development. In addition, new technologies and increased oil prices have created opportunities to drill in areas thought to be undevelopable five years ago.

I. INTRODUCTION

Over the past several years there have been several high profile incidents resulting from interactions between municipalities and the oil and gas industry. These interactions include:

- The Regional Municipality of Wood Buffalo intervening in three consecutive oil sands applications, asking for delays in approvals until the municipal services and infrastructure could be improved to meet the demands of a booming population;
- City of Edmonton retaining a consultant to establish an oil and gas protocol;
- County of Strathcona attempts to establish an oil and gas bylaw;
- City of Red Deer creating a precedent contract for oil and gas developers to sign before drilling;
- City of Calgary intervening in the Compton Petroleum application to drill sour gas wells just outside of the municipal limits of The City; and
- Town of Calmar where a decommissioned gas well situated within a new subdivision started seeping gas into a home owner's backyard.

All of these examples point to a growing frustration within municipalities at the lack of municipal control and inputs into oil and gas development in Alberta.

Regulation of oil and gas activity in the Province of Alberta (the "Province") is primarily a Provincial responsibility. There are aspects of Federal regulations for some aspects of development, but for the most part, the Province has control of oil and gas development. The Province created the Energy Resources Conservation Board ("ERCB") to be the regulator of oil

and gas activity. In creating an oil and gas regulator, the Province established a single point of control over the important oil and gas industry.

As creatures of statute, municipalities only have the jurisdiction to regulate in the fields set out in the *Municipal Government Act* [2](the "MGA"). The Province granted to municipalities the ability to regulate development within municipalities, pursuant to Part 17 of the MGA. However, certain forms of development are exempted from municipal control. The drilling operations associated with oil and gas development is one of the areas where the Province exempted municipal control.

II. Kaiser Oil Well / the "Wal-mart Well"

In the spring of 2011 The City was approached by Kaiser Exploration Ltd. ("Kaiser") seeking The City's consent for a proposed well in North West Calgary. The original well application was for a sweet gas well, however, Kaiser later amended their application and applied for a sweet oil well. The well is proposed for an area near the communities of Rocky Ridge and Royal Oak within The City. The surface lands are owned by Alberta Infrastructure as a gravel pit and several institutions are within the general vicinity, including a psychiatric hospital, a remand centre, youth detention centre and the University of Calgary veterinary facility.

The well is also across the street from a regional big box shopping complex, where the main tenant is Wal-mart. This has led to the well being known as the Wal-mart well within the oil and gas industry. According to a recent Maclean's article on the Kaiser well, the proponent expects the well to produce over six million barrels of oil over 20 years.[3]

In response to the application, The City filed three letters of concern with the ERCB. The letters set out The City's main concerns with the proposed oil well. The City's concerns were as follows:

- Inconsistent information from the applicant;
- Evacuation and public safety issues, especially due to the institutions found within the general vicinity;
- Community engagement;
- Environmental impacts;
- Land use planning impacts; and
- Sour gas concerns.

Kaiser met with The City on a regular basis in an attempt to resolve all of The City's concerns. In fact, many of the issues were resolved by the applicant.

[2] R.S.A. 2000, c. M-26
[3] Supra note.

III. City Don't Go Away Mad, City Just Go Away / ERCB Decision

Throughout the fall of 2011 The City worked with Kaiser on resolving all outstanding issues. One of the last hurdles was a sense of lack of community engagement and the outstanding emergency response concerns. Then on December 19th, 2011, the ERCB sent a letter to The City stating that the ERCB had convened an in-camera meeting to discuss The City's concerns, with no advance warning to The City or Kaiser. In the private hearing the Board decided to dismiss The City's concerns. It was on that very morning that The City held a three hour meeting with Kaiser to discuss the remaining issues.

In the decision letter to The City, the ERCB stated:

> Therefore, based on all the information before the Board, it does not appear that The City has rights or interests that may be directly and adversely affected by the proposed well. Accordingly, the Board hereby dismisses The City's objections and will issue the licence in due course.[4]

The licence was granted to Kaiser the next day.

IV. *Kaiser has exceeded the ERCB consultation requirements*

As previously mentioned, one of the main concerns from a City perspective was the lack of communication with the area residents. According to Kaiser, and the ERCB in the decision letter to The City, Kaiser had "…exceeded the ERCB consultation requirements."[5] Throughout the process of consultation with The City, Kaiser explained that they had met with the area Community Associations, area businesses and the institutions. However, it turns out that the level of consultation with the community may not have been as robust as thought.

