IN RESPONSE TO BILL 32: THE *CLIMATE CHANGE AND EMISSIONS MANAGEMENT ACT*

Environmental Law Centre
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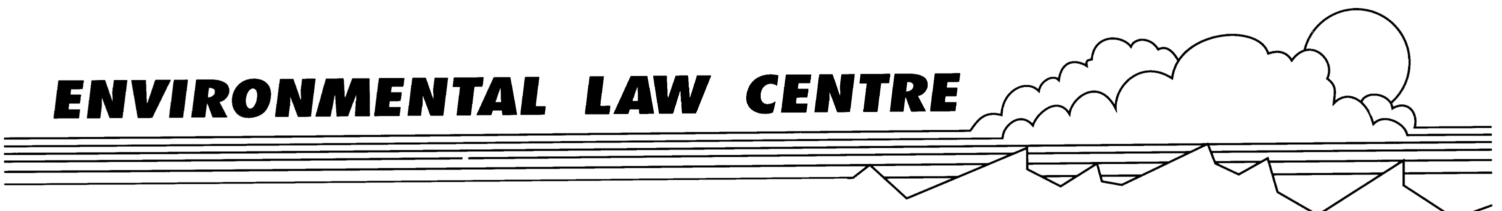

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Environmental Law Centre (Alberta) Society
204, 10709 Jasper Avenue
Edmonton, Alberta T5J 3N3
Phone: (780) 424-5099
Fax: (780) 424-5133
Alberta Toll-free: 1-800-661-4238
Email: elc@elc.ab.ca
Website: http://www.elc.ab.ca

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EXECUTIVE SUMMARY

The Environmental Law Centre is a non-profit charitable organization that has operated in Alberta since 1982. The Centre's goal is to make law and legal processes work to protect the environment. The Centre carries out a wide range of work in advancement of its goal and objectives, including information and community services, public legal education, and law monitoring and reform. It is in the vein of law monitoring and reform that the Centre has undertaken a detailed review and critique of Bill 32, Alberta's *Climate Change and Emissions Management Act*.

In light of the brevity of Bill 32 and the broad scope of climate change, this brief reviews the Bill on the basis of relevant issues rather than on a section by section basis. Recommendations for law reform are found throughout the brief and are also summarized in Appendix B.

Principles of review

Bill 32 must embody the elements of good environmental laws. In the context of climate change and reduction of greenhouse gases a good environmental law should include the following elements:

- Environmental protection,
- Public participation,
- Fairness of processes, and
- Limited discretion.

Bill 32 must also embody basic requirements of any good law. It should be drafted to be clear and understandable. All mandatory requirements should be set out in the Act or regulations rather than in guidelines or policy statements. All regulatory processes should be set out in the Act rather than in regulations, guidelines or policy statements.

Need for Bill 32

It is noteworthy that the climate change strategy that Bill 32 seeks to establish could be achieved by amending the *Environmental Protection and Enhancement Act* (EPEA) instead, as all but one provision of the Bill is addressed by similar, and in some cases identical, EPEA provisions. EPEA offers the added advantages of a comprehensive framework that has been in effect for nearly 10 years and a primary focus on environmental protection.

Constitutional matters

While both the federal and provincial governments have constitutional authority that could be used to deal with greenhouse gases, the assertion in Bill 32 that carbon dioxide and methane are natural resources is unlikely to extend the Province's established jurisdiction to regulate harmful emissions.

The reduction of greenhouse gas emissions is fundamentally an environmental issue. The courts have established that the environment is an area of shared jurisdiction. A plan to reduce greenhouse gas emissions cannot succeed without the cooperation of provincial governments. By the same token, the provinces will be unable to exclude the federal government from implementing a national reduction plan under its constitutional authority. The Province's interests will be best served by establishing a framework for a cooperative approach to emissions reduction, and forcefully voicing those interests within that framework.

Framework nature of Bill 32

Bill 32 is the legal framework for implementation of Alberta's climate change strategy. A major difficulty is that this framework is very sketchy. Bill 32 does not present a cohesive mechanism for addressing climate change at the provincial level. Much of the detail of the main elements, such as the emission trading system, sectoral agreements, and the basic operational structure of the proposed regulatory system, is left to be determined by regulations. The basic processes and elements of the climate change framework should be set out in Bill 32 rather than the regulations. With so little detail in the Bill, it is difficult for Albertans to assess the ultimate structure planned for dealing with climate change.

Discretion

Bill 32 vests a tremendous amount of discretion in the Alberta government and effectively separates creation of the bulk of Alberta's climate change management system from open and public debate and scrutiny. While Canada's constitutional law allows legislatures to make broad delegations of power to the executive branch of government, in this instance such a broad grant of discretion to Cabinet and the Minister is contrary to the public interest and the core principles of Alberta's stated climate change plan.

Public involvement

Public consultation has become a common part of law reform. Providing opportunities for the public to participate and provide input on regulatory systems is one element of good environmental law. However, Bill 32 does not contain this element.

Emission reduction target

Bill 32 proposes an emission reduction target of 50% of 1990 levels of specified gases, relative to Gross Domestic Product, by the end of 2020. The importance and scale of the climate change problem requires a provincial target that will, in conjunction with proportionate reductions in other provinces and territories, allow Canada to reach its Kyoto Protocol target of 6% below 1990 greenhouse gas levels by 2008-2012. Given that the federal government is likely authorized to impose emission reduction targets nationally, the Bill's emphasis should be on ensuring a role for the provincial government in the federal government's plan to negotiate targets for different sectors of the economy.

Reduction tools

Bill 32 proposes four tools for implementation of its climate change initiatives:

- An emission trading system;
- Negotiation of sectoral agreements;
- Establishment of climate change programs; and
- The Climate Change and Emissions Management Fund.

The basic elements of a trading system should be set out in the Bill. Bill 32 should include a positive obligation on the Minister to establish climate change programs and to consult with the public in their establishment. The negotiation process for sectoral agreements appears to be closed to the public as there is no legislative requirement for public involvement. Sectoral agreements may be voluntary, but they do not have to be secret. The legislation also offers no means of consistency between the sectors for reaching targets.

Reporting

To meet basic needs of regulatory fairness, the Bill requires amendment to clarify the reporting duty. It is also important that the information to be gained from release reporting be publicly accessible.

Enforcement

Bill 32 provides a very weak and fragmented framework for its enforcement. It is impossible to determine what actions or omissions will be offences, the parties who might be liable for such offences and the penalties that could be imposed for commission of such offences. Basic legal and procedural fairness demands that such information should be included in primary legislation (Acts) created by legislators, rather than in regulations. Bill 32 should create a more comprehensive enforcement scheme that establishes investigative positions and powers, and specific offences and penalties. To ensure transparency of the climate change regulatory framework and public confidence in that system, enforcement-related information should be publicly accessible.

IN RESPONSE TO BILL 32: THE CLIMATE CHANGE AND EMISSIONS MANAGEMENT ACT

INTRODUCTION

The Environmental Law Centre is a non-profit charitable organization that has operated in Alberta since 1982. The Centre's goal is to make law and legal processes work to protect the environment. To achieve this goal, the Centre pursues three objectives:

1. To ensure that governments enact good environmental laws;

2. To ensure that laws and policies give the public an effective role in environmental regulatory and legislative processes; and

3. To ensure that those processes offer a level playing field to all participants.

The Centre carries out a wide range of work in advancement of its goal and objectives, including information and community services, public legal education, and law monitoring and reform. It is in the vein of law monitoring and reform that the Centre has undertaken a detailed review and critique of Bill 32, Alberta's *Climate Change and Emissions Management Act*.[1] Bill 32 is the intended legislative framework for implementation of the Province's climate change plan.

Contents of this brief

In light of the brevity of Bill 32 and the broad scope of climate change, this brief reviews the Bill on the basis of relevant issues rather than on a section by section basis. The principles applied by the Centre in this review are set out and explained. This is followed by a discussion of the need for Bill 32 in light of existing environmental legislation. The brief then addresses a range of broad issues, including:

- Constitutional matters,

- The framework nature of the Bill,

- The preamble and purposes of the Bill,

[1] Bill 32, *Climate Change and Emissions Management Act*, 2nd Sess., 25th Leg., Alberta, 2002.

- Discretion, and
- Public involvement,

followed by a section addressing more specific matters, such as:

- The emission reduction target,
- Carbon sinks,
- Reduction tools,
- Reporting,
- Enforcement, and
- The appropriate Minister to administer the Bill.

Recommendations for law reform are found throughout the brief and are also summarized in Appendix B.

PRINCIPLES OF REVIEW

As a base for its review of Bill 32, the Centre developed the principles set out below. These principles are derived from the Centre's goal and objectives to ensure a review consistent with the Centre's mandate and direction.

Bill 32 must embody the elements of good environmental laws. In the context of climate change and reduction of greenhouse gases a good environmental law should include the following elements:

- Environmental protection,
- Public participation,
- Fairness of processes, and
- Limited discretion.

Each of these elements are discussed below in further detail.

Environmental protection

The Centre has applied the following principles in reviewing Bill 32 with respect to environmental protection.

- Generally speaking, greenhouse gas reduction will lead to environmental protection.

- Greenhouse gas reduction must have a net positive environmental effect; any action taken to reduce greenhouse gases must not exacerbate other environmental concerns.

- Environmental protection must be the primary consideration of climate change legislation and in a contest of priorities must be given primacy over economic concerns.

- Given the global nature of climate change, relevant legislation must allow for coordination with other jurisdictions. Such an approach is also consistent with Canada's federal system of government and the shared constitutional jurisdiction for environmental matters.

Public participation

The Centre sees public participation as a cornerstone of effective legal and regulatory protection of the environment and has aplied the following principles in its review of Bill 32.

- All members of the public, not only those who are "directly affected", should have the legal right to:

    - Advance notice of decision making that could have a substantial effect with respect to greenhouse gas reduction, such as enacting regulations, developing sectoral agreements, developing and implementing emission trading systems, and establishing programs aimed at greenhouse gas reduction;

    - Access to information on which decision makers will base their decisions; and

    - Reasonable and effective opportunities to be involved in decisions.

Indeed, given the nature of climate change and the effects of greenhouse gases, all members of the public are directly affected and there is no useful distinction to be made by creating such a category within climate change legislation.

- Systems and processes created by climate change legislation must be transparent and all relevant information must be available to the public, including information on emission trading systems, sectoral agreements, reporting and enforcement.

Fairness of processes

Climate change legislation must ensure fairness of processes and systems that it creates. The Centre has applied the following principles related to fairness.

