

## **Court Rules that Kyoto Implementation Act is a Matter for Parliament**

*Friends of the Earth v. Canada (Governor in Council), 2008 FC 1183*

**By Jodie Hierlmeier**  
*Staff Counsel*  
*Environmental Law Centre*

Environmental groups lost the initial Court battle to force the federal government to comply with a law requiring Canada to honour its Kyoto Protocol targets to reduce greenhouse gases (GHGs). The Federal Court found that "while this application raises important questions, they are of an inherently political nature and should be addressed in a political forum rather than in the courts."<sup>1</sup>

This decision is being appealed.

### **Facts**

In 2007, Liberal MP Pablo Rodriguez introduced a private member's bill, the *Kyoto Protocol Implementation Act (KPIA)*,<sup>2</sup> to force the federal government to comply with its obligations under the Kyoto Protocol. On June 22, 2007 *KPIA* became law with the support of opposition parties and the majority of the Senate.

Specifically, *KPIA* requires the Minister of the Environment (the Minister) to prepare a Climate Change Plan that ensures Canada will meet its Kyoto target, which is a 6% reduction in GHGs from 1990 levels between 2008 and 2012. It also calls for the federal cabinet to make or repeal regulations to ensure Canada meets this target and for the Minister to publish the GHG reductions anticipated from such regulations. These obligations are tied to other provisions, which create additional reporting functions and specific timelines for action.

The Minister published a climate change plan on August 22, 2007, which made very clear that the federal government had no present intention to meet its Kyoto target.<sup>3</sup> Under the federal government's plan, Canada's GHG emissions are expected to be 34% higher than our Kyoto target by 2012. The federal cabinet and Minister also failed to enact any regulations or meet a number of timelines as required by *KPIA*.

The environmental organization Friends of the Earth (FOTE), represented by EcoJustice, submitted three judicial review applications to the Federal Court to compel the federal government to comply with *KPIA*'s provisions. FOTE argued that the language of the Act was mandatory and by refusing to carry out the duties imposed by Parliament, both the Minister and cabinet breached the law. On the other side, the Minister and cabinet argued that the applications were not justiciable, meaning that this is not a proper subject matter to be before the Courts; rather, that it was properly a matter for Parliament.

### **Decision**

The Court found the language in *KPIA* to be problematic. It stated that section 5, which requires the Minister to publish a Climate Change Plan, was outside the realm of judicial review. This section requires not only compliance with the Kyoto target, but also measures to ensure a "just transition" for affected workers and an "equitable distribution" of reduction levels. The Court found that these policy-laden considerations were unsuitable for judicial review because there are no objective legal criteria that could be applied to allow a court to decide whether compliance had been achieved. Thus, the Court held that "[w]hile the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not."<sup>4</sup>

The Court also noted that *KPIA* uses the word "ensure" instead of "shall" to connote a mandatory obligation. The Court commented that "ensure" is not commonly used to indicate an imperative. With respect to the duties to enact regulations, the Court found that *KPIA* states that cabinet "may" make regulations; therefore, this obligation was not mandatory.

Overall, the Court found that the subject matter of the Act was inherently political in nature, stating that "the Court has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the *KPIA*."<sup>5</sup> The Court held that even if it was wrong on the issue of justiciability, it could not craft a meaningful remedy. Any mandatory order would be "devoid of meaningful content" and the "response to it so legally intangible that the exercise would be meaningless in practical terms."<sup>6</sup>

### **Implications**

The crux of the decision is that Parliament retains the sole discretion to decide the extent to which Canada complies with its Kyoto target insofar as this international target is expressed as domestic law in *KPIA*. FOTE is hoping that, on appeal, the Federal Court of Appeal will provide further guidance on the issue of justiciability. *KPIA* itself states that it is binding on the government and includes mandatory language and duties (even if these duties are drafted in a non-conventional legislative style). If the government is not accountable in the courts for its non-compliance with this legislation, it could make the same claim for various other laws that it does not want to obey because it would be difficult or inconvenient to do so. That makes this appeal an important case, not just for the Kyoto Protocol, but also for the rule of law in Canada.

<sup>1</sup> *Friends of the Earth – Les Ami(e)s de la Terre v. Canada (Governor in Council)*, 2008 FC 1183 at para. 40.

<sup>2</sup> S.C. 2007, c. 30.

<sup>3</sup> Environment Canada, *Turning the Corner: Canada's Plan to Reduce Greenhouse Gas Emissions And Air Pollution*, online: Environment Canada <<http://www.ec.gc.ca/default.asp?lang=En&n=75038EBC-1>>.

<sup>4</sup> *Supra* note 1, para. 34.

<sup>5</sup> *Ibid.* at para. 46.

<sup>6</sup> *Ibid.* at para. 47.

