

NOTICE OF APPLICATION

FEDERAL COURT

BETWEEN

THE CITY OF MEDICINE HAT and LGX OIL + GAS INC.

Applicants

AND:

**ATTORNEY GENERAL OF CANADA,
THE MINISTER OF THE ENVIRONMENT and
THE GOVERNOR GENERAL IN COUNCIL**

Respondents

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, as amended, and Part 5 of the *Federal Courts Rules*, SOR/98-106, as amended, for judicial review of a decision of the Minister of the Environment and the Governor in Council under the *Species at Risk Act*, SC 2002, c 29.

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the City of Medicine Hat and LGX Oil + Gas Inc. (collectively, the "**Applicants**"). The relief claimed by the Applicants appears on pages 4 and 5 of this Notice of Application.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the

place of hearing will be as requested by the Applicants. The Applicants request that this Application be heard at the Federal Court – Trial Division located at 635 – 8th Avenue S.W., 3rd Floor, in the City of Calgary, in the Province of Alberta.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicants' solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

COPIES of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATED this 3rd day of January, 2014.

**ISSUED
BY:**

**ORIGINAL SIGNED BY
NANCY GAGNÉ
SENIOR REGISTRY OFFICER**

TO: ATTORNEY GENERAL OF CANADA
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8
Tel: 613-992-4621
Fax: 613-990-7255

AND MINISTER OF THE ENVIRONMENT
TO: Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa ON, K1A 0H8
Tel: 613-992-4621
Fax: 613-990-7255

AND GOVERNOR GENERAL IN COUNCIL
TO: Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa ON, K1A 0H8
Tel: 613-992-4621
Fax: 613-990-7255

APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW of the decision of the Governor General in Council, on the recommendation of the Minister of the Environment (the "**Minister**"), pursuant to section 80 and subsection 97(2) of the *Species at Risk Act*, SC 2002, c 29 (the "**SARA**") to make the *Emergency Order for the Protection of the Greater Sage-Grouse*, SOR/2013-202 (the "**Order**"), as published in the Supplement Canada Gazette, Part II (Vol 147, No 25) on December 4, 2013.

The City of Medicine Hat and LGX Oil + Gas Inc. submit that section 80 and subsection 97(2) of the SARA and the Order made thereunder are *ultra vires* the jurisdiction of Parliament.

Further, the Applicants state that the Governor General in Council and the Minister failed to observe principles of natural justice and procedural fairness, erred in law, and based their decisions on erroneous assumptions and facts, rendering the decisions to recommend and introduce the Order unreasonable. The Applicants thus seek relief pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

THE APPLICANTS MAKE APPLICATION FOR:

1. A declaration that section 80 and subsection 97(2) of the SARA and the Order made thereunder are *ultra vires* the jurisdiction of Parliament and are of no force and effect;
2. In the alternative to the relief sought in paragraph 1, a declaration that the Minister and the Governor General in Council did not adhere to the requirements of procedural fairness and natural justice in their decisions to recommend and make the Order;
3. Further and in the alternative to the relief sought in paragraph 1, a declaration that the Applicants were entitled to be heard and make

submissions in respect of the Order and the Restrictions contained in the Order;

4. Further and in the alternative to the relief sought in paragraph 1, a declaration that the decisions of the Minister and the Governor General in Council to recommend and make the Order, including the Restrictions contained in the Order, are unreasonable;
5. Further and in the alternative to the relief sought in paragraph 1, an order in the nature of *certiorari* quashing the Order;
6. In the alternative to the relief sought in paragraph 5, an order in the nature of *certiorari* and *mandamus* suspending the coming into force of the Order for a period of six (6) months;
7. Further and in the alternative to the relief sought in paragraph 1, an order in the nature of *mandamus* directing the Minister to, within six (6) months of the date of said order, hear and consider, in good faith, the submissions of the Applicants with respect to the Minister's recommendation of the Order, the contents of the Order and/or any substantially similar order that similarly affects the rights of the Applicants;
8. Further in the alternative to the relief sought in paragraph 1, an order in the nature of prohibition that bars the Minister from recommending, and any Governor General in Council from enacting, any order that is substantially similar to the Order without first affording procedural fairness and the right to make submissions to the Applicants; and
9. Such further and other relief as to this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

I. INTRODUCTION

10. The City of Medicine Hat and LGX Oil + Gas Inc. agree that protection of the Greater Sage-Grouse (the "**Sage-Grouse**") is an important and laudable goal. In coordination with the Province of Alberta, each of the Applicants has implemented measures to protect the Sage-Grouse and its habitat in the Manyberries area. The Applicants state that it is appropriate to quash the Order for the following reasons.
11. First, the Applicants state that section 80 and subsection 97(2) of the SARA, and the Order made thereunder, are *ultra vires* the jurisdiction of Parliament. The impugned provisions of the SARA and the Order are intended to regulate land use and the oil and gas industry in the provinces and are not a valid exercise of the federal government's criminal law power under subsection 91(27) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (the "**Constitution Act**").
12. Second, certain provisions of the SARA and the Order are a wrongful intrusion into the jurisdiction of the provinces, and in particular, that of the Province of Alberta, which has delegated authority to its various provincial ministries (environment, land use, and energy) under validly enacted legislation to ensure that the oil and gas industry in the Manyberries area implements measures to protect the Sage-Grouse and its habitat.
13. Third, the Applicants take issue with the capricious, unfair, arbitrary and unlawful means employed by the Minister and the Governor General in Council in implementing unreasonable Restrictions (defined below in paragraph 65) on the day-to-day and future operations of the Applicants without consultation or regard for the Applicants.