- Regulatory decision making should be guided by statutory criteria that advance and are relevant to environmental protection. Climate change legislation should avoid including criteria that are irrelevant to achieving the goal of environmental protection.

- Climate change legislation should not preclude judicial review of decision making.

- Hearing processes should be conducted in a fair and open fashion, recognizing the duty of fairness and the principles of natural justice.

Limited discretion

Broad unlimited grants of discretion to decision makers are generally inconsistent with participation of all interested parties in regulatory processes. The Centre has developed and applied the following criteria with respect to discretion.

- Regulation making powers, whether vested in Cabinet or a Minister, should be clearly stated within the Act and should include specific boundaries upon the discretion that may be exercised by these officials.

- Any discretion granted to a Minister or other statutory delegates to determine matters, particularly substantive matters, must not be unqualified and must be subject to specific limits.

Bill 32 must also embody basic requirements of any good law. It should be drafted to be clear and understandable. All mandatory requirements should be set out in the Act or regulations rather than in guidelines or policy statements. All regulatory processes should be set out in the Act rather than in regulations, guidelines or policy statements.

NEED FOR BILL 32

It is noteworthy that the climate change strategy that Bill 32 seeks to establish could be achieved by amending the *Environmental Protection and Enhancement Act*[2] (EPEA) instead, as all but one provision of the Bill is addressed by similar, and in some cases identical, EPEA provisions. EPEA offers the added advantages of a comprehensive framework that has been in effect for nearly 10 years and a primary focus on environmental protection.

Comparison of Bill 32 provisions with EPEA[3]

Half of the preamble's paragraphs (5 of 10) could be addressed within the scope of EPEA's purpose section.[4] Those parts of the preamble dealing directly with natural resources, undue burden and economic certainty would not be covered in that section and amendment of EPEA would be required to include those purposes.

Some of the definitions in section 1 of Bill 32 are not found in EPEA (emission offset; Gross Domestic Product; sink; and specified gas) but could be added through amendment. The terms "owner" and "release" are defined in EPEA but differ somewhat from the Bill 32 definitions; again, these inconsistencies could be addressed through EPEA amendments. The definition of "Minister" is the same in both Bill 32 and EPEA.

Bill 32's section 2, binding the Crown, is the same as section 3 EPEA.

Section 3 of Bill 32, dealing with specified gas emission targets, can be addressed under EPEA section 122(1)(e) – (h). The EPEA sections enable Cabinet to make regulations establishing maximum levels, amounts, rates or concentrations of substances that may be released into the environment. These provisions could certainly be used to

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[2] R.S.A. 2000, c. E-12.
[3] For ease of reference, a table comparing the provisions of Bill 32 to those of EPEA is attached in Appendix A.
[4] *Supra* note 2, s.2.

establish emission targets for greenhouse gases. An added advantage of the EPEA provisions is that public consultation is required before such regulations are made.[5]

The sectoral agreements dealt with under section 4 of Bill 32 could be made under the authority of section 19 EPEA, which empowers the Minister to enter into agreements "relating to any matter pertaining to the environment" with any party, including governments of other jurisdictions. It might be necessary to make some amendments to EPEA to incorporate the level of detail regarding sectoral agreements that is set out in section 4 of Bill 32 or to provide for regulations dealing with these details.

Section 5 of Bill 32 empowers Cabinet to make regulations establishing an emission trading system. EPEA empowers the Minister to establish programs and measures dealing with economic and financial instruments, including emission trading, and to be able to do so in cooperation with other government departments and agencies.[6] Additionally, EPEA provides for Cabinet regulations in support of programs involving economic and financial instruments such as emission trading.

Section 6 of Bill 32 provides for mandatory reporting of releases of greenhouse gases into the environment in excess of regulated levels or in regulated circumstances. Section 110 EPEA deals with reporting of releases into the environment that cause or may cause adverse effect. Some minor amendments to EPEA to trigger reporting in relation to regulated levels would achieve the intent of section 6 of Bill 32.

Section 7 of Bill 32 empowers the Minister to establish or participate in programs directed at greenhouse gas emission reduction and related matters. Various sections of EPEA could also achieve section 7's intended purpose. Section 12(a) EPEA gives the Minister broad general powers to establish programs of the Department and could be used to establish any of the programs referred to in section 7 of Bill 32. Section 13 EPEA provides for the establishment of programs related to economic and financial instruments and market-based approaches and section 14 EPEA deals with the development of guidelines and objectives.

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[5] *Ibid.*, s.122(2).
[6] *Ibid.*, s. 12(h) and 13.

Section 8 of Bill 32, dealing with property rights in sinks, has no equivalent in EPEA; EPEA could be amended to add such a provision.

Section 9 of Bill 32 establishes the Climate Change and Emissions Management Fund, intended to be used for a range of climate change-related purposes. EPEA provides for three separate funds: the Environmental Protection and Enhancement Fund under section 30; a revolving fund under section 31; and the Environmental Protection Security Fund under section 32. Of these funds, the Environmental Protection and Enhancement Fund is the most amenable to achieving the purposes of the fund created by Bill 32, as it is to be used for "environmental protection and enhancement". The other funds target more specific purposes. As well, section 30 EPEA, which creates this fund, is much more comprehensive than Bill 32 in terms of payments into and out of the fund and thus offers better and more transparent financial controls. Some amendment of EPEA might be required to provide for payments into the fund under sectoral agreements.

Sections 10 – 14 of Bill 32 deal with administrative penalties, covering matters such as notice of administrative penalties (s. 10); daily penalties (s.11); protection from prosecution (s.12); limitation period (s.13); and enforcement in the Court of Queen's Bench (s.14). All of the matters dealt with in these provisions are addressed by section 237 EPEA and the *Administrative Penalty Regulation*[7] made under EPEA. The EPEA system is administratively simpler because the penalties are imposed by the Director rather than the Minister, as provided for in Bill 32. As well, the EPEA provisions also enable administrative penalties to be assessed on the basis of economic benefit gained as a result of an offence. The EPEA administrative penalty structure is a comprehensive system that has been in place for a number of years. Amendments to the *Administrative Penalty Regulation* would be needed to identify climate change-related offences as offences for which administrative penalties could be imposed.

Section 15 of Bill 32 addresses liability of directors and officers for corporate offences. The same provision is set out in section 232 EPEA. Additionally, EPEA includes a provision addressing the liability of public officials for offences[8], which would probably be of concern with respect to climate change matters as well.

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[7] A.R. 143/95.
[8] *Supra* note 2, s.233.

Section 16 of Bill 32 deals with vicarious responsibility of employers and others for offences. The same provision is set out in section 253 EPEA.

Section 17 of Bill 32 empowers Cabinet to make a wide range of regulations. Many of these regulation-making powers are currently provided for in EPEA. This includes enabling powers for matters such as: emission level limits; standards; release reporting; record-keeping; information disclosure; methods and procedures; economic and financial instruments; offences and penalties; orders; administrative penalties; appeal body; and fees. EPEA would require amendment to create enabling powers to make regulations on the following matters covered in Bill 32: determination of Gross Domestic Product for establishing emission targets; vesting of specific property rights in sinks; sectoral agreements; and the manner of establishing targets and sectors.

Section 18 of Bill 32 enables the adoption by reference in regulations of standards, codes, guidelines or other documents. The same provision exists in section 38 EPEA.

Recommendation: Bill 32 should be abandoned by the Alberta government and the *Environmental Protection and Enhancement Act* should be amended as discussed above to achieve the intent of Bill 32.

The recommendations in the remainder of this brief are made on the basis of the Alberta government proceeding with enactment of Bill 32.

BROAD ISSUES

Constitutional matters

In general, constitutional authority to make laws to protect the environment, and to reduce greenhouse gases, is split between the provincial and federal governments.

After a discussion of federal jurisdiction to enact a law addressing climate change, this analysis will address Alberta's position, with reference to Bill 32.

Federal jurisdiction over greenhouse gas emissions

Determining a constitutional basis for federal climate change legislation is complicated by several factors. Firstly, although there are a limited number of greenhouse gases, the gases are produced by a very wide array of natural and industrial processes and activities. Most of these sources are under provincial jurisdiction. Secondly, climate change represents a new, unique and serious threat to the environment, both in Canada and around the world. Thirdly, an effective approach to greenhouse gas reduction will require a host of measures, including economic instruments, emission targets and caps, tax reform, land use reform initiatives, and others. Given this breadth, an effective and cost-efficient approach to the issue requires the coordinated legislative efforts of the federal and provincial governments.

Two principal and likely bases for federal authority to regulate emissions will be examined here: the criminal law power and the federal power to legislate for the "peace, order and good government" of Canada where a matter is not exclusively assigned to the provinces.[9] The scope of the federal government's power over treaties will then be briefly examined.

The criminal law power

A federal law to address emissions will by necessity be largely regulatory in nature, providing for emission control, the funding of initiatives, the establishment of an emission trading scheme, etc. *R. v. Hydro Quebec*[10] suggests that the federal government likely has authority under the criminal law power to legislate standards that affect emissions, including standards for energy efficiency of all equipment and buildings.[11] Emission limits could also be imposed under the criminal law power. However, this power is less likely to support aspects of a climate change law requiring more complex regulation, such as an emission trading scheme.[12] It is possible that

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[9] The criminal law power, *Constitution Act, 1867,* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5, s.91(27). The "peace, order and good government" power is set out in the opening words of s.91. Other federal authority that may be relevant includes power over trade and commerce (s.91(2)), interprovincial transportation (ss.92(10)(a) and 91(29)), taxation (s.91(3)), and federal control over lands that the federal government owns.

[10] *R. v. Hydro Quebec*, [1997] 3 S.C.R. 213.

[11] *Ibid*. at 296.

[12] For further discussion on this point, see C. Rolfe, *Turning Down the Heat* (Vancouver: West Coast Environmental Law Research Foundation, 1998) at 357.

such measures would be supported by the "peace, order and good government" power.

The criminal law is an area of exclusive federal jurisdiction; Alberta legislation cannot prevent the federal government from implementing appropriate aspects of its greenhouse gas reduction plan under the criminal law power. Alberta law could address the same matters, but any requirements or restrictions would operate concurrently, meaning in practical terms that both federal and provincial requirements and restrictions would apply. In cases of operational conflict, or if federal and provincial law are at cross-purposes, the federal law would prevail.

The "peace, order and good government" power

Any forthcoming federal climate change law is likely to contain measures that cannot be supported under the criminal law head of power. Emission trading schemes and other complex regulatory measures may depend on the federal government's authority to legislate over matters not assigned to the provinces, for Canada's "peace, order and good government" (POGG).