**Comments on these articles may be sent to the editor at [elc@elc.ab.ca](mailto:elc@elc.ab.ca).**

## **Climate Change and Water Management in Alberta: Seeking Insurance and Flexibility**

**By Jason Unger**  
*Staff Counsel*  
*Environmental Law Centre*

Global warming brings uncertainty to the availability of water within Alberta. The prospects of longer and more frequent droughts and an alteration of rain and snow events on the Canadian Prairies create significant challenges for water managers.<sup>1</sup> This uncertainty and variability must be contrasted with how law and policy typically seek to create certainty in resource allocation and management of individuals' legal rights. Certainty and adaptability are often conflicting concepts, yet adapting water management for climate change means either ensuring there is sufficient flexibility in the management system to allow for changes in how water is used (or not used) or having a sufficient water "buffer" as a level of insurance to ameliorate any prolonged reductions in water availability.

Water policy documents in Alberta acknowledge the need to adapt to changes in knowledge and the physical environment. Both the policy document *Water for Life: Alberta's Strategy for Sustainability*<sup>2</sup> and more recently the *Water for Life Renewal*<sup>3</sup> espouse pursuing an outcomes-based or systems-based approach<sup>4</sup> and have adaptive management as a recurring principle.<sup>5</sup> Statutes and regulations have yet to follow in propounding adaptation and flexibility in management. The *Water Act*<sup>6</sup> is, one could say, maladapted to climate change and related water supply uncertainty. A brief review of the extent to which the *Water Act* allocation is flexible and the ability to provide a water buffer to deal with climate change and supply uncertainty illustrates how water management laws in the province need to evolve.

The level of flexibility in the *Water Act* is minimal and where it exists, it relies on voluntary approaches by licence holders. Water allocations under the *Water Act* are rooted in the "first in time, first in right" (FITFIR) allocation system, creating a hierarchy of "rights" whereby those who entered the game first get the water first.<sup>7</sup> The FITFIR system is not inherently adaptable to climate change impacts on water supply. The *Water Act* attributes "rights" to users of the water resource and those users come to rely on these rights being consistently granted. This reliance creates entrenched positions, largely supported by arguments around the certainty of using the resource for economic return. This rights entrenchment is a significant barrier to flexible approaches and, as will be discussed, may frustrate attempts to create a flexible and responsive market in water allocations.

Further, due to historical allocations in Alberta, protection of water flows for environmental health would likely require the payment of compensation. While the government has the ability to hold or "reserve" water for environmental purposes, the priority of these allocations, where they are taken at all, is relatively low. In cases where allocations already exceed the instream flow needs of a water body, such as the South Saskatchewan River Basin, the impacts of drought on environmental health may be significant.

**The tools that might assist adaptation**

The *Water Act* provides some flexibility for managing existing allocations through water transfers and assignments. In addition, the government has some discretion to suspend or cancel allocations. Licences can be suspended in times of low flow for reasons of public safety or where significant ecological effects may result, but compensation may be required.<sup>8</sup>

Assignments and transfers may occur from senior to junior licence holders, but are limited by the Act. Assignments are only possible in limited circumstances:<sup>9</sup>

- the assignee (receiver of the assigned water) must be an existing rights holder who can access the water by its natural flow,
- the assignment must not impact those of higher priority, and
- the assignment must not create an adverse effect on the aquatic environment.

Water transfers, where an allocation is transferred to another party, are also enabled by the Act but are only available where authorized by an approved water management plan or by Cabinet order.<sup>10</sup> The transfer of water allocations requires that a public review of the transfer be undertaken and allows for holdbacks of 10% of the water being transferred.<sup>11</sup> Both transfers and assignments are further limited by the need to find a willing transferor or assignor.

Licence holders may also try to increase flexibility in their allocations by amending the purpose of the licence. Amendments to the purpose, if granted, allow the licence holder to effectively become a water broker, as they decide what amount of water goes to any one of the numerous purposes that might be included in their amended licence. There are some limitations to how amendments might be used and questions remain regarding their validity under the legislation. Primary among them is whether a licensee should transfer an allocation to the other user rather than simply amending their licence to manage their allocation for a broader spectrum of uses.<sup>12</sup>

The efficacy of these tools is reliant on a significant pool of licensees willing to transfer or assign their water allocations. Since the transfer system is an attempt to engage market principles, any limitations on willing sellers may be problematic. The market is complicated by large licence holders (primarily municipal and irrigation) who may be hesitant (due to political pressures) to sell off such a valuable commodity<sup>13</sup> and by the fact that the buyer is not purchasing a property right, but rather a regulated right or licence to divert a certain amount of Crown owned water.

Even if the market is working effectively, it may result in a simple shuffling of demand from one use to another and not a decrease in demand overall. The market system is also flawed from an environmental standpoint, as environmental interests have not been incorporated into the market, except, to a limited degree, through the exercise of government discretion to reserve water for environmental purposes. From an environmental perspective, the tools for flexibility in water allocations are inadequate, as an over-allocated basin such as the South Saskatchewan River Basin remains over-allocated. The environment would be better served by maintaining a water buffer against climate change uncertainty.