14. The Applicants submit that the Minister and the Governor General in Council breached duties of fairness they owed to the Applicants and as a result, based their decisions on a number of erroneous and incorrect assumptions regarding the significant impact that the Order will have on the Applicants.
15. The Restrictions are imposed arbitrarily on the Applicants and therefore will have minimal, if any, impact on alleviating the threats to the survival and recovery of the Sage-Grouse in Alberta. The Sage-Grouse faces threats of extirpation, meaning that although it faces the threat of no longer existing in the wild in Canada, it continues to exist in the wild elsewhere in the world such as large areas in the States of Montana, Wyoming, Idaho, Oregon and Nevada. Southeastern Alberta comprises a very small percentage of the North American distribution of the Sage-Grouse habitat.
16. Had the Minister and the Governor General in Council consulted the Applicants, they would have known that the Restrictions contained in the Order have the effect of sterilizing all future oil and gas development and prohibiting or significantly limiting the Applicants' ability to continue existing operations on the Affected Lands (defined below in paragraph 56).

II. **FACTS**

A. **The Parties**

17. The Applicant, the City of Medicine Hat (the "**City**"), is a municipal corporation under the *Municipal Government Act*, RSA 2000, c M-26 and is located in southeast Alberta.
18. The City prides itself as being one of the most economical places to live in Canada, with its unique City-owned gas utility (the "**Gas Utility**"), power generation plant, and oil and natural gas assets.

Through its Energy Services unit, the key objectives of the City include the supply and delivery of natural gas and electricity to the City's 61,180 residents and residents in the surrounding area, and providing financial support for municipal services for the benefit of the community.

19. The Gas Utility is primarily responsible for the management of the City's business and affairs relating to petroleum and natural gas resources and operations. Since 1902, the City has owned and operated its own gas utility for the purposes of developing, producing, and distributing natural gas for the use of its residents and commercial customers. The natural gas produced by the City is used as heating fuel for homes and businesses in the community as well as a fuel source of the City's power plant.
20. With the decline of natural gas prices in Alberta, the City has sought to further diversify its energy portfolio to ensure the ongoing sustainability of its Gas Utility. Effective January 1, 2012, the City acquired oil and gas interests in the Manyberries field in southeastern Alberta, and acts as operator over these interests and those interests of other joint owners.
21. The Applicant, LGX Oil + Gas Inc. ("LGX"), is a corporation formed under the laws of Alberta and is publicly traded on the TSX Venture Exchange. LGX carries on business as a junior oil and natural gas company engaged in the exploration and development of resource-type oil and natural gas opportunities primarily focused in southern Alberta. LGX is dedicated to delivering growth in reserves and production for its investors through land acquisition followed by exploration and development of its oil and natural gas resources.
22. Effective November 7, 2012, LGX acquired oil and natural gas interests in the Manyberries field in southeastern Alberta to provide

cash flow, exploitation and development of drilling inventory. LGX acts as operator over these interests and those interests of other joint owners in the Manyberries field.

23. The Respondent, the Minister of the Environment, is responsible for the administration of the SARA, which is a federal Act respecting the protection of wildlife species at risk in Canada.

B. The Greater Sage-Grouse

24. The Sage-Grouse is listed as an endangered species under Schedule 1 of the SARA and was identified as such when the SARA was proclaimed in 2003. The distribution of the Sage-Grouse in Canada is limited to the sagebrush and native prairie areas in southeastern Alberta and southwestern Saskatchewan. The Sage-Grouse faces threats of extirpation, meaning that although it faces the threat of no longer existing in the wild in Canada, it continues to exist in the wild elsewhere in the world such as large areas in the States of Montana, Wyoming, Idaho, Oregon and Nevada. Southeastern Alberta comprises a very small percentage of the North American distribution of the Sage-Grouse habitat.
25. The Sage-Grouse is listed as an endangered species in Alberta and Saskatchewan under the *Wildlife Act*, RSA 2000, c W-10 (the "**Wildlife Act**") and *The Wildlife Act, 1998*, SS 1998, c W-13.12, respectively. The Sage-Grouse is not a migratory bird protected by the *Migratory Birds Convention Act, 1994*, SC 1994, c 22.
26. According to the Committee on the Status of Endangered Wildlife in Canada ("**COSEWIC**"), the Sage-Grouse experienced a 98% decline in total Canadian population between 1988 and 2012. Current provincial data estimates that in 2012, there were 40 to 60 adult birds in Alberta and 55 to 80 adult birds in Saskatchewan. Threats to the Sage-Grouse have been identified to include habitat loss or

degradation, predation, altered landscape hydrology, disease, direct mortality, climate fluctuations, extreme weather events, drought, sensory disturbance, collisions with vehicles and vertical structures.