In order for a federal climate change law to be brought under POGG, the federal government would need to establish that greenhouse gas emissions are a matter of national concern. To establish this, the federal government must show that the emissions, as a subject matter, have

> …a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.[13]

In light of its extra-provincial and international character and implications, it is likely that the reduction of greenhouse gas emissions will be found to be a matter of national concern.[14] The fact that the greenhouse effect is a well-defined problem addressed internationally through the Kyoto Accord weighs in favour of this conclusion. The inability of the greenhouse effect to be effectively addressed at the

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[13] *R. v. Crown Zellerbach Canada Ltd.,* [1988] 1 S.C.R. 401 at para 33.
[14] *Ibid*., *R. v. Crown Zellerbach Canada Ltd.*; *R. v. Canada Metal Co*. (1982), 144 D.L.R. (3d) 124 (Man. Q.B.). See also A.R. Lucas, *R. v. Crown Zellerbach Canada Ltd.* [comm.](1989) 23:2 U.B.C.L. Rev. 355 at 360-61.

provincial level without cooperation from all provinces also supports this view.[15]

A finding that reducing the emissions is a matter of national concern would confer exclusive authority upon the federal government to regulate those emissions. Alberta would still be able to regulate emissions indirectly through its authority over forestry, land use, road transport, and industrial activity.[16] However, the Province could be totally excluded from important aspects of emission regulation, in particular an emission trading scheme.

The courts might, however, find that the drastic intrusion into provincial jurisdiction that would be necessary to address climate change effectively at the federal level is irreconcilable with Canada's constitutional division of powers.

The federal treaty power

The federal government has the authority to sign and ratify international treaties.[17] In passing implementing legislation, however, the federal government is currently limited to the subject matters assigned to it under the *Constitution Act.* Treaty implementation outside these subject matters depends on provincial legislation.[18] However, the Supreme Court of Canada has indicated a willingness to reconsider whether the federal government could implement treaties directly affecting provincial jurisdiction.[19]

In a constitutional challenge to a federal emissions reduction law, it is possible that the courts would take the opportunity to revisit and expand the federal treaty power. The result could radically curtail provincial jurisdiction to regulate the emissions.

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[15] *R. v. Crown Zellerbach Canada Ltd., supra* note 13 at paras. 33 and 38.
[16] For discussion see Rolfe, *supra* note 12 at 364-365.
[17] *Letters Patent constituting the office of Governor General of Canada,* R.S.C. 1970, Appendix II, No. 35. For discussion see P.W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, Ont.: Thomson Carswell, 1997) at 11.3.
[18] *A.G. Can. v. A.G. Ont.* (Labour Conventions Case), [1937] A.C. 326 (P.C.).
[19] *MacDonald v. Vapor Canada Ltd.,* [1977] 2 S.C.R. 134 at 171-72; *R. v. Crown Zellerbach Canada Ltd., supra* note 13 per La Forest J., dissenting.

Provincial jurisdiction over greenhouse gas emissions

The Alberta Crown owns the Province's renewable and non-renewable natural resources, including any public property not expressly transferred to the federal government.[20] This ownership is the primary basis for the province's regulation of its natural resources.[21] This authority is separate from the Province's legislative authority over matters assigned to the provinces by the Constitution.[22]

The Province currently regulates the components or quality of air through the regulation of activities, and through restrictions on the release of harmful substances.[23] Provincial authority for such regulation is derived from Alberta's ownership of public property, and the Province's legislative powers over non-renewable resources, public lands and timber, and property and civil rights.[24]

The Province has the authority, pursuant to these same powers, to restrict both the activities that generate greenhouse gases and the emissions themselves.

Natural resource ownership

Bill 32 goes much further, however. In an effort to insulate emissions from federal regulation and protect Bill 32 from constitutional challenge, the Bill asserts provincial jurisdiction over carbon dioxide and methane as provincially owned natural resources.

The Province owns and has exclusive legislative authority over geological sources of methane as a non-renewable natural resource. The federal government is unlikely to have any jurisdiction to directly regulate this resource.

With respect to carbon dioxide and non-geological methane, it could be argued that the gases belong to the Province as residual owner of public property. However, the same reasoning could apply to all

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[20] *Natural Resources Transfer Agreement, Constitution Act, 1930,* R.S.C. 1985, Appendix II, No. 26 (Schedule); *Constitution Act, 1867, supra* note 9, s.117. See also G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: Univ. of Toronto Press, 1969) at 76.
[21] Hogg, supra note 17 at 28.3.
[22] *Supra* note 9, s.92; Hogg, *supra* note 17 at 28.2.
[23] See for example Alberta's *Environmental Protection and Enhancement Act*, *supra* note 2.
[24] *Constitution Act, 1867, supra* note 9, ss.92A, 92(5) and 92(13).

substances that have the potential to harm the environment or human health. The courts are very unlikely to restrict established federal jurisdiction over serious, national environmental matters on the basis that the Provinces have theoretical ownership of the harmful substances involved.

It is unlikely that carbon dioxide can be characterized as a natural resource. Emissions of the gas are predominantly the result of industrial processes, and the potential for Alberta to derive any significant independent benefit from its development or management is largely speculative.

It is unclear whether non-geological sources of methane could be considered a natural resource. Again, establishing that the gas is capable of providing a significant independent benefit to Albertans or the Province would assist in this characterization. Even so, such methane could not be regulated as a non-renewable resource.[25]
Bill 32's assertion is particularly problematic in light of international concern over increasing atmospheric levels of the gases, and the Kyoto Protocol, under which Canada has committed to reducing emissions.[26]
Other jurisdictions have enacted laws specifically regulating carbon dioxide emissions as a pollutant.[27] Carbon dioxide, methane and the other greenhouse gas emissions are, given current atmospheric levels, best characterized as pollutants that are harming the environment.

However, evidence that the Province can benefit from the gases could help establish that a federal law regulating them is not reconcilable with Canada's constitutional division of powers. Bill 32 provides little support for this argument, since it is primarily and necessarily directed at reducing emissions.

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[25] W. Tilleman, ed., *The Dictionary of Environmental Law and Science*, (Toronto: Edmond Montgomery Publications Ltd, 1994) *s.v.* "non-renewable resources" defines non-renewable resources as "[r]esources that exist in fixed amounts…and have the potential for renewal only by geological, physical, and chemical processes taking place over hundreds of millions of years…." J. and K. Dunster, *The Dictionary of Natural Resource Management* (Vancouver: UBC Press, 1996) *s.v.* "non-renewable resources" defines such resources as "[r]esources whose total physical quantity does not increase significantly within a human based timescale….".

[26] *Kyoto Protocol to the U.N. Framework Convention on Climate Change,* 10 December 1997, UNFCCC COP, 3d Sess., UN doc. FCC/CP/1977/L.7/Add.1.

[27] U.S., A.B.1493*, An act to amend Section 42823 of, and to add Section 43018.5 to, the Health and Safety Code, relating to air quality,* 2001-02, Reg. Sess., Cal., 2001 (enacted).

Finally, the Bill's characterization of carbon dioxide and methane as natural resources suggests that they will be regulated differently than the other greenhouse gases. On a practical level this assertion raises more questions than it answers; Bill 32 provides no indication of how the two gases would be regulated, or which departments or agencies of the government would be involved. This confusion further weakens the Bill.

The assertion in Bill 32 that carbon dioxide and methane are natural resources is unlikely to extend the Province's established jurisdiction to regulate harmful emissions. This jurisdiction is rooted in the Province's proprietary powers and legislative authority over public land and property and civil rights. Provincial efforts to exclude the federal government from regulating emissions are likely to have the unintended effect of bolstering the argument for a broad federal authority under POGG or an expanded treaty power. The Bill's assertion also creates unnecessary confusion over the regulation of greenhouse gases that the Bill does not address as natural resources.

Recommendation: Preamble paragraphs 2, 3 and 10 of the Bill should be deleted.

Recommendation: The federal government likely has authority under the criminal law power to set greenhouse gas emission limits and targets. Section 3(3) of Bill 32 is unlikely to survive a constitutional challenge, and should be deleted.

Recommendation: In light of the limited uncertainty surrounding the scope of the POGG power to support a federal greenhouse emission reduction law, Bill 32 should demonstrate, as a priority, that Alberta is committed to reducing greenhouse gas emissions proportionately and in a manner that, in coordination with the other provinces, will allow Canada to reach its Kyoto target. This is Alberta's best argument against a broad federal authority to legislate the aspects of its climate change plan that cannot be brought under the criminal law power.

Intergovernmental cooperation

The reduction of greenhouse gas emissions is fundamentally an environmental issue. The courts have established that the environment is an area of shared jurisdiction. A plan to reduce greenhouse gas emissions cannot succeed without the cooperation of

provincial governments. By the same token, the provinces will be unable to exclude the federal government from implementing a national reduction plan under the criminal law or POGG power, or both. The Province's interests will be best served by establishing a framework for a cooperative approach to emissions reduction, and forcefully voicing those interests within that framework.

An important element of such a framework is the ability of the government to enter into agreements with other jurisdictions. Such agreements could be used to coordinate provincial and federal regulation, and reduce or eliminate overlap in administration and enforcement of emissions reduction laws. As an example, the Canada-Alberta Equivalency Agreement[28] currently coordinates federal and provincial regulation of certain toxic substances.

Recommendation: Bill 32 should be amended to provide the tools for provincial-federal cooperation on developing and implementing greenhouse gas reduction measures. These amendments should empower the provincial government to enter into agreements with other jurisdictions.

Framework nature of Bill 32

The provincial government has presented Bill 32 as the legal framework for implementation of its climate change strategy. While the Bill is undeniably framework in nature, a major difficulty is that this framework is very sketchy. Bill 32 does not present a cohesive mechanism for addressing climate change at the provincial level, either omitting elements of the climate change plan or leaving the bulk of the detail to regulations. It does not address certain major elements of the climate change plan and touches on others in a cursory fashion. As a result, Bill 32 is much more a random restatement of ideas from the provincial climate change plan than a logical and well-framed regulatory structure for addressing a broad-ranging environmental issue.

[28] *An Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta,* C. Gaz. 1994.I.3462. Pursuant to the *Alberta Equivalency Order* (SOR 94-752) C. Gaz. 1994.I.3459, specified regulations under the *Canadian Environmental Protection Act*, *1999*, S.C. 1999, c.33, do not apply in Alberta.