After the ERCB approval, some concerned citizens convened an open house and invited along the ERCB, Kaiser, their MLA and The City, including the area Aldermen. It was expected that upwards of a 100 residents would attend the event. On Saturday, February 11th, 2012, the open house was held. By all accounts, upwards of a 1000 residents showed up and most of whom stated their shock that the development had been approved without any notice given to them.

[4] ERCB Decision Letter to The City, dated December 19, 2011.
[5] Ibid

V. City of Calgary Reaction to the Kaiser Decision

The above overview of the Kaiser well application process in Calgary raised numerous concerns for The City. These concerns have led to several initiatives to attempt to place The City in a better position to deal with oil and gas issues. There are three main initiatives:

1. City of Calgary ERCB Review application for the Kaiser decision (please find attached);
2. Notice of Motion from Council seeking possible ways for The City to have more of a say in oil and gas development; and
3. A review of The City's Gas and Oil Group.

Once the ERCB decision was rendered, The City spent several months deciding whether to file an appeal, file a review application or simply to let the decision stand. In the end, the direction was provided to file a review application with the Board. The community association and the owner of the Wal-mart site had already filed their own review applications earlier in the spring.

In addition, the area Aldermen brought forth a Notice of Motion directing Administration to review possible regulatory amendments to give The City more of a say in oil and gas development. The Report will return to Council in June, 2012.

Finally, the existing Calgary Gas and Oil Group ("GOG") is currently undergoing a mandate review. The GOG is an informal group consisting of City Business Units that are impacted by oil and gas development. This group includes Fire, Planning, Law, Urban Development, Environmental and Safety Management, amongst others. The hope is to establish an oil and gas liaison officer, similar to what has been done in Red Deer and Edmonton.

VI. Municipal Consent Required?

One of the main issues for The City in the ERCB review is why The City was told by Kaiser, and other oil and gas developers, that municipal consent is required for all oil and gas development within municipal boundaries. This explanation had been provided by Board staff in the past as well. In addition, The City was told that if no municipal consent is granted, an ERCB hearing would be held. In the Kaiser instance, no consent was ever provided.

The interesting part is that the ERCB's rules for applications, which is known as Directive 056 – Energy Development Applications and Schedules[6] does set out rules for when a municipality must provide consent. However, that consent appears to only be necessary when there is an application for a sour gas well.

[6] http://www.ercb.ca/docs/documents/directives/directive056.pdf

However, associated with Directive 056 is a Frequently Asked Questions document, known as the Directive 056: Frequently Asked Questions – Participant Involvement.[7] One of the FAQ's referenced in this document relates to municipal consent:

- **URBAN CENTRES**

- **Question:**
  - Our company is preparing for a well that will be within the boundaries of an urban centre. Directive 056 indicates that we only need to notify the urban authority. Are there any other requirements?

- Answer
  - The ERCB recognizes that there may be additional concerns when a well, pipeline, or facility is proposed within the corporate boundary of the urban centre relating to future subdividing, planning, and setbacks**. In these cases, it is necessary to obtain consent from the urban authority. If the application is being submitted routinely, it will be necessary to submit that consent with the application.** (emphasis added)

It would appear that the FAQ's do not reflect the language found in Directive 056. Based upon the language of the FAQ's, there is even a question of whether the Kaiser application was complete. The FAQ appears to require the consent as part of the application to the ERCB.

VII. When we Say City, we Really Mean Rural (Urban Authority vs. Local Authority)

Another interesting wrinkle when dealing with the ERCB is that they have two distinct definitions for municipalities, one of which appears to be the elected officials of the municipality, and another that appears to be for administration. The definitions are[8]:

> **Local authority** Council of a city, town, village, or municipal district, or in the case of an improvement district or special area, the Minister of Municipal Affairs, the council of a settlement under the *Métis Settlements Act*, or the band council of

[7] http://www.ercb.ca/portal/server.pt/gateway/PTARGS_0_0_302_0_0_43/http%3B/ercbContent/publishedcontent/publish/ercb_home/industry_zone/rules__regulations__requirements/directives/FAQs_056_partinvolve.aspx

[8] Supra note 3

a First Nations reserve.

Urban authority The administrator of a city, town, new town, village, summer village, or

hamlet with not fewer than 50 separate buildings, each of which must be an

occupied dwelling, or other incorporated centre.

For certain projects, the consent and notification is required for both the Urban and the Local authority, pursuant to the rules provided in Directive 056. This would mean an oil and gas developer would require the consent of both council and administration, which appears to be a fairly odd requirement. When The City asked the ERCB for further clarification on this particular issue, the following explanation was provided by the ERCB Law Department:

> The use of the term "council" in the definition of a "local authority" is not intended to refer to a City Council. Local authority was traditionally called "rural authority" and is intended to apply to areas other than "urban centres" and generally refers to Municipal Districts. Accordingly, if you are looking for notification requirements relevant to the City, you should look for references to Urban Authorities.[9]

The explanation from the ERCB would make some sense, if their own definition for Local Authority did not include cities.