27. Since June 2000, both the federal government and the governments of Alberta and Saskatchewan have expended time and resources to identify the critical habitat of the Sage-Grouse, and implement measures to help mitigate the factors that may contribute to the decline in population and degradation of the habitat of the Sage-Grouse. In addition, the Applicants have expended significant time and resources contributing to the study of the Sage-Grouse and have adopted measures to help stabilize the Sage-Grouse and its habitat in the Manyberries area. Examples of some of these measures include: removing surface infrastructure at inactive locations, ensuring well abandonments at locations nearest to Sage-Grouse mating sites (“leks”), conducting pre-drilling wildlife surveys, adopting minimal disturbance practices, and sponsoring Sage-Grouse research.

III. REGULATORY FRAMEWORK

A. Regulatory Framework in the Province of Alberta

28. The Province of Alberta has implemented legislation and measures to protect the Sage-Grouse and its habitat.
29. In 1996, Alberta signed the national *Accord for the Protection of Species at Risk* (the “**Accord**”) wherein the federal, provincial and territorial ministers responsible for wildlife committed to designate species at risk, protect their habitats and develop recovery plans as well as complementary legislation, regulations, policies and programs.
30. To support implementation of the Accord, the *National Framework for Species at Risk Conservation* (the “**National Framework**”) was developed jointly by federal, provincial and territorial governments and

provides a common set of principles, objectives and overarching approaches for the conservation of species at risk.

31. In January 2009, Alberta issued *Alberta's Strategy for the Management of Species at Risk (2009-2014)* which provides the policy framework for species at risk management in Alberta. It is intended to be a part of and incorporates the principles from the National Framework, for the conservation and recovery of species at risk in all jurisdictions of Canada. Alberta is represented on the national COSEWIC and takes an active role in the Committee for Recovery of Nationally Endangered Wildlife.
32. Section 36(1) of the *Wildlife Act* prohibits disturbance of a house, nest or den of a Sage-Grouse. This is enforced by Alberta Environment and Sustainable Resource Development ("ESRD"), Fish and Wildlife Division. The penalties for breaching the *Wildlife Act*, per sections 86 and 92 of that Act, include large fines and imprisonment. The *Wildlife Regulation*, Alta Reg 143/97, also delegates to the Alberta Conservation Association the power to implement plans to restore populations and habitat.
33. On recommendation of the Endangered Species Conservation Committee, the Alberta Minister of ESRD adopted a number of recovery plans for the Sage-Grouse which were reviewed by the special independent technical advisory group and underwent public consultation.
34. Alberta's Enhanced Approval Process ("EAP") sets out the application requirements and approval standards for surface land use applications under the *Public Lands Act*, RSA 2000, c P-40. Pursuant to section 9.1.1 of the *EAP Integrated Standards and Guidelines* (December 1, 2013):

- (a) Activities shall not occur within 3200 meters from the perimeter of a Sage-Grouse lek (Approval Standard 100.9.1.1.1); and
 - (b) Activities shall not occur within 1000 meters of areas identified and mapped as active Sage-Grouse habitat (Approval Standard 100.9.1.1.2).
- 35. Any dispositions and acquisitions of land in the Manyberries area are subject to the EAP non-standard application process. Such dispositions include any application for new oil and natural gas development on lands in the Manyberries area (which lands include the lands identified by the Order as critical habitat and defined as the Affected Lands). All non-standard oil and natural gas applications undergo a technical and administrative review by Alberta Energy Regulator (the "AER") (formerly reviewed by ESRD prior to the enactment of the *Responsible Energy Development Act*, SA 2012, c R-17.3 ("REDA")) prior to approval.
- 36. The most recent recovery plan for the Sage-Grouse in Alberta is the *Alberta Greater Sage-grouse Recovery Plan 2013–2018: Alberta Species at Risk Recovery Plan No. 30* (Alberta Environment and Sustainable Resource Development, 2013) (the "**Alberta Recovery Plan**"). The Alberta Recovery Plan was created under section 6 of the *Wildlife Act* and was prepared by a team composed of representatives who may be affected by the management of Sage-Grouse and its habitat, including Alberta Energy, ESRD, Alberta Fish and Game Association, the oil and gas industry, the local ranching community, the Society of Grassland Naturalists and the City.
- 37. According to the Alberta Recovery Plan:
 - (a) The number of natural gas and oil wells within the current Alberta range of Sage-Grouse totals 1,533 wells (170

abandoned, 617 reclamation certified, 149 reclamation exempt, 186 suspended and 411 active wells).

- (b) The proposed model of critical habitat for nesting, brooding and wintering which has been consolidated with information on the location and extent of known breeding habitat and used to guide habitat conservation and management in Alberta. This Parks Canada model has been used internally by the Government of Alberta to develop a land management tool that identifies "Conservation and Development Zones" to manage surface land use within the range of Sage-Grouse. The Alberta Recovery Plan indicates that "the intent of this approach is to facilitate limited continued resource utilizations, where possible, and promote long-term conservation and remediation of sage-grouse habitat." This approach has been reviewed and endorsed by the petroleum stakeholders within the range of Sage-Grouse in Alberta.
- (c) With respect to the oil and gas industry, actions are aimed at minimizing the footprint of industrial activities within the Sage-Grouse habitat through land use standards, the use of Conservation and Development Zones and reclamation. This is implemented through the AER Guidelines.
- (d) The Conservation and Development Plan approach, endorsed by industrial stakeholders within the range of Sage-Grouse, will help protect critical habitat for Sage-Grouse while facilitating continued resource utilization.
- (e) Alberta Energy has added an addendum to all new subsurface mineral sales within Sage-Grouse habitat to provide up-front information to industry prior to mineral sales regarding surface access limitations.