Albertans & Climate Change: A Plan for Action, the province's climate change plan, sets out a list of core principles underlying the Alberta strategy.[29] These principles are:

- Informed consultation;
- Competitiveness and compatibility with trading partners;
- Investment in technology and research;
- Energy conservation and efficiency;
- Interjurisdictional cooperation to achieve a national climate change plan; and
- Shared responsibility of all Albertans to address climate change.

One would expect to find these core principles embedded in the framework legislation of Bill 32. However, those principles connected with economic matters are covered in a minimal fashion, and other core principles are not addressed at all. The principle of competitiveness and compatibility is touched on through provisions of the preamble and emission trading systems, while shared responsibility is briefly addressed in the preamble. Bill 32 provisions dealing with programs and the Climate Change and Emissions Management Fund could address the principles of investment in technology and research and energy conservation and efficiency. In contrast, Bill 32 does not deal with the principles of informed consultation and interjurisdictional cooperation.

In addition to these gaps, the framework established by Bill 32 is sketchy because so much of the detail of the main elements, such as the emission trading system, sectoral agreements, and the basic operational structure of the proposed regulatory system, is left to be determined by Cabinet through regulations. The basic processes and elements of the climate change framework should be set out in Bill 32 rather than the regulations. With so little detail in the Bill, it is difficult for Albertans to assess the ultimate structure planned for dealing with climate change.

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[29] Alberta Environment, *Albertans & Climate Change: A Plan for Action* (Edmonton: Alberta Environment, 2002) at 3.

Recommendation: Bill 32 should be amended to provide a more defined legal structure for the climate change framework. Specific processes related to the creation of sectoral agreements and the operation of an emission trading system should be set out within the Bill. Offences and enforcement mechanisms should also be provided for within the Bill. Bill 32 should be amended to include specific provisions empowering the Alberta government to work in cooperation with other jurisdictions, through agreements and programs, and recognizing the public role and providing for specific public participation mechanisms.

Preamble and purposes

The preamble to Bill 32 sets out the Bill's purposes. The emphasis of the preamble is on asserting provincial jurisdiction over the major greenhouse gases, and ensuring that economic growth is maintained.

Courts may refer to a preamble when called upon to interpret legislation. However, the stated purposes of legislation carry greater weight if placed in a "purpose section" or "purpose statement" within the body of the bill, rather than in a preamble. The *Environmental Protection and Enhancement Act*[30], for example, does not contain a preamble but instead lists the purposes of the legislation in section 2. Courts and tribunals have relied on that list to interpret the legislation.

Driedger on the Construction of Statutes refers to the differences between a preamble and a "purpose section":

> Like preambles, purpose statements reveal the purpose of legislation and they are also an important source of legislative values. Unlike preambles, they come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they cannot be contradicted by courts; they carry the authority and the weight of duly enacted law.

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[30] *Supra* note 2.

In *R v. T.(V.)* the Supreme Court of Canada suggested that it was prepared to take purpose statements seriously. It rejected the suggestion that a purpose statement is merely a preamble that does not carry the same force as a substantive provision. [31]

Recommendation: The purposes of Bill 32 should be removed from the preamble and included in a purpose section.

The preamble to Bill 32 asserts four main points:

1. Alberta is committed to the protection of Alberta's environment (paragraph 1). It should also be recognized that Alberta has a responsibility to address its contribution to national and global environmental problems.

2. The major greenhouse gases (carbon dioxide and methane) are provincially owned natural resources under provincial jurisdiction, addressed by the following parts of the preamble:

   - The provincial government owns and manages renewable and non-renewable natural resources in Alberta (paragraph 2);

   - Alberta is recognized as a leader in the development of technology relating to efficient natural resource exploitation (paragraph 3); and

   - Carbon dioxide and methane are natural resources, non-toxic, and linked with the management of other natural resources (paragraph 10)

   Provincial ownership of carbon dioxide and methane as natural resources is a tenuous and unlikely basis for provincial jurisdiction over these gases. The paragraphs above also imply that the four remaining greenhouse gases are not provincially owned and might therefore be regulated differently. Furthermore, in the context of global warming, it is the contribution of carbon dioxide and methane to the greenhouse effect that is relevant, not toxicity. Lastly, although the above paragraphs suggest that Bill 32 is a resource management bill, in substance Bill 32 is a pollution control bill. This inconsistency weakens the Bill.

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[31] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 264.

3. Alberta requires a climate change plan that will enable Albertans to limit emissions while maintaining or enhancing competitiveness and not impairing Alberta's economic growth, addressed by the following parts of the preamble:

    - The Alberta government is committed to "realistic and workable" solutions to climate change that reduce greenhouse gas emissions without impairing economic growth (paragraph 4);

    - The Alberta government and industry are developing approaches to address climate change (paragraph 5);

    - The Alberta government is committed to creating a framework to enable Albertans to "do their fair share" to limit greenhouse gas emissions (paragraph 6);

    - There is a need for an emission reduction plan to reflect the different circumstances of the provinces and sectors of the economy, and to maintain or enhance competitiveness without creating an undue burden on any jurisdiction (paragraph 7); and

    - The determination of undue burden must be made by the jurisdiction accepting the burden (paragraph 8).

    These paragraphs indicate that the Bill's priority is ensuring that the Province's greenhouse gas emission management plan does not affect economic growth. Maintaining growth and competitiveness is an important factor in any emission management plan. However, the stated priority of the Bill should be environmental protection and greenhouse gas emission reduction.

    Climate change is a global problem that cannot be effectively addressed if regional governments are able to subjectively determine what reduction measures would create an "undue" burden.

4. All sectors of the Alberta economy require certainty with respect to government plans to address climate change, set out in paragraph 9 of the preamble, which provides that the Alberta government is committed to providing certainty to all sectors of the economy through a clear greenhouse gas emission reduction plan.

Recommendation: Paragraph 1 of the preamble should be revised to include an acknowledgement of Alberta's responsibility to address its contribution to national and global environmental problems.

Recommendation: As recommended above under *Provincial jurisdiction over greenhouse gas emissions*, preamble paragraphs 2, 3 and 10 should be deleted.

Recommendation: Paragraphs 4 and 8 of the preamble should be deleted.

Recommendation: In paragraph 7, the word "undue" should be replaced with "unfair", and all words following "economy" should be deleted.

Recommendation: In addition, the Bill should be amended to include the following clauses in the preamble or, better, in a purpose section:

The purpose of this Act is to protect the environment by reducing greenhouse gas emissions while recognizing the following:

1. **A link between increasing levels of atmospheric greenhouse gases and climate change has been established by international scientific consensus;**

2. **Climate change represents a serious threat to the environment, both globally and in Alberta;**

3. **Climate change is an interjurisdictional problem that can only be effectively addressed in Canada through the cooperation of the provinces, territories and the federal government;**

4. **The responsibility of the Government of Alberta to work co-operatively with governments of other jurisdictions to reduce emissions;**

5. **The shared responsibility of all Alberta citizens for reducing greenhouse gas emissions through individual actions;**

6. **The need for public participation in decision-making relating to the design and implementation of a provincial greenhouse gas reduction plan.**

Discretion

Bill 32 vests a tremendous amount of discretion in the Alberta government, chiefly allocated to Cabinet with a lesser amount given to the Minister.

Cabinet's discretion lies in regulation-making powers. These powers are notable in Bill 32 for their broad scope. Matters left to be determined in regulations include the following:

- Determination of Gross Domestic Product for calculation of the emission target;

- Definition of "emission offset";

- Interim and other emission targets;

- Establishment of a wide range of climate change-related standards, including performance, operations, technology, testing and monitoring;

- Release reporting, including reportable releases, person to whom to report, manner and time for reporting, and disclosure of reporting information;

- General reporting and record-keeping requirements;

- Determination of ownership of sinks related to mines and minerals;

- Implementation, application, imposition and enforcement of sectoral agreements;

- Use of economic and financial instruments and market-based approaches;
- Emission trading systems;
- Establishment of offences and penalties;
- Compliance orders;
- Contraventions subject to administrative penalties;
- Process for imposition of administrative penalties; and
- Fees.

The Minister's discretion in Bill 32 lies in actions that he or she may take. These include:

- Entering into sectoral agreements;
- Disclosing reporting information, in accordance with the regulations;
- Establishing and participating in programs;
- Making payments out of the Climate Change and Emissions Management Fund; and
- Imposing and enforcing administrative penalties.

The discretion is particularly broad with respect to sectoral agreements, programs and payments from the Fund. Bill 32 lists topics that may be covered in sectoral agreements, but does not establish a procedure for developing these agreements or even set out basic mandatory elements of sectoral agreements. Section 7, which deals with programs, lists examples of programs that may be established by the Minister, but does not provide any detail with respect to expected results or other matters. Most significantly, the Minister is given broad power to make payments out of the Fund, without any indication of triggers or accountability with respect to such payments.

For many of the discretionary matters under Bill 32, important elements such as structure and process are left to the regulations. As a whole, Bill 32 effectively separates creation of the bulk of Alberta's climate change management system from open and public debate and scrutiny. Although the regulations are to be made and thus reviewed by Cabinet, there will be no opportunity for public review, debate and discussion of such regulations prior to their enactment or for review, comment and debate by opposition members of the Legislature.

While Canada's constitutional law allows legislatures to make broad delegations of power to the executive branch of government,[32] in this instance such a broad grant of discretion to Cabinet and the Minister is contrary to the public interest and the core principles of Alberta's stated climate change plan.

Recommendation: Bill 32 should be amended to add greater detail and less discretion with respect to a number of matters, as follows:

- **The definition of "Gross Domestic Product", to be used in determination of the emission target, should be provided in Bill 32.**

- **The process for establishing interim emission targets, emission targets for each specified gas and for different sectors of the Alberta economy should be set out in the Bill and should provide for public participation.**

- **Bill 32 should establish a basic process for development of sectoral agreements, listing mandatory elements of all sectoral agreements and providing for public participation.**

- **The release reporting provisions of Bill 32 (section 6) should clearly indicate the person to whom releases should be reported and the manner of reporting, and should provide for public disclosure of reporting information.**

[32] Hogg, *supra* note 17 at 14-4 – 14-5.