**The insurance of a water buffer**

Creating a buffer of water availability may be accomplished by reducing water use or by increasing water storage during higher flows. It should be recognized that a severe drought might still result in insufficient water availability notwithstanding a buffer, be it created by dam or decreased demand. Driving demand down to create the buffer is the environmentally sustainable preference due to the inherent environmental impacts of water storage projects. Storage projects are rarely treated as buffers. Instead, they are promoted as economic engines that foster further growth, water use and development and increase reliance on the supply, thereby undermining attempts to deal with the uncertainty climate change brings.

The *Water Act* does not drive demand well. As already mentioned, the water allocation transfer system is an attempt to activate a market and take advantage of supply and demand forces. But this transfer system, even if effective, is not likely to create a buffer of water availability; it simply allocates water to the highest value.

Some might argue that the *Water Act's* provisions relating to water conservation objectives and the ability for the government to hold an allocation to reserve this amount in the river is a way to drive conservation practices.<sup>14</sup> While this tool may ensure that over-allocations of river basins do not occur (if put in operation early enough and at an appropriate level), it does nothing to stimulate lower demand, as existing licence holders have their vested "rights" in hand.

The *Water for Life* policy, on the other hand, has set a goal of increasing the efficiency and productivity attained through water use by 30% over 2005 levels by 2015.<sup>15</sup> The Alberta Water Council, a multistakeholder advisory council, has created recommendations for attaining this goal through sector planning.<sup>16</sup> The question that remains is whether the conserved water will simply be made available for other uses or whether it will be returned to the river to maintain ecological health and to provide a buffer zone when water availability is low.

Whether the policy approach is sufficient to address climate change uncertainty is an open question. It is clear, however, that other legislative approaches for demand side management must be considered. These include:

- Prescribing a legislative priority of demand management in water planning processes;
- Altering the water allocation system to oblige licencees to establish efficient and beneficial use;
- Making the sector efficiency and productivity plans regulatory in nature;
- Regulating, minimizing or virtually eliminating consumptive uses in threatened watersheds;
- Prescribing legislative standards and regulations to minimize water "losses" through amendments to building codes and tightening of provisions for permitted industrial and agricultural diversions;

- Establishing a graduated water charge system; and
- Water efficiency product labeling.

## Conclusion

With the closure of the majority of the South Saskatchewan River Basin to further water allocations, Alberta is coming to grips with a water-constrained future. Climate change will require modifications to water laws and policy in order to deal with probable alteration of water supply in the future. Adapting to physical and resource constraints is likely to require a more flexible approach to water management and should be accompanied by efforts to ensure there is a buffer supply of water for both the environment and the economy. Water policy in Alberta has started to reflect the need to be adaptable, but now is the time to ensure the *Water Act* follows suit.

<sup>1</sup> See D.S. Lemmen, R.E. Vance, S.A. Wolfe, and W.M. Last, "Impacts of Future Climate Change on the Southern Canadian Prairies: A Paleoenvironmental Perspective", *Geoscience Canada* 24:3 (September 1997) 121, online: Natural Resources Canada <<http://gsc.nrcan.gc.ca/climate/palliser/pdf/palliser.pdf>>. Also see D. Sauchyn, and S. Kulshreshtha, "Chapter 7: Prairies" in Natural Resources Canada, *From Impacts to Adaptation: Canada in a Changing Climate 2007*, D.S. Lemmen, F.J. Warren, J., Lacroix and E. Bush, eds. (Ottawa: Natural Resources Canada, 2007) online: Natural Resources Canada <[http://adaptation.nrcan.gc.ca/assess/2007/index\\_e.php](http://adaptation.nrcan.gc.ca/assess/2007/index_e.php)>.

<sup>2</sup> Government of Alberta, *Water for Life: Alberta's Strategy for Sustainability*, (Edmonton: Government of Alberta, 2003), online: Alberta Environment <<http://www.waterforlife.gov.ab.ca/docs/strategyNov03.pdf>> [*Water for Life*].

<sup>3</sup> Government of Alberta, *Water for Life: A Renewal* (Edmonton: Government of Alberta, 2008), online Alberta Environment <<http://environment.gov.ab.ca/info/library/8035.pdf>> [*Renewal*].

<sup>4</sup> A systems approach or outcomes based approach can be generally described as a management framework that facilitates attaining management outcomes through a process of information gathering, monitoring and assessment, policy alignment and adaptation.

<sup>5</sup> *Water for Life*, *supra* note 2 at 17 & 19 espouses "adaptive management" as part of the work of Watershed Planning and Advisory Councils and has "adaptive management" as a long term outcome to guide all three goals of *Water for Life*, which include: safe, secure drinking water supply; healthy aquatic ecosystems; and reliable quality water supplies for a sustainable economy. The *Renewal*, *supra* note 3, states at page 7 that as a guiding management principle "best available practices and market-based tools will be used in order to maintain flexible and adaptive water management".