For contentious projects within a municipality, this is clearly a distinction that could be a useful tool for elected officials with a desire to provide inputs into a project.

VIII. Municipal Jurisdiction in Relation to Oil and Gas Development

Based upon The City's recent experiences with the Kaiser well, it appears that the oil and gas regulatory regime in Alberta is largely based upon a rural experience. In addition, it is also clear that the regulatory regime was created to largely keep municipalities out of the oil and gas approval process. Professor Laux provides three reasons as to why he believes this is the case:

> First, oil and gas is the lifeblood of the provincial economy and as such should not be subjected to local control that might vary from place to place. Second, unlike most other types of developments, oil and gas wells are not susceptible to being shifted in time and space to suit local land use planning aspirations. Third, permission to drill oil and gas

[9] March 20, 2012 e-mail correspondence from the ERCB.

> wells must be obtained through the licensing procedures prescribed in the *Oil and Gas Conservation Act* and regulations made thereunder.[10]

In Alberta, municipalities have very little jurisdiction when it comes to oil and gas development within the municipality. What jurisdiction there is comes from two main sources within the MGA. These two sources are the general bylaw making powers and very limited planning and development controls.

The two main land use planning related provisions for resource extraction within the MGA can be found at sections 618 and 619.

Section 618 states, in part:

> 618 (1) This Part and the regulations and bylaws under this Part do not apply when a development or a subdivision is effected only for the purpose of
>
> (a) a highway or road,
>
> (b) a well or battery within the meaning of the *Oil and Gas Conservation Act* , or
>
> (c) a pipeline or an installation or structure incidental to the operation of a pipeline. …[11]

As a result of section 618, the normal Part 17 of the MGA rules and regulations do not apply to the drilling of wells within a municipality.

Section 619 grants to municipalities limited approval scope for other forms of oil and gas development. However, the ERCB approval will still trump any municipal approval and conditions. Section 619 states, in part:

> 619 (1) A licence, permit, approval or other authorization granted by the NRCB, ERCB, AEUB or AUC prevails, in accordance with this section, over any statutory plan, land use bylaw, subdivision decision or development decision by a subdivision authority, development authority, subdivision and development appeal board, or the Municipal Government Board or any other authorization under this Part.
>
> (2) When an application is received by a municipality for a statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization under this Part and the application is consistent with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AEUB or AUC, the municipality must approve the application to the extent that it complies with the licence, permit, approval or other authorization granted under subsection (1).

[10] Frederick A. Laux, Q.C., Planning Law and Practice in Alberta, 3d ed. (Edmonton: Juriliber Limited, 2010) at 4-36.
[11] Supra note 1.

(3) An approval of a statutory plan amendment or land use bylaw amendment under subsection (2)

(a) must be granted within 90 days after the application or a longer time agreed on by the applicant and the municipality, and

(b) is not subject to the requirements of section 692 unless, in the opinion of the municipality, the statutory plan amendment or land use bylaw amendment relates to matters not included in the licence, permit, approval or other authorization granted by the NRCB, ERCB, AEUB or AUC. . .[12]

These rules would apply to larger scale projects. However, the interesting problem for municipalities is that these large projects, such as refineries and upgraders, would need to be in industrial zones for numerous technical reasons. As a result, the potential impact on residents would be limited. It is the wells, batteries and pipelines that could literally be in your backyard that the municipality would have limited control over.

Another component of section 618 is the power granted to the Municipal Government Board to compel municipalities to amend statutory plans and land use bylaws. This is a very powerful mechanism and takes away council's land use bylaw powers for bylaws that could be viewed to be contrary to an ERCB approval. Section 618(8) states:

(8) In an appeal under this section, the Municipal Government Board may

(a) order the municipality to amend the statutory plan or land use bylaw in order to comply with a licence, permit, approval or other authorization granted by the NRCB, ERCB, AEUB or AUC,[13]

IX. Does the ERCB Consider Planning Regimes?

The ERCB may consider planning issues at a hearing. However, if no hearing is convened, it appears the ERCB does not take into account planning issues. One of the big issues for The City is that the ERCB appears to not have taken into account The City's planning regime for the Kaiser well as part of the internal review.

The ERCB is moving away from holding hearings on projects. As a result, municipalities may not be able to get planning information in front of the Board. The ERCB receives tens of thousands of applications every year. Historically, the ERCB held approximately 15 hearings. Over the past few years, this number has dwindled to less than 10. The reason is that the ERCB is moving towards a greater emphasis on Alternative Dispute Resolution.