- **Section 9, which creates the Climate Change and Emissions Management Fund, should be amended to include more detailed provisions with respect to the structure and operation of the Fund. These provisions should be modeled on section 30 of the *Environmental Protection and Enhancement Act*. Section 9 should also be amended to put Fund payments under the control of the Provincial Treasurer, rather than the Minister, similar to section 30 EPEA.**

- **Offences, penalties and enforcement powers and tools should be set out in Bill 32 rather than the regulations.**

Public involvement

Public consultation has become a common part of law reform. Providing opportunities for the public to participate and provide input on regulatory systems is one element of what the Centre considers good environmental law. However, Bill 32 does not contain this element. Other than the potential for creation of a public registry related to emission trading, the Bill does not provide for public consultation or participation related to any of its important key elements. For example, the Bill is silent with respect to public input into the regulations, the climate change programs, the Climate Change and Emissions Management Fund, an emission trading system and any of the tools being used to determine targets. It is not possible to have a fair process that protects the environment if there is no requirement for public notices, meetings, evaluations, or mandatory consultation.

Accessibility, availability, and accuracy of materials about activities, policies, agreements, programs, enforcement and compliance promotes transparency of the process to the public. A transparent process encourages parties to be observant and call for accountability and justification if obligations are not being met. A transparent process can deter non-compliance if there is public visibility tied to that non-compliance.

The greater the amount of information available, the more likely it is that government, industry and public representatives can work successfully together. A transparent information system is critical to the proper management of the agreements, initiatives, regulations and programs under the Bill because the public can seek accountability.

Part of a transparent information system includes easy accessibility of information including accessibility under the *Freedom of Information and Protection of Privacy Act (FOIP)*[33]*.* The public should be able to freely obtain requested information. Part of a good and accessible program therefore means providing materials free of charge, and a mailout or fax service to those who are unable to meet restricted office hours. The regulations under the Bill should not prevail over the authority of FOIP.

Recommendation: In order to meet commitments outlined in the preamble to the Bill to protect Alberta's environment and create a framework to enable Albertans to participate in the climate change challenge, it is recommended that Bill 32 be amended to include mandatory public consultation initiatives with respect to the development of the regulations, climate change programs, and the Climate Change and Emissions Management Fund. Bill 32 should also be amended to provide for public participation in the development and review of sectoral agreements and the development of the emission trading program. All public participation initiatives should be properly funded to support maximum participation and benefit to the process.

Recommendation: Access to information under Bill 32, including any regulations made under section 17(1)(h), should be modeled on section 35 of *the Environmental Protection and Enhancement Act and the Disclosure of Information Regulation* under that Act. Additionally, section 17(2) which gives a regulation made under section 17(1)(h) authority over the *Freedom of Information and Protection of Privacy Act* should be removed.

SPECIFIC MATTERS

Emission reduction target

Bill 32 proposes an emission reduction target of 50% of 1990 levels of specified gases, relative to Gross Domestic Product, by the end of 2020.

[33] R.S.A. 2000, c.F-25.

The threat to the environment posed by climate change requires real reductions in greenhouse gas emissions. With an emission reduction target tied to gross domestic product, an expanding economy is likely to mean an *increase* in actual emissions. Bill 32's target formula is designed to ensure continued maximal economic growth, not emission reductions. The Province has predicted that Bill 32's target will result in an emissions reduction of 20 million tonnes (carbon dioxide equivalent) by 2010, and 60 million tonnes by 2020, over the "business as usual" scenario.[34] However, Bill 32 includes no reference to this prediction, and no basis to ensure that it is realized.

The importance and scale of the climate change problem requires a provincial target that will, in conjunction with proportionate reductions in other provinces and territories, allow Canada to reach its Kyoto Protocol target of 6% below 1990 greenhouse gas levels by 2008-2012. Given that the federal government is likely authorized to impose emission reduction targets nationally, the Bill's emphasis should be on ensuring a role for the provincial government in the federal government's plan to negotiate targets for different sectors of the economy.

It is appropriate for Bill 32 to provide a mechanism for the determination of targets. However, instead of setting an explicit emission reduction target, the Bill should require that the target be set by regulation only after consultation and in coordination with the federal government, and the other provinces and territories. The target imposed under the Bill should, in conjunction with targets imposed by these other jurisdictions, enable Canada to meet its commitment under the Kyoto Protocol. This could be accomplished through

- absolute reduction targets, i.e. not relative to any other indicator,

- measuring reductions relative to Gross Domestic Product but imposing a cap, or

- providing for the periodic reformulation of the "relative to Gross Domestic Product" target measure to ensure overall targets are met.

[34] *Albertans and Climate Change: A Plan for Action,* supra note 29 at 10-11.

If a "relative to Gross Domestic Product" measure is used, the basis for calculating Gross Domestic Product is likely to have a serious affect on what reductions are ultimately required. It is essential that the basis for determining Gross Domestic Product be included in the Bill itself.

Recommendation: Bill 32 should be amended to authorize the provincial government to enter into agreements with the other provinces, territories and the federal government regarding greenhouse gas emission targets.

Recommendation: Section 3(1) of Bill 32 should be deleted and replaced by a section authorizing Cabinet to set a provincial emission reduction target by regulation, following consultation and coordination with the federal, provincial and territorial governments. The provincial emission reduction target set under Bill 32 must ultimately achieve absolute reduction in greenhouse gas emission levels.

Recommendation: Section 1(b) of Bill 32 should be amended to set out the means of determining Gross Domestic Product within the Bill, rather than by regulation.

Carbon sinks

Carbon sinks, essential to any plan to reduce atmospheric greenhouse gas levels, fall primarily under provincial jurisdiction. The determination of property rights, and the management of forests and public land, are matters exclusively assigned to the provinces under the *Constitution Act.*[35] The federal government may be authorized to establish a scheme for trading credits, including credits for carbon sinks, under the POGG power. However, provincial jurisdiction over the sinks and their benefits is clear, and the federal government will need provincial cooperation to regulate the sinks.

Section 8 of Bill 32 provides that

> (1) Subject to subsection (2), the title to a sink and to the benefit of a sink that forms part of or is affixed to land is a property right vested in the owner of the land.

[35] *Supra* note 9, ss.92(5) and (13).

(2) The ability of a mine or mineral or any pore space within a mine or mineral or surrounding the mine or mineral to act as a sink is a property right and is vested in the owner of the mine or mineral in the manner determined in the regulations.

(3) Any instrument for the trading of rights in respect of a sink is personal property.

The apparent intent of subsection (3) is that the rights themselves are personal property, and do not run with the land. However, subsection (3) suggests that the instrument itself is personal property.

Recommendation: Section 8(3) should be amended to read "The right to use and benefit from a sink, and to trade those rights, are personal property rights."

Recommendation: The creation of new rights in property is a significant legal development. For clarity, property rights in mines, minerals and pore space as sinks (s.8(2)) should be fully determined in the Bill itself, and not left to the regulations.

Reduction tools

Bill 32 proposes four tools for implementation of its climate change initiatives:

- An emission trading system to achieve greenhouse gas reductions;

- Negotiation of sectoral agreements to meet gas emission targets;

- Establishment of climate change programs including energy conservation, energy efficiency, alternative energy and renewable energy sources; and

- The Climate Change and Emissions Management Fund to be applied to emission reduction initiatives.

Each of the above tools will be discussed in detail below.

Emission trading

The first paragraph in the preamble to Bill 32 speaks to an established commitment to protect Alberta's environment. However, the essence of this introduction is undermined by the remaining paragraphs of the preamble which emphasize climate change reduction without impeding economic growth. In essence, the approach taken by the Bill is that any legislative tools for emission reduction will not be implemented at a loss to the economy. This creates cause for concern with respect to environmental protection, because losses to the environment could occur in such a scenario.

Section 5 of Bill 32 proposes an emission trading system to achieve specified gas emission reductions that is consistent with any established targets, the terms of any sectoral agreement, and any regulations. This enabling section is not only broad, but completely discretionary. The basic elements of a trading system should be set out in the Bill, such as the means for determining a tradable emission unit. Further direction is needed in the Bill to direct the creation of a trading system. The discretionary power should be limited by qualifying and setting limits on the regulation-making powers.

A public component is also missing from section 5. There is no detail provided on how the public will be involved in the development of regulations to establish the emission trading system or its components. As previously discussed, the public component is critical to establishing a fair and transparent process that works best for all parties involved. The advantage of having public input into development of the system is to encourage environmental protection while promoting emission reduction. The public does not want a system in which industry simply buys another's credits continuously without reducing its emission levels or considering environmental benefits.

The creation of a public registry regarding the emission trading system is a positive step. It provides for transparency and public accessibility. There should, however, be a positive obligation on the Minister to create the registry and to ensure that it is easily accessible. For example, the registry should be free to use, photocopies should be supplied and forwarded to those unable to come into the registry center.

We support the direction for payment into the Climate Change and Emissions Management Fund of amounts payable to the Government through operation of the emission trading system. Any funds paid into the Fund are a positive contribution to the Fund's purpose. Section 5 should provide for an accountability of the transfer of any funds.

Bill 32 is flawed because it only identifies emission trading as the appropriate tool for achieving reductions in specified gas emissions. Other options should also be highlighted in the Bill, as emission trading may work best for some aspects of greenhouse gas reductions, but not as well for others.

Recommendation: Bill 32 should require establishment of methods to measure the net positive effects to the environment, not just the positive effects to the economy, of the emission trading system. This should involve mandatory program development to measure short and long term changes to air emissions, human and animal health, and vegetation.

Recommendation: The development of the emission trading system should provide for public involvement as well, particularly in the development of regulations.

Recommendation: Criteria for determining a tradable emission unit and developing time frames for implementation must be established and further direction for setting up the emission trading system provided.

Recommendation: Accountability for transfers of money from the emission trading system to the Climate Change and Emissions Management Fund should be included in Bill 32.

Programs

Section 7 of Bill 32 provides for the establishment of programs and measures including emission reductions and the use of sinks, energy efficiency and energy conservation initiatives, and measures to develop alternative energy and renewable energy sources. The Minister has discretionary power with respect to establishment of the various programs and measures. The Bill does not require the Minister to include public input into program development. The Bill should include a positive obligation on the Minister to establish these programs and to consult with the public in their establishment.

One way to positively involve the public is to ensure there is public representation on any committee that is formed as a result of a program initiative.

Energy efficiency, energy conservation, alternative energy and renewable energy sources are extremely important tools that should be incorporated into an emission reduction program. The Bill needs to be strengthened in this regard. An emission trading program will not necessarily provide all of the desired results with respect to emission reduction. Bill 32 should make it mandatory that energy efficiency, energy conservation, alternative energy and renewable energy measures be established and implemented. A time frame and financial commitment is necessary for Alberta to increase its alternative energy production sources, with an ultimate goal of reducing reliance on fossil fuels, and lessening impact on the environment.