38. Significantly, the current Alberta range of Sage-Grouse identified in the Alberta Recovery Plan is larger than and includes the area identified by the Order as critical habitat.
39. In addition to the efforts through ESRD, the Province of Alberta has provided for the protection of species of concern, such as the Sage-Grouse through the AER. While, pursuant to the REDA, jurisdiction over wildlife remains with ESRD, Fish and Wildlife, the AER's current guidelines (the "**Guidelines**") are aimed at minimizing the footprint of industry activity within the Sage-Grouse habitat, were developed specifically for the petroleum industry and include:
- (a) Alberta Energy and Utilities Board (predecessor to the AER) Informational Letter IL 2002-1, entitled *Principles for Minimizing Surface Disturbance in Native Prairie and Parkland Areas* (January 18, 2002);
 - (b) A recommendation of the best practices included within the guidelines entitled *Petroleum Industry Activity in Native Prairie and Parkland Areas: Guidelines for Minimizing Surface Disturbance* (Native Prairie Guidelines Working Group, January 2002) ("**Surface Disturbance Guidelines**");
 - (c) The Surface Disturbance Guidelines are based on land use standards, the use of Conservation and Development Zones (developed in cooperation with the University of Calgary) and reclamation;
 - (d) In accordance with the Surface Disturbance Guidelines, industry proposing to drill in environmentally sensitive areas such as Manyberries, as depicted within the Guidelines, is required to notify ESRD prior to applying for a well licence; and

(e) Section 6 of the Surface Disturbance Guidelines deals with reclamation activities. Section 6.2 sets out the requirement that recontouring of a disturbed site be completed, as required, to match the pre-disturbed landscape, and section 6.3 provides that erosion must be controlled. Section 6.3 lists "installing snow fencing" as a preferred alternative to using straw crimping as an erosion control.

40. The effect of the above regulatory provisions means that the Applicants' current and future oil and natural gas operations must satisfy and do satisfy the measures implemented by the Province of Alberta to protect the Sage-Grouse and its habitat (which habitat is identified by the Province as being in an area larger than that identified by the Order).

B. Federal Regulatory Framework

1. The SARA

41. The SARA was assented to in 2002 as federal legislation with the stated purposes (a) to prevent wildlife species from being extirpated or becoming extinct, (b) to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity, and (c) to manage species of special concern to prevent them from becoming endangered or threatened.

42. At enactment, the federal government announced that the SARA was being enacted under the criminal law power found in subsection 91(27) of the *Constitution Act*, and emphasized that it was doing so in order to recognize and preserve the need for the provinces and the federal government to work together to achieve resolutions on matters of environmental concern.

43. The SARA sets out a process whereby wildlife species can be listed as extirpated, endangered, threatened and/or of "special concern" in Schedule 1 to the SARA. Once a species is listed, it receives significant legal protections on federal lands and on other lands if it is an aquatic species or migratory bird. In certain circumstances, the SARA will extend to listed wildlife species found on provincial lands.
 44. If the Minister "is of the opinion that the species faces imminent threats to its survival or recovery" (regardless of whether it is a listed species or on what lands it is found) then, pursuant to section 80 of the SARA, the Minister is required to recommend the Governor in Council make an emergency order. The only exception to this requirement is where the Minister is "of the opinion that equivalent measures have been taken under another *Act of Parliament* to protect the wildlife species" (SARA, s. 81).
 45. Where an endangered species is neither an aquatic species nor a migratory bird, and is on land other than federal land, the emergency order may, pursuant to subsection 80(4)(c)(ii) of the SARA,
 - (a) identify habitat necessary for the survival or recovery of the species; and
 - (b) include provisions prohibiting activities that may adversely affect the species and that habitat.
 46. The SARA provides for large fines and/or imprisonment for breaching the above provisions and the provisions of an emergency order.
- 2. Application of the SARA to the Sage-Grouse**
47. As set out above, the Sage-Grouse was listed as an endangered species under Schedule 1 of the SARA in 2003.

48. Pursuant to section 37 of the SARA, the Minister published the Recovery Strategy for the Greater Sage-Grouse (*Centrocercus urophasianus urophasianus*) in Canada (the “**2008 Recovery Strategy**”) on January 14, 2008. As a result of an Order of the Honourable Justice Zinn of the Federal Court in *Alberta Wilderness Association v Canada (Environment)*, 2009 FC 710, 94 Admin LR (4th) 81, the Minister was directed to remedy the critical habitat provision by including the identification of critical habitat in the 2008 Recovery Strategy. The Recovery Strategy was amended on October 9, 2009 to include a partial identification of critical habitat for the Sage-Grouse in Alberta and Saskatchewan.

49. On June 7, 2013, Environment Canada sent a letter to the Applicants inviting each of them to attend one of three consultation meetings that Environment Canada hosted to discuss the draft Amended Recovery Strategy for the Sage-Grouse in Canada which included a map of the proposed critical habitat. At no time did Environment Canada propose, discuss, consult or hear any submissions of the City or LGX with respect to a proposed emergency order under the SARA or restrictions of the nature that were placed in the Order. Rather, Environment Canada made it clear at the June meeting that the preferred protection of the Sage-Grouse habitat would be under the laws of the Province and a federal cabinet order would be considered a last resort.