<sup>6</sup> S.A. 2000, c. W-3.

<sup>7</sup> Exempt from this hierarchy is domestic use.

<sup>8</sup> *Supra* note 6, s. 55.

<sup>9</sup> *Ibid.*, s. 33.

<sup>10</sup> *Ibid.*, s. 81(7).

<sup>11</sup> *Ibid.*, s. 83.

<sup>12</sup> For a discussion of this, see Randy Christensen & Danielle Droitsch, *Fight to the Last Drop: A Glimpse Into Alberta's Water Future* (Vancouver: Ecojustice, 2008) online: Ecojustice <<http://www.ecojustice.ca/publications/reports/fight-to-the-last-drop-a-glimpse-into-alberta2019s-water-future/attachment>>. This power to amend purposes of water allocation raises questions of equity among other applicants and how the transfer system may be avoided. This goes to a deeper underlying notion of whether the purpose of the allocation is of any relevance to water management. If the purpose is not relevant on a public policy front then every licence holder may be seen as a broker and water speculators could access the market. Yet the Act itself has provisions for canceling licences for nonuse which reflects a definite public policy goal of ensuring that water is efficiently and productively allocated.

<sup>13</sup> Even on a lesser scale the high return sectors will be able to monopolize water allocations at the expense of other valid social and environmental pursuits that people value but do not necessarily pay for. The approach to valuing water for environmental and social outcomes raises deeper conflicts between value choices being driven by markets versus values determined through democratic choice. In this regard, the public is often more than willing to bypass economic opportunity that benefits private entities to preserve social and environmental values. In this way values espoused through democratic processes may be in conflict with market values.

<sup>14</sup> *Water Act*, *supra* note 6, s. 25.

<sup>15</sup> *Water for Life*, *supra* note 2 at p. 8.

<sup>16</sup> Alberta Water Council, *Recommendations for Water Conservation, Efficiency and Productivity Sector Planning* (Edmonton: Alberta Water Council, 2008) online: Alberta Water Council <<http://www.albertawatercouncil.ca/Portals/0/pdfs/CEP%20Sector%20Plan%20Final%20Report.pdf>>.

### **Editor's Note**

Climate change and greenhouse gas emissions are topics that have been widely discussed, though not well understood, for several years. Interest and speculation have grown in response to recent developments, including the global economic downturn, the possibilities of a coalition government in Ottawa, and the inauguration of U.S. President Barack Obama. However, there still remains significant uncertainty about how our laws and regulations will deal with these matters.

This issue of *News Brief* focuses on topics related to climate change and greenhouse gas emissions regulation. This reflects the Environmental Law Centre's emphasis on greenhouse gas emissions regulation as one of the strategic objectives under our current strategic plan. Other strategic objectives include: information and education; land use planning and decision-making; watershed and aquatic ecosystem protection; cumulative environmental impact assessment; and public participation. Our second issue of *News Brief* in 2008 (Vol. 23, No. 2) focused on land use matters, and we plan to bring you more topic-specific issues in the future.

We hope this issue will provide you with some clarity and greater understanding on the complex topics of climate change and greenhouse gas emissions regulation, and invite you to send us your comments on this or any other *News Brief* issue at [elc@elc.ab.ca](mailto:elc@elc.ab.ca).

Cindy Chiasson  
Executive Director, Environmental Law Centre

## Electricity Micro-Generation in Alberta

**By Dean Watt**  
*Staff Counsel*  
*Environmental Law Centre*

### Introduction

Alberta's *Provincial Energy Strategy 2008 (Energy Strategy)* states that it is in Alberta's interests to aggressively adopt renewable energy and identifies several new policy initiatives, including a micro-generation policy that would allow Albertans to generate their own electricity from renewable or alternative sources and sell their surplus to the electricity grid for use by other Albertans.<sup>1</sup> The *Energy Strategy* goes on to suggest that regulatory barriers to micro-generation will be reduced.<sup>2</sup> This article describes the current regulatory regime and processes that are applicable to electricity micro-generation.

### Background

In Alberta, electric energy is regulated by the Alberta Utilities Commission (AUC) under the *Alberta Utilities Commission Act*<sup>3</sup> and the *Electric Utilities Act (EUA)*.<sup>4</sup> The *Micro-Generation Regulation*, issued in February 2008 under the *EUA*, allows Albertans to generate their own electricity and receive credit for any electricity they supply to the provincial grid, without requiring micro-generators to sell their power directly into the Power Pool.<sup>5</sup> The AUC has created a set of rules that apply to micro-generators. These rules cover a range of matters including the legal obligations of micro-generators and their dealings with other participants in the electricity industry.