Although renewable energy sources may be more costly at present than fossil-fuel based sources, increased financial assistance to develop them and find a place within the market system is necessary. According to Chris Rolfe[36] a 1996 study estimated that Canada subsidizes the fossil fuel industry $5.9 billion in tax breaks per year. The level of subsidization for fossil fuels is far greater than any subsidization for renewables. Renewable energy sources have less impact on the environment, yet commitment to their development has been extremely limited. Bill 32 is strong in promoting the continuing use of fossil fuels, while authority to establish renewable energy programs is not strong enough. While this may be understandable due to the long term supply of coal in the province, Bill 32 should take a more balanced approach in regulating the use of renewable energy sources.

Recommendation: Bill 32 should be amended to make it mandatory that the Minister establish climate change programs including measures related to energy conservation, energy efficiency, alternative energy and renewable energy. A time frame should also be established for implementation of such programs. The establishment of programs should also include a mandatory requirement that the Minister include public input into program development and that funding sources be available for public participation and implementation of renewable energy programs.

[36] C. Rolfe, *supra* note 12 at 117.

Sectoral agreements

Negotiation of sectoral agreements to achieve target emission reduction is authorized under section 4 of Bill 32. According to the Climate Change Plan[37], this section is intended to create partnerships to pursue what the sectors wish to achieve with respect to emission reductions, emission intensity improvements, new technology development, energy efficiency and energy conservation. The process appears to be closed to the public as there is no legislative requirement for public involvement in the negotiations. Section 4 should include a public component that would provide a more transparent and accessible means for parties to become involved. Sectoral agreements may be voluntary, but they do not have to be secret. A more consistent approach that includes the involvement of all sectors would be better.

We support section 4(1)(m) which provides for enforcement of compliance of the terms of the agreements and section 4(1)(n) which provides for negotiating terms for payments into the Climate Change and Emissions Management Fund. Although the authority exists for negotiation of agreements, the government retains broad discretion and could impose an agreement by regulation if there is no agreement with a sector. This broad discretion may deter some sectors from entering into negotiations and slow down the intended reduction process. Protection for the parties should be incorporated into Bill 32 by requiring some form of negotiation before imposition of a sectoral agreement through regulation.

Even if a public role is not desired with respect to the negotiation of sectoral agreements, the availability of information for public review is important. Initiatives like the Clean Air Strategic Alliance could provide a means for the public to be involved in creating sectoral agreements through a transparent process.

As a management tool, the sectoral agreements offer a means to achieve emission reduction targets, but the legislation offers no means of consistency between the sectors for reaching targets. Ideally, the idea behind emission reductions should be environmental protection. The link between these is missing in this Bill.

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[37] *Supra* note 29.

The Bill does not provide any structure or process for development of the agreements, nor any timeframes for the initiatives to take place. Bill 32 should address the objectives for sectoral agreements, not only with respect to meeting emission targets but for purposes of environmental protection. It should also address the schedules for achieving emission targets, set out reporting requirements, penalties, and minimum terms for providing funding pools, rather than leaving these to the discretion of the Minister.

There may be some elements within sectoral agreements that limit individual emitting industries to operations within the province. This could pose problems for those industries who may want access to the open international market or credits. It is possible that Bill 32 could be seen to impede this.

Recommendation: Bill 32 should be amended to provide a more structured process for developing sectoral agreements that includes mandatory participation by the parties, and should include the process and timelines for development and administration of agreements. The Bill should make it mandatory that agreements address environmental protection as well as the sector objectives for meeting their emission targets. Reporting requirements, penalties, and minimum terms for funding should also be mandatory terms of the agreements. There should be a public role provided for in section 4, where the public is either a participant in the negotiations or is notified of agreements that have been reached, and a means for their access and review should be provided. Agreements should not be imposed by regulation on sectors unless some form of negotiations have first taken place.

Climate Change and Emissions Management Fund

The establishment of this Fund is a positive tool. Section 9(2) of Bill 32 requires the Fund to be used for purposes related to reducing specified gas emissions. It provides clear direction that funds are to be for energy conservation and efficiency measures, new technologies, use of alternative energy and renewable energy, as well as other gas storage technologies and removal of gases by sinks. This is a positive step for expanding on non-fossil fuel based energy technologies and providing for long term environmental protection.

The Fund is an important tool as long as it is used and there are funds available for use. The Bill does not provide for a minimum dollar amount for the Fund, and reliance on funds from sectoral agreements or enforcement activities does not guarantee there will be sufficient funds for the purposes outlined in section 9(2). It would be more credible if there were commitment of funds by the government to keep the Fund operative.

There are other flaws in section 9, such as its silence regarding public disclosure of Fund-related matters. No checks or balances are provided in Bill 32 with respect to incoming or outgoing funds. Section 9 needs more structure and a means of public accountability. There is no requirement to file an annual accounting, and the funds are directed through the Minister rather than the Provincial Treasurer as is required of the Environmental Protection and Enhancement Fund under the *Environmental Enhancement and Protection Act*[38].

Recommendation: Section 9 of Bill 32 needs to be amended to provide more structure and accountability for the movement of funds. This would include providing public disclosure of Fund matters, adding a public review component, and providing access to information to be consistent with a transparent and fair process. Formation of a committee with public representation should be mandatory to review funding applications and payments. There must be a minimum amount that is guaranteed to be available from the Fund with a commitment by government to keep it operative. There should be an annual public accounting of the Fund, and if the Minister is given the authority to make payments there should be an amendment to section 9 making the Minister accountable for all transactions.

Reporting

Reporting of substance releases into the environment can serve a number of purposes. The information reported can be used to compile a stockpile of baseline information to assist in future standard-setting or establishment of regulatory limits. It can also be used to assess the environmental performance of operators and activities that may affect the environment and to guide compliance and enforcement action where necessary.

[38] *Supra* note 2, s.30.

It is unclear which of these purposes section 6 of Bill 32 is intended to achieve. While section 6 purports to create a mandatory reporting obligation, it is not possible to determine clearly those parties subject to the duty to report, the instances in which reporting will be required, the format and manner of reporting and the official or agency to whom the reports must be made. To meet basic needs of regulatory fairness, the Bill requires amendment to clarify the reporting duty.

It is also important that the information to be gained from release reporting be publicly accessible. Public access to this information will ensure greater public understanding of Alberta's climate change situation and provide a tool to assist the public in its role in greenhouse gas emission reduction.

Recommendation: Section 6(1) should be amended to clarify the circumstances in which releases of specified gases will be reportable. This provision should also be amended to clearly indicate the party to whom releases will be reported, as well as the information that will be required in a report and the time for reporting.

Recommendation: Section 6(2) should be amended to impose a mandatory obligation on the Minister to publicly disclose release reporting information. Similar to section 35(1)(iv) of the *Environmental Protection and Enhancement Act*, this provision should require the disclosure of the reporting information and data, together with "processing information that is necessary to interpret that data".

Enforcement

Bill 32 provides a very weak and fragmented framework for its enforcement. From a reading of the Bill, it is impossible to determine what actions or omissions will be offences, the parties who might be liable for such offences and the penalties that could be imposed for commission of such offences. Basic legal and procedural fairness demands that such information should be included in primary legislation (Acts) rather than in regulations, as Bill 32 currently provides in sections 17(1)(r), (s) and (u) – (x) in particular.

In addition, Bill 32 provides no means for investigation of possible offences, which raises the spectre of wholly voluntary mechanisms with no enforcement. Even the imposition of administrative penalties, currently provided for in sections 10 – 14 of the Bill, will need to based on valid factual grounds to be gathered in some fashion by the regulators. Bill 32 should create a more comprehensive enforcement scheme that establishes investigative positions and powers, and specific offences and penalties.

Section 17(1)(w) of the Bill enables Cabinet to create regulations providing for appeals of administrative penalties, including constitution of an appeal body. We question why a new appeal body would be needed given the existence of the Environmental Appeal Board, which has been hearing environmental appeals, including appeals of administrative penalties, for nearly ten years. As such, section 17(1)(w) should be deleted from the Bill and a new section added providing for appeals of administrative penalties to the Environmental Appeal Board.

To ensure transparency of the climate change regulatory framework and public confidence in that system, enforcement-related information should be publicly accessible, similar to the *Environmental Protection and Enhancement Act.* Under that Act, information related to orders is explicitly stated to be publicly accessible, while access is also provided to information about administrative penalties and prosecutions. Public access to this information also provides a measure of accountability for government and a tool for those members of the public who wish to pursue enforcement action.

Recommendation: Bill 32 should be extensively amended to create more detailed enforcement provisions. These new provisions should establish powers and limitations for inspectors and investigators and processes to be followed for investigations; specify offences under the legislation and the penalties that may be imposed in relation to these offences; and set out the compliance and enforcement tools that may be used by regulators and the courts in addressing offences. Parts 10 – 12 of the *Environmental Protection and Enhancement Act* should be used as a model in making these amendments to Bill 32. As part of these amendments, sections 17(1)(r) and (s) should be deleted from the Bill and their subject matter dealt with as substantive provisions of the Bill rather than enabling powers.

Recommendation: Bill 32 should be amended to add a section designating the Environmental Appeal Board as the appeal body with respect to administrative penalties and section 17(1)(w) should be deleted.

Recommendation: Bill 32 should be amended to explicitly provide that enforcement-related information, including compliance orders, administrative penalties and prosecutions, be publicly accessible at a minimal charge.

Appropriate Minister

Under section 1(c) of Bill 32, the Minister responsible for this legislation is to be determined under the *Government Organization Act*.[39] While this is standard practice in Alberta legislation, the administering Minister can have significant influence on the implementation of legislation under his or her responsibility. Given the emission reduction focus of Bill 32 and the important environmental implications of climate change, the Minister of Environment should be the responsible Minister.

Recommendation: Section 1(c) of Bill 32 should be amended to designate the Minister of Environment as the Minister responsible for the legislation. In the alternative, the Minister of Environment should be designated under section 16 of the *Government Organization Act* as the Minister responsible for Bill 32.

CONCLUSION

The Environmental Law Centre recognizes and applauds the Alberta government for moving ahead on climate change through development of a legislative framework. However, the initial attempt has several flaws and there are a number of ways that this framework can be strengthened and made much better.

An important matter to consider is whether Alberta needs a separate climate change framework at all, given the broad, comprehensive nature and established framework of the *Environmental Protection and Enhancement Act* (EPEA). Virtually every element of Bill 32 could be achieved through the vehicle of EPEA, with some limited amendments.