50. On September 17, 2013, The Honourable Leona Aglukkaq, Federal Minister of the Environment (defined above as the “Minister”), issued a news release (the “**News Release**”) and announced the federal government’s intention to introduce an Order for the Sage-Grouse “in the coming months.” In the News Release, the Minister stated: “Through a combination of stewardship measures we are addressing the imminent threats to the . . . Sage-Grouse [.] We will be working

with provinces and stakeholders over the coming months to implement these measures.” The Minister did not consult or hear any submissions of the Applicants in the months following this statement.

51. On December 20, 2013, Environment Canada released a proposed Amended Recovery Strategy for the Greater Sage-Grouse (*Centrocercus urophasianus urophasianus*) in Canada, which is subject to a 60-day public comment period. At the time of its final posting, it will replace the 2008 Recovery Strategy.

IV. THE ORDER

52. Absent consultation with the Province of Alberta and the Applicants, the Governor General in Council, on the recommendation of the Minister, made the Order pursuant to section 80 and subsection 97(2) of the SARA, as published in the Supplement to the Canada Gazette, Part II (Vol 147, No 25) on December 4, 2013. The Order is stated to come into force on February 18, 2014. The Order represents the first time section 80 of the SARA has been invoked since section 80 came into effect in June 2004.
53. Without prior consultation, the Applicants received notice of the Order by way of letter from Environment Canada dated December 4, 2013.
54. A regulatory impact analysis statement (the “**Impact Statement**”) was prepared in support of the Order and was published in the Supplement Canada Gazette, Part II (Vol 147, No 25) on December 4, 2013. The Order was not published in the Canada Gazette, Part I. As set out in the Impact Statement, the Minister “was unable consult on the details of this Order with the governments of Alberta or Saskatchewan, or with local landowners or industry representatives.”
55. Contrary to the suggestion in the Impact Statement that the Minister was unable to consult on the details of the Order due to the “urgent

nature of this Order”, nearly two (2) months passed between the date that the Minister declared that the Sage-Grouse “faces imminent threats to its survival or recovery” to the date that the Order was published in the Canada Gazette, Part II.

56. The Order introduces restrictions on activities on 1,672 km² of provincial and federal Crown lands in southeastern Alberta and southwestern Saskatchewan (the “**Affected Lands**”). The Affected Lands have been identified as habitat that is necessary for the survival or recovery of the Sage-Grouse. The Affected Lands include 1,276 km² (76% of the Affected Lands) of provincial Crown land and 356 km² (21% of the Affected Lands) of federal protected areas, and lands leased from the provinces to Agriculture and Agri-Food Canada that include community pastures and lands surrounding a research station (40 km²). Private lands in the Manyberries area are excluded from the Order.
57. Subsection 3(1) of the Order contains year-round restrictions on the Affected Lands of the following activities:
 - (a) killing or moving sage-brush, native grasses and native forbs in areas identified in the Order unless the lands were already used for growing and harvesting non-native plants at any given time in 2011, 2012 or 2013, or in an area within 15 m of a road (s. 3(1)(a) and (b));
 - (b) installing or constructing new fencing (except when fencing is used to manage grazing animals and conforms with the standard set out in Schedule 2 of the Order for Sage-Grouse friendly fencing) (s. 3(1)(c),(3));
 - (c) installing or constructing a new structure or machine that produces chronic noise (i.e. sounds greater than 45dB(A) for

more than 60 minutes a day (total) on 10 or more days per month) (s. 3(1)(d));

- (d) installing or constructing a new structure that will house a machine that produces chronic noise in a location where such noise did not exist at the time of coming into force of the Order (s. 3(1)(d));
- (e) altering an existing structure or machine, or its use, in a way that results in the production of chronic noise (s. 3(1)(d));
- (f) constructing a new road or widening an existing one (s. 3(1)(e)); and
- (g) installing or constructing a structure (excluding a fence), machine or pole exceeding 1.2 metres in height, or increasing the height of an existing structure, machine or pole beyond 1.2 metres in height (s. 3(1)(f));

(collectively, the **“General Restrictions”**).

- 58. Section 4 of the Order includes seasonal noise restrictions (the **“Seasonal Noise Restriction”**) during the Sage-Grouse’s mating season (effective between 1.5 hours prior to sunset and 1.5 hours after sunrise from April 1 to May 30 of any given year) on certain defined lands within the Affected Lands that have been identified by the Minister as leks used by male Sage-Grouse in at least one of the years between 2007 and 2012.
- 59. Sections 3 through 5 of the Order include an extensive list of situations and circumstances in which the restrictions do not apply to the agricultural industry.
- 60. Section 6 then states that some, but not all, of the restricted activities may give rise to offences under section 97 of the SARA.

61. According to section 97 of the SARA, every person commits an offence who, *inter alia*, contravenes a prescribed provision of an emergency order. Every person who commits an offence, whether it be on indictment or by summary conviction, is liable to pay a fine and/or imprisonment.
62. Subsection 97(2) of the SARA states that an emergency order may prescribe which of its provisions may give rise to an offence.
63. In summary, the federal government, through the mechanism of the SARA and the Order, has declared certain commercial and private activities, legally conducted in furtherance of local matters and on provincial lands, to be criminal offences.