There are a number of specific types of micro-generation units described in the regulations and rules. They are differentiated on the basis of generation capacity and are referred to as large micro-generators, small micro-generators and mini-micro-generators.<sup>6</sup>

### Approvals and permits required

Micro-generation installers need to be aware of applicable approvals, permits and safety requirements. Municipal development permits may be required, equipment and installation must conform to applicable provincial safety standards and the micro-generation unit must be inspected by a municipal electrical inspector prior to connection to the grid. Wind-powered micro-generation units may also require specific approval from NAV Canada, the national civil air navigation services provider, as well as from Transport Canada and Alberta Transportation.<sup>7</sup> A micro-generation unit that is not a mini-micro-generator must also obtain AUC approval to construct and operate a power plant under section 11 of the *Hydro and Electric Energy Act*.<sup>8</sup>

### Notice to distribution system owner

A "micro-generation generating unit" is defined to mean a customer's generating unit that:<sup>9</sup>

- exclusively uses renewable or alternative energy;
- is intended to meet all or a portion of the customer's electricity needs;



- is, at the time of construction or installation, sized to all or some of the customer's anticipated load;
- has a total nominal capacity of not more than 1 MW ; and
- is located on the customer's site or on a site owned by or leased to the customer that is adjacent to the customer's site.

A customer who intends to supply the interconnected electricity grid with energy generated from a micro-generation unit must notify the distribution system owner in the area where the unit and interconnection are located. This notice must be in prescribed form and information must include the type of micro-generator being installed and the date on which the customer proposes to begin supplying electricity to the grid.<sup>10</sup>

The distribution system owner may, if it is of the opinion that the generating unit will not qualify as a micro-generator, file a notice of dispute with the AUC. The AUC is then required to investigate and determine whether the customer's generating unit is or will be a micro-generation generating unit. The AUC's decision is final and cannot be appealed.<sup>11</sup> If a determination is made that a generation unit is not a micro-generation generating unit, the customer cannot connect to the grid as a micro-generator.

Once a customer has provided notice to a distribution system owner and that notice is either not disputed or any dispute has been resolved by the AUC, the distribution system owner is required to provide the customer with a meter suitable for net-billing. A net-billing meter subtracts electric energy supplied by the customer to the grid during the billing period from the electric energy taken from the customer off the grid during the same billing period and calculates a net charge or credit to the customer.<sup>12</sup>

### **Compensation for micro-generation**

As noted above, a micro-generation customer is not required to exchange electric energy through the Power Pool. Rather, that customer sells surplus electricity into the provincial system through that customer's retailer. The customer and the retailer may enter into an agreement respecting a compensation rate; however, where no agreement is made, the *Micro-Generation Regulation* provides a default rate. Small micro-generation is credited at the retailer's retail rate; large micro-generation is credited at the hourly pool price for each hour in the billing period.<sup>13</sup> The Alberta Interconnected System Operator, the operator of the interconnected grid, is required to compensate retailers for electric energy purchased from micro-generators.

### **Opportunities for future streamlining**

Currently, the installation of micro-generation requires that a number of regulatory hurdles be overcome. One possible means of reducing this regulatory burden is to eliminate the need for municipal development permits where certain conditions are satisfied. At present, municipal planning powers are subject to decisions by the Energy Resources Conservation Board, Natural Resources Conservation Board and AUC. A similar approach for micro-generation units would still ensure that health and safety issues are covered, as micro-generators would still have to conform to safety requirements and obtain electricity permits. The province could prescribe, through legislation and regulations, certain types of land use areas and corresponding types of micro-generators that would be exempt from a municipal requirement to obtain a

development permit. For instance, the use of low profile rooftop solar panels in an urban residential area could be exempted from the requirement for a development permit, while a 20-metre wind power generator in the same location would not.

<sup>1</sup> Alberta Department of Energy, *Launching Alberta's Energy Future: Provincial Energy Strategy* (Edmonton: Government of Alberta, 2008) at 35, online: Alberta Energy <[http://www.energy.gov.ab.ca/Org/pdfs/AB\\_ProvincialEnergyStrategy.pdf](http://www.energy.gov.ab.ca/Org/pdfs/AB_ProvincialEnergyStrategy.pdf)>.

<sup>2</sup> *Ibid.*, at 45.

<sup>3</sup> S.A. 2007, c. A-37.2.

<sup>4</sup> S.A. 2003, c. E-5.1.

<sup>5</sup> Alta. Reg. 27/2008, s. 6.

<sup>6</sup> *Ibid.*, s. 1(g). "Micro-generation" includes large micro-generation and small micro-generation. Large micro-generation means, except for limited exceptions set out in the regulation, generation from a micro-generation unit with a nominal capacity of at least 150 kW but not exceeding 1 MW; small micro-generation is defined as the generation of electricity from a micro-generation unit with a nominal capacity less than 150 kW. A "mini-micro-generator" is defined to mean a micro-generation generation unit that uses an inverter or similar technology, has a generation capacity of no more than 10 kW and is generating electric energy solely for the customer's own use; Alberta Utilities Commission, *Rule 024: Rules Respecting Micro-Generation* (Calgary, Alberta Utilities Commission, 2008) [Rule 024].