[12] Ibid.
[13] Ibid

Here are some statistics from the ERCB website:

ERCB application and hearing activity:

- In 2006, the ERCB received over 38,000 applications relating to energy facilities (including wells, pipelines, batteries, and gas plants), resources, and utilities.
- Every year, the ERCB holds about 15 public hearings into specific energy applications received.

The likelihood of a hearing considering planning matters is fairly minimal, based upon the number of applications per year and the actual hearings held by the Board.

In his leading text on Alberta planning, Professor Laux states, at 4-36:

> While there are no court cases dealing with the point, it would appear that, consistent with its practice, the board is not only entitled, but is duty bound, to take into account land use planning considerations in arriving at a decision.[14]

The Board itself does appear to take into account planning considerations, when a hearing occurs. In a 2001 decision, the Alberta Energy and Utilities Board, the predecessor to the ERCB, made the following revelations in relation to planning considerations:

> Land use planning regimes are, however, relevant to the Board's consideration because they indicate from the municipality's perspective, the nature of the past, present, and future uses of a proposed site or lands in close proximity to a site. The Board is thus better able to determine whether the relative impacts created by energy facilities on the use of lands are acceptable.[15]

X. Potential Part 2 Regulation?

Any regulation of oil and gas activities via Part 17 of the MGA is problematic and limited. The Province has created an approval process that purposely pushes municipalities out of any meaningful planning inputs for oil and gas activities. However, the door is open for municipalities to regulate some of the oil and gas activities post-ERCB approval via Part 2 of the MGA.

A major concern for municipalities when oil and gas development occurs in the vicinity of residential development is the potential for nuisances associated with the drilling operation. There is the potential to deal with these nuisances through the general bylaw making abilities of a municipality.

[14] Supra note 7.
[15] *AES Calgary ULC: 525-MW Natural Gas-Fired Power Plant – Application No. 2001-101 (11 December 2001)* at 4.

The general bylaw making powers of a municipality can be found in section 7 of the MGA, which states, in part:

> 7 A council may pass bylaws for municipal purposes respecting the following matters:
>
> (a) the safety, health and welfare of people and the protection of people and property;
>
> (b) people, activities and things in, on or near a public place or place that is open to the public;
>
> (c) nuisances, including unsightly property;
>
> (d) transport and transportation systems;
>
> (e) businesses, business activities and persons engaged in business; …[16]

Arguably the bulk of the above bylaw powers could apply to oil and gas facilities. The concerns of the public in relation to oil and gas activity relate to safety, nuisances, traffic and business activities. As long as the municipality does not interfere with the ERCB approvals, then the municipal could regulate aspects of the operations.

The issue of potential conflicts between the bylaw and a provincial enactment is problematic. Section 13 of the MGA deals with the potential conflict issue:

> 13 If there is an inconsistency between a bylaw and this or another enactment, the bylaw is of no effect to the extent of the inconsistency.[17]

The other limitation placed on the section 7 bylaw enacting jurisdiction can be found in section 10 of the MGA:

> 10 (1) In this section, "specific bylaw passing power" means a municipality's power or duty to pass a bylaw that is set out in an enactment other than this Division, but does not include a municipality's natural person powers.
>
> (2) If a bylaw could be passed under this Division and under a specific bylaw passing power, the bylaw passed under this Division is subject to any conditions contained in the specific bylaw passing power.
>
> (3) If there is an inconsistency between a bylaw passed under this Division and one passed under a specific bylaw passing power, the bylaw passed under this Division is of no effect to the extent that it is inconsistent with the specific bylaw passing power. [18]

[16] Supra note 1.
[17] Ibid
[18] Ibid

It is clear that The City could not pass a bylaw granting full oil and gas facility approval powers to The City, which would contravene sections 618 and 619 of the MGA. However, general bylaws dealing with nuisance issues could still be valid, as long as there is not a clear conflict with the ERCB approval and other legislation.

XI. Potential Conflicts (Bylaw Always Looses)

The general issue of municipal powers and the specific issue of conflicts between bylaws and provincial enactments has been the subject of a great deal of case law over the past ten years. From a Calgary perspective, *United Taxi* really laid the groundwork for the broad and purposive approach to the powers granted to a municipality. Justice Bastarache stated at paragraph 6:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M255; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.[19]

This new approach was tested again in the *Croplife Canada* decision. This decision has even more of a bearing on the potential oil and gas bylaw powers. In *Croplife Canada* a pesticide company was questioning the City of Toronto's ability to enact a new pesticide bylaw. The company made the argument that pesticide application was governed by provincial laws. While the case stems from the Ontario *Municipal Government Act*, the bylaw powers of that act are similar to Alberta's MGA.