V. EFFECTS OF THE ORDER ON THE APPLICANTS

64. The Affected Lands include significant oil and natural gas interests owned or partially owned, and operated by the Applicants.
65. The General Restrictions and the Seasonal Noise Restriction (collectively, the "**Restrictions**") sterilize the Applicants' plans for future development of their oil and natural gas interests and prohibit or significantly limit the Applicants' ability to operate and optimize recovery from existing wells and facilities on the Affected Lands.
66. The current oil and natural gas operations of the Applicants that are on provincial Crown lands and are directly affected by the General Restrictions include:
 - (a) in the case of the City, approximately 105 wells (40 active producing wells, 9 active injecting wells, and 56 inactive wells, and at least 17 abandoned wells sites), 3 multi-well batteries, several facilities and at least a hundred kilometres of associated pipelines and roads; and

- (b) in the case of LGX, approximately 169 wells (66 active producing wells, 5 active injecting wells, 1 water source well, 88 inactive wells, and at least 9 abandoned well sites), 3 multi-well batteries, several facilities and hundreds of kilometres of associated pipelines and roads.

- 67. The effect of the Seasonal Noise Restriction will require existing oil wells to suspend their production for the months of April and May. The current oil and natural gas interests of the Applicants that are on provincial Crown lands and are directly or indirectly affected by the Seasonal Noise Restriction include:
 - (a) in the case of the City, approximately 30 wells (10 active producing wells, 13 inactive wells, 3 suspended injecting wells and 4 abandoned well sites), 1 multi-well facility, and several kilometres of pipeline and roads; and
 - (b) in the case of LGX, approximately 6 wells (3 active producing wells, 1 active injecting well, 1 suspended well and 1 abandoned well site), pipelines and roads.

- 68. In addition, current oil and natural gas operations of the Applicants that are on private lands are indirectly affected by the General Restrictions and Seasonal Noise Restrictions by reason of limited road access on the Affected Lands, production of the wells that are directly affected as described above in paragraph 66, and wells that are tied into the facilities that are impacted by the Seasonal Noise Restrictions.

- 69. The General Restrictions make it difficult, if not impossible, to comply with good oilfield practices that are regulated and mandated by and under the jurisdiction of the Province of Alberta.

- 70. By way of background, the Alberta Energy Regulator (defined above in paragraph 35 as the "AER") is the main regulator of oil and gas

activities in Alberta. The AER's broad responsibility for regulating oil and gas activities in Alberta is located in a number of statutes including the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (the "**OGCA**"). Section 10 of the OGCA grants the AER the authority to make rules respecting a wide range of activities relating to oil and gas operations, including licensing and approval of wells, location of wells, operation of wells, drilling and completion of wells, repair and maintenance of wells, suspension and abandonment of wells, and measures to conserve and prevent waste of oil and gas.

71. The AER implements these rules by way of "directives" ("**AER Directives**") which, pursuant to the *Oil and Gas Conservation Rules*, Alta Reg 151/1971, set out the terms conditions, requirements and process for implementation of oil and gas activities. Licensees, permittees and other approval holders under the jurisdiction of the AER are required by the *Oil and Gas Conservation Rules* to comply with the requirements of all applicable AER Directives.
72. Some examples of the difficulty or impossibility of compliance with both the AER Directives and the Order, and effects on current operations include:
 - (a) Pursuant to AER Directive 065: *Resource Applications for Oil and Gas Reservoirs* (March 14, 2012) ("**Directive 65**"), the Applicants are required to replace the oil and water into the reservoir for that which has been produced (voidage replacement). In order to comply with Directive 65, the Applicants will be required to build and use infrastructure to pump and source water contrary to subsections 3(1)(f), 3(1)(a), (b) and (f) of the Order;
 - (b) Routine maintenance activities on existing wells and licensed pipelines in accordance with good oilfield practice, such as

repairing, inspecting, or maintenance and pressure testing requirements:

- (i) for inactive wells, pursuant to AER Directive 013: *Suspension Requirements for Wells* (July 24, 2007) and AER Manual 001: *Facility and Well Site Inspections* (September 15, 2010); and
- (ii) for existing licensed pipelines, pursuant to the *Pipeline Regulation*, Alta Reg 91/2005, Canadian Standards Association CSA Z662: *Oil and Gas Pipeline Systems* and AER Directive 077: *Pipelines – Requirements and Reference Tools* (March 21, 2011);

may result in a killing or moving of sagebrush plants and native grasses that have grown around the existing well or utilizing equipment and therefore placing the Applicants in contravention of subsections 3(1)(a) and (b) of the Order; and

- (c) Pursuant to section 137 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (“EPEA”), the Applicants must conserve and reclaim all well sites and obtain a reclamation certificate in accordance with the provisions of EPEA, including all applicable approvals or codes or practice. Further section 3.013 of the *Oil and Gas Conservation Rules* requires compliance with AER Directive 020: *Well Abandonment* (June 9, 2010) and AER Directive 079: *Surface Development in Proximity to Abandoned Wells* (September 20, 2012) which set out additional requirements for the Applicants for the abandonment of well sites. In order to comply with section 137 of EPEA, the *Oil and Gas Conservation Rules* and the applicable AER Directives, the Applicants are required to abandon and reclaim old wells to the standards stipulated

therein and this will likely result in a killing or moving of sagebrush plants and native grasses contrary to subsections 3(1)(a) and (b) of the Order.