<sup>7</sup> Alberta Utilities Commission, *Micro-Generator Application Guideline* (Calgary: Alberta Utilities Commission, 2008) at 2.

<sup>8</sup> *Rule 024, supra* note 6, s. 2; *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16.

<sup>9</sup> *Supra* note 5, s. 1. (h)

<sup>10</sup> *Ibid.*, s. 2.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, s. 1(j).

<sup>13</sup> *Ibid.*, s. 7.

**Environmental Law Centre *News Brief***  
**Volume 23 Number 5 2008**

News Brief (ISSN 1712-6843)

is published a minimum of four times a year by the Environmental Law Centre (Alberta) Society.

**EDITORS**

Cindy Chiasson  
Leah Orr

**ASSISTANT EDITORS**

Jason Unger  
Jodie Hierlmeier  
Dean Watt

**PRODUCTION EDITOR**

Debra Lindskoog

**ADVISORY  
COMMITTEE**

Roger Bryan  
Elaine Hughes  
Ron Kruhlak  
Glen Semenchuk  
Marta Sherk

Copyright© 2008  
All Rights Reserved

*The opinions in News Brief do not necessarily represent the opinions of the members of the News Brief Advisory Committee or the Environmental Law Centre Board of Directors. In addition, the opinions of non-staff authors do not necessarily represent the opinions of Environmental Law Centre staff.*

## **No Consensus Reached at UN Climate Change Conference in Poland**

**By Jodie Hierlmeier**  
*Staff Counsel*  
*Environmental Law Centre*

The annual United Nations (UN) Climate Change conference took place in Poznań, Poland, December 1-12, 2008. The conference included the 14<sup>th</sup> Conference of the Parties (COP 14) to the UN Framework Convention on Climate Change (UNFCCC) and the 4<sup>th</sup> Meeting of Parties to the Kyoto Protocol (MOP 4).

Although the primary focus of the conference was the post-2012 period, when current Kyoto targets are set to expire, the meetings wrapped up with few concrete commitments and lots of work left for 2009.

### **Background on the UNFCCC and Kyoto Protocol**

The international political response to climate change began with the adoption of the UNFCCC in 1992. The UNFCCC sets out a framework for action aimed at stabilizing atmospheric concentrations of greenhouse gases (GHGs) to avoid "dangerous anthropogenic interference" with the climate system. The UNFCCC entered into force in 1994 and now has 192 parties.<sup>1</sup>

In 1997, delegates at COP 3 in Kyoto, Japan, agreed to a Protocol to the UNFCCC that commits industrialized countries and countries in transition to achieve GHG emission targets. These countries, known as Annex I parties, agreed to reduce their overall global emissions by an average of 5.2% below 1990 levels between 2008-2012 (the first Kyoto commitment period), with specific targets varying from country to country. Canada's Kyoto target is a 6% reduction in GHGs below 1990 levels by 2012. The Kyoto Protocol entered into force on 16 February 2005 and now has 183 parties, 37 of which have binding emission targets.<sup>2</sup>

Negotiations for Kyoto's second commitment period (2013-2017) began at MOP 1 in Montreal in 2005. However, it wasn't until MOP 3 in 2007 in Bali, Indonesia where the parties agreed on a two-year process, or "Bali roadmap" and "Bali action plan" which charts the course for a negotiating process designed to tackle climate change on a global scale, with the aim of completing this by COP 15 in 2009 in Copenhagen, Denmark.<sup>3</sup>

### **The Poznań meetings (COP 14/MOP 4)**

The negotiations in Poznań marked the halfway point in an ongoing series of meetings leading to Copenhagen in December 2009, which is the deadline for concluding negotiations under the Bali roadmap. Two main issues discussed at the conference included the need for post-2012 GHG targets and enabling an "Adaptation Fund" to help developing countries adapt to droughts and floods attributed to climate change.

As for targets, the conference agreed that the world has to cut emissions to avoid the worst effects of climate change; however, little progress was made on how exactly to do this. The UN's Intergovernmental Panel on Climate Change has warned that global emissions must start to fall within the next 15 years and then be halved by 2050 if the

world wants to prevent irreversible and possibly catastrophic climate change.<sup>4</sup> Although the European Union has already committed to a 20% target by 2020 (and is prepared to undertake a 30% target if a global agreement can be reached), no consensus was reached at the conference as to what target should be imposed, and on whom, starting in 2012.

As for the Adaptation Fund, controversies centered on where to get the money for the estimated \$1 billion fund. It was suggested that billions of dollars could be raised by placing a levy on existing carbon markets, but this was largely rejected by developed countries who argued it was too soon to decide on financing mechanisms when it is not known how the carbon markets will work on a global scale and how much money is needed for adaptation. While a 2% levy on carbon credits issued under the Clean Development Mechanism, which would provide \$60 to \$80 million for the fund, was approved, no agreement was reached on levies from other Kyoto mechanisms.