In dismissing the company's argument, the Ontario Court of Appeal ruled:

[19] *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485

> [72] The motion judge found that the by-law is aimed primarily at the matters of health, safety, and well-being of the City of Toronto's inhabitants. Its municipal purpose therefore falls squarely within the authority granted by s. 130 of the *Municipal Act, 2001*.
>
> [73] No by-law can be enacted under s. 130 to regulate matters of health, safety, or well-being of the inhabitants of the city if the purpose of the by-law is to regulate a "matter that is specifically provided for by this Act or any other Act." These limiting words require the court to examine the *Municipal Act, 2001* and other provincial acts to determine if they give municipalities any specific powers to regulate the use of pesticides. If so, no such by-law can be enacted using s. 130. There is no dispute that there is no specific municipal power to regulate pesticide use contained in the *Municipal Act, 2001* or in any other Ontario statute. Therefore, the limiting words of s. 130 do not preclude enactment of the pesticide by-law.
>
> [74] Finally, the by-law will not be effective if it expressly contradicts any other law, whether federal or provincial, or if it frustrates the purpose of those laws. The appellant concedes that it is not impossible to comply with the pesticide by-law at the same time as the federal *PCPA* or the Ontario *Pesticides Act*. Moreover, as I have found, the pesticide by-law does not frustrate the purpose of those acts. Therefore, the by-law is not rendered inoperative by the conflicts test in s. 14 of the *Municipal Act, 2001*, applied in accordance with the Supreme Court's decisions in *Spraytech* and *Rothmans*, *supra*.[20]

Professor Nickie Vlavianos from the University of Calgary Law School has written extensively on the issue of municipal jurisdiction in relation to energy projects and the potential conflicts with the ERCB and the provincial enactments. In one of her papers she provides the following analysis:

> …any consideration of the validity of such a general noise or toxic sub-stances bylaw would be subject to the Spraytech and Rothman tests. First, it would have to be asked whether the bylaw could be complied with alongside any provincial regulation on the same subject matter. Second, it would have to be asked whether the operation of the bylaw displaces or frustrates the intent or purpose of the provincial enactment. If not, they could both be valid.
>
> In this way, it may be possible for municipalities to regulate some, although certainly not all, aspects of oil and gas development. This may be so even in the case of wells, pipelines, and batteries that are expressly exempted from municipal planning and development powers. The key, of course, will be ensuring that the purpose of any bylaw

[20] *Croplife Canada v. Toronto (City of)* (2005), 75 O.R. (3d) 357 (C.A.)

> falls squarely within a valid municipal purpose in relation to the protection of the health and safety of the municipality's residents, or in relation to nuisances.[21]

XII. The Province Gives, and the Province Tries to Take Away

An interesting twist associated with this matter is the fact an arm of the Province, the Surface Rights Board, granted Kaiser the right to drill on lands held by another agency of the Province, Alberta Infrastructure. At first Alberta Infrastructure objected to the well before the lead oil and gas regulator in Alberta, the ERCB. After pressure was brought to bear, the surface rights owner conceded and the licence to drill was granted.

However, after the licence was granted, Alberta Infrastructure raised ERCB issues (safety, environment, future development) at the Surface Rights Board. This board's mandate is to ensure access rights are dealt with in a fair manner. The ERCB is the lead regulator in Alberta for oil and gas development. Matters relating to safety, environment and development implications are properly brought before the ERCB to be resolved. It is interesting that Alberta Infrastructure would choose a surface rights board to argue the merits of the oil and gas activity.

XIII. Conclusion

The power to approve oil and gas activities within Alberta municipalities has been granted to the ERCB. Any municipal powers to regulate would be at the operation stage, after a project has already approved. Given the drastic impact an oil and gas well could have on a municipality, it is an issue municipalities need to consider before an application is made to drill a well within the municipality.

The ERCB has stated that the Directives are living documents and will be amended on a regular basis. The City will be pursuing amendments with the Province to ensure that municipalities have a greater say in where a well is situated in the municipal realm.

Even though The City may have some oversight post-approval, once a well is situated on a parcel, the impacts could potentially be felt by the municipality for upwards of a 100 years. Such an impact on community planning is something that municipalities must consider when an application for an oil well is made in someone's backyard.

[21] Nickie Vlavianos and Chidinma Thompson, "Alberta's Approach to Local Governance in Oil and Gas Development", Alberta Law Review, (2010) 48 Alta. L. Rev. 55-92.