VI. **ULTRA VIRES PARLIAMENT**

73. The Applicants state that section 80 and subsection 97(2) of the SARA and the Order made thereunder are *ultra vires* the jurisdiction of Parliament.
74. The federal government has chosen to exercise its authority in respect of the SARA under its criminal law power, subsection 91(27) of the *Constitution Act*. Emergencies, imminent threats and national concerns are not relevant to analysis of the criminal law power and cannot be used to justify the use of such power.
75. For legislation to legitimately fall within the federal criminal law power, such legislation must consist of prohibitions backed by penalties, and be directed at a legitimate public purpose. The Applicants state that section 80 and subsection 97(2) of the SARA and the Order fail to meet those criteria.
76. The extremely broad powers granted to the Minister and Governor in Council pursuant to section 80 and subsection 97(2) of the SARA allow the federal government to declare an emergency with respect to a listed species and, in so doing, regulate every conceivable activity on provincial lands, regardless of the nature or extent of valid provincial legislation or jurisdiction.
77. In pith and substance, the purpose of section 80 is, insofar as a listed species faces imminent threats to its survival or recovery, to delineate the powers which the federal government may exercise over species on its lands or subject to its statutes in ordinary circumstances versus the emergency circumstances under which it purports to have power

over such species on provincial and private lands. In short, it allows the federal government to declare an emergency with respect to a listed species, and in so doing, regulate activities on provincial and private lands.

78. While the protection of the environment is a legitimate public purpose which could support the enactment of criminal legislation, in the present case the impugned provisions of the SARA and the Order are a colourable attempt to regulate otherwise legal commercial activity, including the oil and gas industry, on Affected Lands in the provinces rather than to prohibit or proscribe it.
79. A review of the effects of section 80 and subsection 97(2) of the SARA confirms that the impugned scheme seriously affects land use and commerce and overlaps or conflicts with many provincial statutes and regulations. The impugned provisions have a direct impact on the relationship between individuals and provincial lands. The Order sets out rules for the use of provincial lands which are Sage-Grouse habitat, even though rules already exist in the sophisticated provincial regulatory scheme in place which relies on the harmonious interplay of several statutes in the provinces.
80. As set out above, the Province of Alberta exercises its constitutional authority over the protection of the Sage-Grouse through several different heads of power including its right to pass legislation over municipal affairs, local works and undertakings, the management of public land, matters of a local or private nature, property and civil rights and perhaps most importantly, over the development, conservation and management of non-renewable natural resources within their boundaries. The Province of Alberta has wide authority to make laws concerning the management and conservation of wildlife.

81. The impugned provisions of the SARA, viewed from the perspective of their pith and substance, are not connected with the federal criminal law power. As such, the impugned provisions and the Order extend beyond the purview of criminal law and cannot be justified under subsection 91(27) of the *Constitution Act*.

VII. LACK OF FAIRNESS

82. Notwithstanding the Minister's acknowledgement that the main sector expected to be affected by the Order is the energy sector, and notwithstanding that the Minister identified only two entities that were active in the oil and gas industry, namely the Applicants, the Minister failed to give notice or hear any submissions of the Applicants with respect to the Order or the type of restrictions in the Order.

83. Furthermore, the Applicants are disproportionately and unfairly affected by the Restrictions in the Order, rendering the effects of the Order arbitrary and nugatory. Regardless of proximity to leks identified by the Minister:

- (a) private lands are excluded from the Order;
- (b) there are a number of exceptions in the Order made for the agricultural industry. For example,
 - (i) there are no restrictions on grazing operations on provincial and federal crown lands;
 - (ii) the Noise Restriction does not apply to buildings, shelters or machines used to feed, handle, treat or provide water to grazing animals; and
 - (iii) the Noise Restriction with respect to vehicles that exceed 45 dB(A) does not apply to persons operating a

motor vehicle to or from a place where that person is conducting an agricultural operation; and

- (c) no significant restrictions are imposed by the Order on ranching, which occurs on almost all of the Affected Lands.

84. The Applicants submit that the Order was targeted at their activities on the Affected Lands, and therefore they were owed a duty of fairness by the Minister and the Governor General in Council. As acknowledged in the Impact Statement, the Applicants were not consulted nor given the opportunity to make submissions and be heard. As such, the Minister and the Governor in Council breached their duties of procedural fairness owed to the Applicants.

VIII. UNREASONABLENESS OF DECISION AND ORDER

85. In recommending and making the Order, the Governor General in Council and the Minister failed to consult or hear any submissions of the Applicants and as a result relied on a number of erroneous facts and assumptions in arriving at their decisions.