#### **Canada's role in COP 14/MOP 4**

Canada attracted criticism at the conference, and ranked second last out of the 57 largest GHG emitters in its performance in fighting climate change, ahead of only Saudi Arabia.<sup>5</sup> While Kyoto requires Canada to achieve a 6% reduction from 1990 levels by 2012, our federal government has rejected this target, seeking instead to reduce emissions by 20% from 2006 levels by 2020. Canada was also given the dubious honour of being unofficially named the most obstructive country among 190 participating nations attending the conference, winning a total of 10 "Colossal Fossil" awards. The Fossil awards are selected and presented by the Climate Action Network, a group that includes more than 400 non-governmental organizations.<sup>6</sup>

#### **Next steps**

COP/MOP is set to meet again in Bonn, Germany in the early part of 2009 when the first version of the text to be agreed on in Copenhagen will be debated. Ultimately a decision must be made in Copenhagen in 2009 as the Kyoto Protocol runs out in 2012 and it will likely take the world two years to ratify any agreement.

#### **Conclusions**

All in all, Poznań has left much work for 2009. The lack of progress in Poznań may be partly attributed to parties waiting to see what the new U.S. administration will do with respect to climate change. Many are hopeful that President Barack Obama will usher in a new era of pro-climate change policy in the U.S. Of course, concerns over a worldwide recession did not help, as countries are currently concerned about how much the cost of curbing GHGs will impact their economies. With Kyoto's expiry date looming, time is running out for the world to reach a global consensus on how to deal with climate change within the current UNFCCC regime.

<sup>1</sup> See generally online: United Nations Framework Convention on Climate Change <<http://unfccc.int/>>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Limiting average global warming to 2°C above the pre-industrial level will require by 2050 a cut in GHG emissions of more than 50% of current levels; see UN Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, UK: Cambridge University Press, 2007), online: IPCC <<http://www.ipcc.ch/ipccreports/ar4-wg3.htm>> at Table 6.

<sup>5</sup> Jan Burck, Christopher Bals & Simone Ackerman, *Climate Change Performance Index Results 2009* (Germany: Germanwatch & Climate Action Network Europe, 2008) online: Germanwatch <<http://www.germanwatch.org/klima/ccpi09.pdf>>.

<sup>6</sup> Online: Fossil of the Day <<http://www.fossil-of-the-day.org/>>.

## **Renewable Portfolio Standards for Alberta**

**By Dean Watt**  
*Staff Counsel*  
*Environmental Law Centre*

### **Introduction**

The Alberta Government's *Provincial Energy Strategy 2008 (Energy Strategy)* has indicated the Government's plans to introduce a renewable fuels standard, which would require that gasoline and diesel fuel sold to consumers contain ethanol or biodiesel.<sup>1</sup> The use of renewable fuels is one approach to reducing greenhouse gas emissions associated with transportation because the emissions associated with ethanol or biodiesel are less than those associated with fossil fuels. Notably absent from the *Energy Strategy* is a similar plan to require a renewable portfolio standard (RPS) for electricity. An RPS is a regulatory approach that requires a certain percentage of the electricity generated in the province be from renewable energy sources such as wind or solar power. This article briefly describes an RPS and describes how such a standard may be implemented. This article concludes by suggesting that the failure to include an RPS in the *Energy Strategy* may be a missed opportunity that should be explored further, but recognizes several challenges to the implementation of an RPS in Alberta.

### **Background**

The *Energy Strategy* introduces the Government's intention to implement a renewable fuels standard. British Columbia, Saskatchewan, Manitoba and Ontario have renewable fuel standards in place. The federal government is in the process of implementing a similar requirement. The Alberta Government suggests that the use of renewable fuels has the potential to reduce carbon dioxide emissions by approximately one million tonnes per year.<sup>2</sup> The Government is to be commended for recognizing the benefits of renewable fuels and for planning to create regulations requiring its incorporation into fuels bought at the pump.

Similar benefits might be realized through regulatory incorporation of renewable energy sources into the province's electricity generation mix. Alberta's *Climate Change Action Plan*, released in 2002, called for 3.5% of electricity to be from renewable sources.<sup>3</sup> This recommendation was voluntary, however, and was not repeated in the Government's *Climate Change Strategy*, released in 2008.<sup>4</sup>

### **What is a renewable portfolio standard?**

An RPS is a regulatory control over electricity generation. Central to an RPS is the setting of a minimum required amount of renewable energy to be generated for the province. This minimum amount would normally be expressed as a percentage of

overall generation capacity and that percentage could increase gradually over time as technology and pricing improves. A RPS may be implemented as a control on generation in jurisdictions where generation planning is regulated. In Ontario, the Ontario Power Authority is required to prepare integrated power system plans that comply with ministerial directives setting out goals relating to increases of generation capacity from renewable energy sources.<sup>5</sup> In jurisdictions where electricity retailers are regulated, an RPS may be implemented by requiring that all retailers include a minimum percent of renewable electricity in their supply portfolio.<sup>6</sup> Retailers can generate their own renewable electricity or buy it from another party to meet this requirement.<sup>7</sup>