[39] R.S.A. 2000, c.G-10.

EPEA also offers the advantages of a time-tested framework and a primary focus on environmental protection.

While the EPEA framework does not address the province's assertion of natural resource ownership leading to jurisdiction over climate change from a constitutional law basis, that approach is weak and offers limited chances of success in a contest of constitutional authority. Given the current state of Canadian constitutional law, the most probable resolution is one of shared jurisdiction and cooperation between the federal and provincial levels of government.

Failing use of EPEA as the climate change legislation, a better framework through Bill 32 is required. Bill 32 must include clear and explicit recognition of environmental protection as its primary goal. The Bill should be amended to provide greater detail for processes related to regulatory and policy development and implementation of the legislation, particularly with respect to emission reduction tools, such as the emission trading system, sectoral agreements, programs and the Climate Change and Emissions Management Fund.

Amendments are also needed to reduce the amount of discretion in the Bill and impose more limitations on the discretion remaining. If such amendments are not made, then the provincial government should release draft regulations for public review and consultation before enacting Bill 32. A similar approach was successfully undertaken by Alberta Environment in its development and enactment of the *Environmental Protection and Enhancement Act* and related regulations in the early 1990's. Finally, Bill 32's current framework is greatly lacking structure with respect to compliance and enforcement and must be expanded and strengthened before the Bill is passed.

Bill 32 must also be amended to clarify and guarantee the public's role in various elements of this legislation. Amendments are needed to address public participation in regulatory processes, transparency and easy and broad public access to information. A strong public role is key to the enactment of good environmental laws.

In conclusion, we wish to comment on the consultation process for Bill 32. The consultation on this legislation has been very limited and subject to short time lines. Notice of consultation meetings with stakeholder groups was given only one week before such meetings. The consultation meetings have included consultation on a specific policy document as well, with only 25 minutes of a half-day meeting allocated to open discussion of Bill 32. There appears to be no intent

to consult with the general public, in contrast to the core principles of the province's climate change plan and the extensive publicity campaign undertaken prior to ratification of the Kyoto Accord. As mentioned above, draft regulations under Bill 32 should have been released for public review and comment. Such an approach would give Albertans a more complete picture of the province's planned system of addressing climate change.

While the move to enact climate change legislation is positive, the proposed legislation can be modified to achieve much more. Better legislative structure, greater detail, less discretion and a broader and more defined public role will result in a stronger and more credible legislative framework for Alberta's climate change strategy.

APPENDIX A – COMPARISON OF BILL 32 PROVISIONS WITH *ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT* (EPEA)

BILL 32 PROVISION	EQUIVALENT/SIMILAR EPEA PROVISIONS
Preamble, paragraph 1 (commitment to environmental protection)	Section 2(a), environmental protection Section 2(c), sustainable development
Preamble, paragraph 2 (ownership & management of natural resources)	No equivalent
Preamble, paragraph 3 (technological innovation)	Section 2(e), government leadership in research, technology & protection
Preamble, paragraph 4 (greenhouse gas reduction without economic impairment)	Section 2(b), integration of environmental protection & economic decisions
Preamble, paragraph 5 (innovative approaches)	Section 2(e), government leadership in research, technology & protection
Preamble, paragraph 6 (Albertans' individual responsibility)	Section 2(f), Albertans' shared responsibility for environmental protection
Preamble, paragraph 7 (no undue burden)	No equivalent
Preamble, paragraph 8 (determining undue burden)	No equivalent
Preamble, paragraph 9 (certainty through government action)	No equivalent
Preamble, paragraph 10 (carbon dioxide & methane as natural resources)	No equivalent
Section 1(a), definition of "emission offset"	No equivalent
Section 1(b), definition of "Gross Domestic Product"	No equivalent
Section 1(c), definition of "Minister"	Section 1(mm), definition of "Minister"
Section 1(d), definition of "owner"	Section 1(ss), definition of "owner"

BILL 32 PROVISION	EQUIVALENT/SIMILAR EPEA PROVISIONS
Section 1(e), definition of "release"	Section 1(hhh), definition of "release"
Section 1(f), definition of "sink"	No equivalent
Section 1(g), definition of "specified gas"	No equivalent
Section 2, Crown is bound	Section 3, Crown is bound
Section 3, specified gas emission targets	Section 122(1)(e), regulations setting maximum levels of substances released Section 122(1)(f), regulations setting maximum amounts of substances released Section 122(1)(g), regulations setting maximum rates of substances released Section 122(1)(h), regulations setting maximum concentrations of substances released
Section 4, sectoral agreements	Section 19, Minister may enter into agreements
Section 5, emission trading system	Section 13, programs & measures for economic & financial instruments, including emission trading Section 12(h), cooperation with other government departments & agencies to establish economic & financial instruments Section 37(c), regulations for programs for economic & financial instruments, including emission trading
Section 6, mandatory release reporting (specified gases)	Section 110, release reporting (adverse effect)
Section 7, programs & measures for climate change – related matters	Section 12(a), establish Department's programs Section 13, programs for economic & financial instruments Section 14, development of guidelines & objectives
Section 8, property rights in sinks	No equivalent

BILL 32 PROVISION	EQUIVALENT/SIMILAR EPEA PROVISIONS
Section 9, Climate Change and Emissions Management Fund	Section 30, Environmental Protection and Enhancement Fund Section 31, revolving fund Section 32, Environmental Protection Security Fund
Section 10, notice of administrative penalty	Section 237(1), notice of administrative penalty
Section 11, daily penalties (administrative penalties)	Section 237(2)(a), daily penalties (administrative penalties)
Section 12, protection from prosecution (administrative penalties)	Section 237(3), protection from prosecution (administrative penalties)
Section 13, limitation period (administrative penalties)	Section 2(3), *Administrative Penalty Regulation* (A.R. 143/95), limitation period (administrative penalties)
Section 14, enforcement in Court of Queen's Bench (administrative penalties)	Section 237(4), enforcement in Court of Queen's Bench (administrative penalties)
Section 15, directors' & officers' liability for corporate offences	Section 232, directors' & officers' liability for corporate offences
Section 16, vicarious responsibility	Section 253, vicarious responsibility
Section 17(1)(a), regulations determining Gross Domestic Product	No equivalent
Section 17(1)(b), regulations setting limits on specified gas releases	Section 122(1)(e), regulations setting maximum levels of substances released Section 122(1)(f), regulations setting maximum amounts of substances released Section 122(1)(g), regulations setting maximum rates of substances released Section 122(1)(h), regulations setting maximum concentrations of substances released
Section 17(1)(c), regulations setting minimum energy efficiency levels	No equivalent

BILL 32 PROVISION	EQUIVALENT/SIMILAR EPEA PROVISIONS
Section 17(1)(d), regulations setting maximum emission levels for specified gases per unit of input/output	Section 122(1)(e), regulations setting maximum levels of substances released Section 122(1)(f), regulations setting maximum amounts of substances released Section 122(1)(g), regulations setting maximum rates of substances released Section 122(1)(h), regulations setting maximum concentrations of substances released
Section 17(1)(e), regulations creating operating, technology or performance standards	Section 86(1)(e) & (f), regulations on activities & devices related to environmental protection, including design, construction, maintenance & use
Section 17(1)(f), regulations on release reporting and disclosure of reporting information	Section 121, regulations on release reporting; also *Release Reporting Regulation* (AR 117/93) Section 36(h)–(j), regulations on information disclosure; also *Disclosure of Information Regulation* (A.R. 116/93)
Section 17(1)(g), regulations on general reporting and record-keeping under Act	Section 85(1)(l)-(n), regulations on reports and record-keeping regarding activities
Section 17(1)(h), regulations on access to information provided to government under Act	Section 35, public access to information provided to government under Act Section 36(h)-(j), regulations on information disclosure *Disclosure of Information Regulation* (A.R. 116/93)
Section 17(1)(i), regulations on methods for testing, analysis, monitoring, etc. under Act	Section 122(1)(i)-(j), regulations on methods for measuring and determining substances under Act Section 85(1)(k), regulations on sampling, including frequency, methods & procedures

BILL 32 PROVISION	EQUIVALENT/SIMILAR EPEA PROVISIONS
Section 17(1)(j), regulations on standards & requirements related to sinks & emission offsets	No equivalent
Section 17(1)(k), regulations determining vesting of property rights in sinks	No equivalent
Section 17(1)(l), general regulations regarding sectoral agreements	No equivalent
Section 17(1)(m), regulations applying sectoral agreements to non-parties	No equivalent
Section 17(1)(n), regulations imposing sectoral agreements	No equivalent
Section 17(1)(o), regulations regarding economic & financial instruments	Section 37(c), regulations for programs for economic & financial instruments
Section 17(1)(p), regulations on manner of establishing specified gas emission targets	No equivalent
Section 17(1)(q), regulations establishing sectors of Alberta economy for Act's purposes	Section 36(g), regulations for establishment of management areas for economic & financial instruments & guidelines & standards
Section 17(1)(r), regulations establishing offences & prescribing penalties	Section 227, offences Sections 228 & 230, penalties Section 239(a)-(b), regulations establishing offences & penalties for contraventions of regulations
Section 17(1)(s), regulations regarding compliance orders, including issuance, order contents, non-compliance & appeals	Sections 240-243, environmental protection orders generally Sections 113, 114, 116, 129, 140-142, 150-151, 156, 158-160, 183, specific forms of environmental protection orders Sections 210-211, enforcement orders Sections 214, 245, non-compliance with orders Section 91(1)(e)-(h), appeals of orders

BILL 32 PROVISION	EQUIVALENT/SIMILAR EPEA PROVISIONS
Section 17(1)(t), regulations defining terms not defined in Act	Sections 85(1)(o), 175(a), regulations defining specific terms
Section 17(1)(u), regulations on form & contents of notice of administrative penalty	Section 2(2), *Administrative Penalty Regulation* (A.R. 143/95), form & contents of notice of administrative penalties
Section 17(1)(v), regulations prescribing offences for which administrative penalties apply & amounts of administrative penalties	Schedule, *Administrative Penalty Regulation* (A.R. 143/95), offences for which administrative penalties apply Section 3, *Administrative Penalty Regulation* (A.R. 143/95), amounts of administrative penalties
Section 17(1)(w), regulations regarding appeals of administrative penalties, including creation of appeal body, evidence, powers of appeal body, appeal procedure	Section 91(1)(n), appeals of administrative penalties Section 90, establishment of Environmental Appeal Board Sections 95 & 98, powers of Environmental Appeal Board re: administrative penalties Section 95(1), evidence before Environmental Appeal Board *Environmental Appeal Board Regulation* (A.R. 114/93), appeal procedure
Section 17(1)(x), regulations on any other matters for administrative penalties	Section 239(h), regulations on any other matters for administrative penalties
Section 17(1)(y), regulations on charging fees under Act	Section 36(k), regulations on charging fees under Act
Section 17(1)(z), regulations generally addressing climate change	Section 122(1)(m), regulations generally for environmental protection & regulation of sources of substances
Section 17(1)(z), regulations under s.17(1)(h) apply despite FOIP	No equivalent