86. The erroneous facts and assumptions underlying the Minister's recommendation and the Governor in Council's decision to make the Order are set out in the Impact Statement and include the following:

- (a) That the provincial legislation and measures are "not mandatory" and do "not protect the species' habitat" (pp. 117 and 129);
- (b) That "four active oil wells exist in the area affected by the Order" (p.119);
- (c) That "two new oil wells would have been developed between 2014 and 2023 in the area affected by the Order" and in turn only 1-2 stakeholders are expected to be affected (p.119);

- (d) That one "existing oil pipeline (the Express Pipeline) runs through the affected area" (p.116);
- (e) That "production from four existing oil wells is assumed to be deferred for two months during the Sage-Grouse mating season (April-May) due to noise prohibitions in the Order" and that operational costs of a temporary shut-down are expected to be low (p.119);
- (f) That future gas development could "take place in such a way as to not contravene the Order (e.g. via horizontal access of the resource) without significantly increasing the cost", which in turn affects no stakeholders (pp.117 and 119);
- (g) That "compared to the overall oil and gas activity in Alberta and Saskatchewan, the oil and gas industry within the Sage-grouse habitat is relatively small" (p.117);
- (h) That the Order does "not add a burden to small business" as "the only small business located in the area subject to the Order are agricultural operations" (pp.109 and 127);
- (i) That any plans for new development could be achieved through access to the same oil field on lands not affected by the Order (p. 122);
- (j) That the costs to the Government are limited to education, implementation, enforcement, investigations and prosecutions (p.123);
- (k) That the "incremental costs associated with the ... Order are expected to be low", and that the costs of forgone production for new oil wells on the Affected Lands translates to \$10 million (p.123); and

- (l) That the Restrictions will have an impact on alleviating the imminent threats to the survival and recovery of the Sage-Grouse;

(collectively, the “**Erroneous Assumptions**”).

87. Had there been any consultation with the Applicants, the Minister and the Governor General in Council would know the following facts (enumerated in the same manner as the Erroneous Assumptions):

- (a) That the Applicants' oil and natural gas activities must satisfy and do satisfy the measures implemented by the Province of Alberta to protect the Sage-Grouse and its habitat (which habitat is identified by the Province as being in an area larger than that identified by the Order);
- (b) That at least 100 active producing wells are impacted by the Order, not 4 wells as stated;
- (c) Each of the City and LGX had plans in place to drill significantly more wells and maximize production of existing wells in the future;
- (d) That there are hundreds of kilometres of licensed pipelines that run through the Affected Lands that will be impacted by the Order;
- (e) That the temporary shut-down imposed by the Noise Restriction affects more than 4 producing wells: it affects approximately 13 producing wells and requires the temporary shut-down of one multi-well battery operated by the City;
- (f) The statement that future gas development could take place so as to not contravene the Order is factually incorrect due to factors such as the distance from the reservoir, cost, new road

construction and lease access restrictions created by the Order, which all affect any future gas development. In particular, the placement of horizontal drills on oil and gas wells would require the removal of the existing well heads and the placement of higher structures and heavy equipment to effect the installation. Consequently, such development would likely contravene some or all of subsections 3(1)(a) (b), (d) and (e) of the Order;

- (g) With respect to the comparison of the Applicants to the oil and gas activity in Alberta, this ignores the significant individual impact to the Applicants;
- (h) With respect to the finding that the Order “does not add a burden to small business” each of the City and LGX employ over 100 small businesses and their employees who are native to the Medicine Hat area to work on drilling and completion operations, and to maintain and repair equipment used in daily operations of the producing wells. The Order will also cause harm to the residents, taxpayers of the City and taxpayers of the Province of Alberta;
- (i) The statement that the same oilfield could be accessed through lands not affected by the Order ignores the complexity and costs of developing the oil pools in the Manyberries area;
- (j) With respect to the costs to government, the provincial governments will lose royalty revenue from the affected wells in an amount well in excess of \$12 million;
- (k) That the costs of forgone production to the Applicants arising from new wells greatly exceeds \$10 million—it is at least \$80 million; and

(l) The Restrictions are imposed arbitrarily on the Applicants and therefore will have minimal, if any, impact on alleviating the imminent threats to the survival and recovery of the Sage-Grouse.

88. Given the number of Erroneous Assumptions, the Applicants submit that the Order is not correct and falls outside the range of reasonable outcomes which are defensible in respect of the facts and the law. Because of these errors, the Order lacks intelligibility and justification. Moreover, the Order was made without regard for the facts that ought to have been before the Minister and the Governor General in Council.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. Affidavits on behalf of each of the Applicants, to be served; and
2. Such further and additional material as counsel may advise and this Honourable Court may allow.

THE APPLICANTS REQUEST THAT THE MINISTER send a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Minister's and Department of Environment's possession to the Applicants and to the Registry:

1. The record of materials that the Minister relied upon in coming to the opinion that the Sage-Grouse faces imminent threats to its survival and recovery;
2. The record of materials that the Minister relied upon to identify habitat that is necessary for the survival or recovery of the Sage-Grouse;
3. The record of materials relating to any and all consultation with affected or interested persons;
4. The record of materials before the Governor General in Council in relation to the *Emergency Order for the Protection of the Greater Sage-Grouse*; and

5. The record of materials before the Minister, the Department of the Environment and/or Parks Canada relevant to the recommendation to make the *Emergency Order for the Protection of the Greater Sage-Grouse* to the General Governor in Council.

DATED this 3rd day of January, 2014.



Kara L. Smyth / Kimberly J. Howard / Kelli C. McAllister

McCarthy Tétrault LLP

Barristers & Solicitors

Suite 3300, 421 - 7 Avenue S.W.

Calgary, AB T2P 4K9

Solicitor for the Applicants