### ***Energy Strategy's failure to include RPS***

In Alberta, regulators take a hands-off approach to electricity generation, considering neither the economics of nor need for a generating unit when issuing an approval.<sup>8</sup> The *Energy Strategy* states: "[we] defer to the market to determine what mix and proportion of energy sources Alberta will ultimately use...".<sup>9</sup> Electricity from investor-owned generators is sold into a Power Pool, created under the *Electric Utilities Act*, at market rates.<sup>10</sup> This deference to the market is a rejection of government intervention in the determination of an appropriate electricity supply mix and the rejection of RPS. This seems like a missed opportunity given that the principle of an RPS is similar to, and has the same general appeal of, a renewable fuel standard.

The position of the Alberta Government may be influenced by the nature of the province's electricity regulation scheme, which differs from other provinces. In many other jurisdictions, the government owns electricity infrastructure. In these jurisdictions, the decision to incorporate more renewable electricity generation is a simple one. In other areas, electricity infrastructure may be owned by a private corporation that has its rates regulated by the government. In such cases, the generation, transmission, distribution and retail sale of electricity are all regulated and rates for each function are set. Often each of these functions is carried out by the same entity as a vertically integrated operation. In these jurisdictions, implementation of an RPS may also be fairly simple.

In Alberta, however, electricity infrastructure is owned by a combination of investor-owned and municipally owned companies. Various parties undertake a wide range of functions, and electricity is largely deregulated. As noted above, generation is not regulated at all and the retail sale of electricity is not fully regulated. Albertans can choose to purchase electricity from a regulated rate provider or from a competitive retailer, whose rates are not set.

Given that generation is currently unregulated, a decision to require that a certain percentage of the electricity supply mix be made up of renewable electricity would involve the creation of regulations that change the way that the Power Pool purchases electricity. Additionally, because electricity retail is only partially regulated, regulations to implement an RPS would have to take into account a number of challenges that may not be faced by other jurisdictions that have not deregulated their electricity industries.<sup>11</sup> For instance, unregulated retail customers with existing contracts entered into before an RPS is implemented would likely seek to have their existing retail prices honored through grandfathering of their contracts. If this were done there would be a possibility for differential treatment as between regulated and unregulated purchasers. In addition, different reporting requirements may have to be created for different types

of retailers. However, if an RPS can deliver the same kind of benefits as a renewable fuels standard, it may be argued that a similar intrusion into the market is appropriate to ensure that renewable energy sources make up an appropriate percentage of Alberta's electricity supply mix.

<sup>1</sup> Alberta Department of Energy, *Launching Alberta's Energy Future: Provincial Energy Strategy* (Edmonton: Government of Alberta, 2008) at 35, online: Alberta Energy <[http://www.energy.gov.ab.ca/Org/pdfs/AB\\_ProvincialEnergyStrategy.pdf](http://www.energy.gov.ab.ca/Org/pdfs/AB_ProvincialEnergyStrategy.pdf)>.

<sup>2</sup> Alberta Department of Energy, *Talk About Bioenergy* (Edmonton: Government of Alberta, 2008) online: Alberta Energy <[http://www.energy.alberta.ca/BioEnergy/pdfs/FactSheet\\_RFS.pdf](http://www.energy.alberta.ca/BioEnergy/pdfs/FactSheet_RFS.pdf)>.

<sup>3</sup> Alberta Environment, *Albertans & Climate Change: Taking Action* (Edmonton: Government of Alberta, 2002) at 3, online: Alberta Environment <<http://www.environment.gov.ab.ca/info/library/6123.pdf>>.

<sup>4</sup> Alberta Environment, *Alberta's Climate Change Strategy: Responsibility/Leadership/Action* (Edmonton: Government of Alberta, 2008), online: Alberta Environment <<http://environment.gov.ab.ca/info/library/7894.pdf>>.

<sup>5</sup> *Electricity Act, 1998*, S.O. 1998, c. 15, s. 25.30.

<sup>6</sup> Clean Air Strategic Alliance, Renewable and Alternative Energy Project Team, *Recommendations for a Renewable and Alternative Electrical Energy Framework for Alberta* (Edmonton: Clean Air Strategic Alliance, 2007) at 16, online: Clean Air Strategic Alliance <[http://www.casahome.org/wp-content/uploads/2007/05/RAreport29May2007\\_FINAL\\_incl-BoardRevisions.pdf](http://www.casahome.org/wp-content/uploads/2007/05/RAreport29May2007_FINAL_incl-BoardRevisions.pdf)>.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16, s. 3.

<sup>9</sup> *Supra* note 1 at 45.

<sup>10</sup> S.A. 2003, c. E-5.1.

<sup>11</sup> *Supra* note 6 at 17.