BILL 32 PROVISION	EQUIVALENT/SIMILAR EPEA PROVISIONS
Section 17(3), regulation under s.17(1)(m) may apply sectoral agreement more stringently to non-party	No equivalent
Section 17(4), regulations made under s.17(1)(n) constitute sectoral agreement	No equivalent
Section 18, adoption by reference	Section 38, adoption by reference
Section 19, coming into force	No equivalent because only put into legislation when first enacted; EPEA would have had such a provision when it was enacted in 1992

APPENDIX B – SUMMARY OF RECOMMENDATIONS

Recommendation: Bill 32 should be abandoned by the Alberta government and the *Environmental Protection and Enhancement Act* should be amended as discussed above to achieve the intent of Bill 32. 12

Recommendation: Preamble paragraphs 2, 3 and 10 of the Bill should be deleted.. 18

Recommendation: The federal government likely has authority under the criminal law power to set greenhouse gas emission limits and targets. Section 3(3) of Bill 32 is unlikely to survive a constitutional challenge, and should be deleted.. 18

Recommendation: In light of the limited uncertainty surrounding the scope of the POGG power to support a federal greenhouse emission reduction law, Bill 32 should demonstrate, as a priority, that Alberta is committed to reducing greenhouse gas emissions proportionately and in a manner that, in coordination with the other provinces, will allow Canada to reach its Kyoto target. This is Alberta's best argument against a broad federal authority to legislate the aspects of its climate change plan that cannot be brought under the criminal law power. .. 18

Recommendation: Bill 32 should be amended to provide the tools for provincial-federal cooperation on developing and implementing greenhouse gas reduction measures. These amendments should empower the provincial government to enter into agreements with other jurisdictions. 19

Recommendation: Bill 32 should be amended to provide a more defined legal structure for the climate change framework. Specific processes related to the creation of sectoral agreements and the operation of an emission trading system should be set out within the Bill. Offences and enforcement mechanisms should also be provided for within the Bill. Bill 32 should be amended to include specific provisions empowering the Alberta government to work in cooperation with other jurisdictions, through agreements and programs, and recognizing the public role and providing for specific public participation mechanisms... 21

Recommendation: The purposes of Bill 32 should be removed from the preamble and included in a purpose section. 22

Recommendation: As recommended above under *Provincial jurisdiction over greenhouse gas emissions*, preamble paragraphs 2, 3 and 10 should be deleted. 24

Recommendation: Paragraphs 4 and 8 of the preamble should be deleted. 24

Recommendation: In paragraph 7, the word "undue" should be replaced with "unfair", and all words following "economy" should be deleted. 24

Recommendation: In addition, the Bill should be amended to include the following clauses in the preamble or, better, in a purpose section:

The purpose of this Act is to protect the environment by reducing greenhouse gas emissions while recognizing the following:

1. A link between increasing levels of atmospheric greenhouse gases and climate change has been established by international scientific consensus;

2. Climate change represents a serious threat to the environment, both globally and in Alberta;

3. Climate change is an interjurisdictional problem that can only be effectively addressed in Canada through the cooperation of the provinces, territories and the federal government;

4. The responsibility of the Government of Alberta to work co-operatively with governments of other jurisdictions to reduce emissions;

5. The shared responsibility of all Alberta citizens for reducing greenhouse gas emissions through individual actions;

6. The need for public participation in decision-making relating to the design and implementation of a provincial greenhouse gas reduction plan. 25

Recommendation: Bill 32 should be amended to add greater detail and less discretion with respect to a number of matters, as follows:

- The definition of "Gross Domestic Product", to be used in determination of the emission target, should be provided in Bill 32

- The process for establishing interim emission targets, emission targets for each specified gas and for different sectors of the Alberta economy should be set out in the Bill and should provide for public participation

- Bill 32 should establish a basic process for development of sectoral agreements, listing mandatory elements of all sectoral agreements and providing for public participation

- The release reporting provisions of Bill 32 (section 6) should clearly indicate the person to whom releases should be reported and the manner of reporting, and should provide for public disclosure of reporting information

- Section 9, which creates the Climate Change and Emissions Management Fund, should be amended to include more detailed provisions with respect to the structure and operation of the Fund. These provisions should be modeled on section 30 of the *Environmental Protection and Enhancement Act*. Section 9 should also be amended to put Fund payments under the control of the Provincial Treasurer, rather than the Minister, similar to section 30 EPEA

- Offences, penalties and enforcement powers and tools should be set out in Bill 32 rather than the regulations. 28

Recommendation: In order to meet commitments outlined in the preamble to the Bill to protect Alberta's environment and create a framework to enable Albertans to participate in the climate change challenge, it is recommended that Bill 32 be amended to include mandatory public consultation initiatives with respect to the development of the regulations, climate change programs, and the Climate Change and Emissions Management Fund. Bill 32 should also be amended to provide for public participation in the development and review of sectoral agreements and the development of the emission trading program. All public participation initiatives should be properly funded to support maximum participation and benefit to the process. 29

Recommendation: Access to information under Bill 32, including any regulations made under section 17(1)(h), should be modeled on section 35 of *the Environmental Protection and Enhancement Act and the Disclosure of Information Regulation* under that Act. Additionally, section 17(2) which gives a regulation made under section 17(1)(h) authority over the *Freedom of Information and Protection of Privacy Act* should be removed 29

Recommendation: Bill 32 should be amended to authorize the provincial government to enter into agreements with the other provinces, territories and the federal government regarding greenhouse gas emission targets. 31

Recommendation: Section 3(1) of Bill 32 should be deleted and replaced by a section authorizing Cabinet to set a provincial emission reduction target by regulation, following consultation and coordination with the federal, provincial and territorial governments. The provincial emission reduction target set under Bill 32 must ultimately achieve absolute reduction in greenhouse gas emission levels. 31

Recommendation: Section 1(b) of Bill 32 should be amended to set out the means of determining Gross Domestic Product within the Bill, rather than by regulation. 31

Recommendation: Section 8(3) should be amended to read "The right to use and benefit from a sink, and to trade those rights, are personal property rights." 32

Recommendation: The creation of new rights in property is a significant legal development. For clarity, property rights in mines, minerals and pore space as sinks (s.8(2)) should be fully determined in the Bill itself, and not left to the regulations. 32

Recommendation: Bill 32 should require establishment of methods to measure the net positive effects to the environment, not just the positive effects to the economy, of the emission trading system. This should involve mandatory program development to measure short and long term changes to air emissions, human and animal health, and vegetation. 34

Recommendation: The development of the emission trading system should provide for public involvement as well, particularly in the development of regulations. 34

Recommendation: Criteria for determining a tradable emission unit and developing time frames for implementation must be established and further direction for setting up the emission trading system provided. 34

Recommendation: Accountability for transfers of money from the emission trading system to the Climate Change and Emissions Management Fund should be included in Bill 32. 34

Recommendation: Bill 32 should be amended to make it mandatory that the Minister establish climate change programs including measures related to energy conservation, energy efficiency, alternative energy and renewable energy. A time frame should also be established for implementation of such programs. The establishment of programs should also include a mandatory requirement that the Minister include public input into program development and that funding sources be available for public participation and implementation of renewable energy programs. 35

Recommendation: Bill 32 should be amended to provide a more structured process for developing sectoral agreements that includes mandatory participation by the parties, and should include the process and timelines for development and administration of agreements. The Bill should make it mandatory that agreements address environmental protection as well as the sector objectives for meeting their emission targets. Reporting requirements, penalties, and minimum terms for funding should also be mandatory terms of the agreements. There should be a public role provided for in section 4, where the public is either a participant in the negotiations or is notified of agreements that have been reached, and a means for their access and review should be provided. Agreements should not be imposed by regulation on sectors unless some form of negotiations have first taken place. 37

Recommendation: Section 9 of Bill 32 needs to be amended to provide more structure and accountability for the movement of funds. This would include providing public disclosure of Fund matters, adding a public review component, and providing access to information to be consistent with a transparent and fair process. Formation of a committee with public representation should be mandatory to review funding applications and payments. There must be a minimum amount that is guaranteed to be available from the Fund with a commitment by government to keep it operative. There should be an annual public accounting of the Fund, and if the Minister is given the

authority to make payments there should be an amendment to section 9 making the Minister accountable for all transactions. 38

Recommendation: Section 6(1) should be amended to clarify the circumstances in which releases of specified gases will be reportable. This provision should also be amended to clearly indicate the party to whom releases will be reported, as well as the information that will be required in a report and the time for reporting. 39

Recommendation: Section 6(2) should be amended to impose a mandatory obligation on the Minister to publicly disclose release reporting information. Similar to section 35(1)(iv) of the *Environmental Protection and Enhancement Act*, this provision should require the disclosure of the reporting information and data, together with "processing information that is necessary to interpret that data". 39

Recommendation: Bill 32 should be extensively amended to create more detailed enforcement provisions. These new provisions should establish powers and limitations for inspectors and investigators and processes to be followed for investigations; specify offences under the legislation and the penalties that may be imposed in relation to these offences; and set out the compliance and enforcement tools that may be used by regulators and the courts in addressing offences. Parts 10 – 12 of the *Environmental Protection and Enhancement Act* should be used as a model in making these amendments to Bill 32. As part of these amendments, sections 17(1)(r) and (s) should be deleted from the Bill and their subject matter dealt with as substantive provisions of the Bill rather than enabling powers. 40

Recommendation: Bill 32 should be amended to add a section designating the Environmental Appeal Board as the appeal body with respect to administrative penalties and section 17(1)(w) should be deleted. 41

Recommendation: Bill 32 should be amended to explicitly provide that enforcement-related information, including compliance orders, administrative penalties and prosecutions, be publicly accessible at a minimal charge. 41

Recommendation: Section 1(c) of Bill 32 should be amended to designate the Minister of Environment as the Minister responsible for the legislation. In the alternative, the Minister of Environment should be designated under section 16 of the *Government Organization Act* as the Minister responsible for Bill 32. 41