News Brief

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In This Issue

Environmental Law Centre

Celebrating 21 years of excellence in environmental law

1982 – 2003

Constitutional Support Lacking for Alberta's Bill 32

Introduction

In the last issue of News Brief (Vol. 17, No. 4) we provided an overview of some important issues in Alberta's Bill 32, the *Climate Change and Emissions Management Act*.[1] This article, adapted from the Environmental Law Centre's brief *In Response to Bill 32: The Climate Change and Emissions Management Act*,[2] further examines the constitutional issues raised by the Bill. Readers seeking a comprehensive analysis of Bill 32 should refer directly to *In Response to Bill 32*.

Bill 32 was introduced in the Alberta Legislature and passed second reading in November, 2002, during the fall sitting. A revised version of the Bill was introduced as Bill 37 in April 2003 during the spring legislative sitting. Bill 32 provided a framework for the regulation of greenhouse gas emissions in the Province and, significantly, expressly excluded the application of any federal emissions reduction targets.

This article will examine federal and provincial jurisdiction over greenhouse gases and whether the Province will be able to exclude federal regulation of the gases. On a practical level, the likely consequences of the provincial government's approach will be reviewed, and alternatives recommended.

Constitutional basis for laws to reduce greenhouse gases

Like most environmental matters, greenhouse gases do not fit easily under either provincial or federal powers granted by the *Constitution Act, 1867*. As a matter of shared jurisdiction, both the federal and provincial governments have authority to make laws to reduce the gases. The scope of each government's power to do so will depend on the courts' characterization of climate change and this determination would occur as part of an analysis of a federal or provincial law addressing these matters.

Federal jurisdiction over greenhouse gas emissions

Determining a constitutional basis for federal climate change legislation is complicated by several factors. Firstly, although there are only a limited number of 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, emissions 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 both 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. The federal treaty power will also be briefly discussed.

The criminal law power

In *R.* v. *Hydro Quebec*, the Supreme Court of Canada confirmed that environmental protection is a legitimate purpose for the criminal law.[3] However, to be a valid criminal law, federal legislation must also create a system of prohibitions and penalties.

(Constitutional Support Lacking for Alberta's Bill 32 . . .continued from Page 1)

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As stated above, greenhouse gases are emitted by common industrial and personal activities. A federal law to address emissions will by necessity be largely regulatory in nature, providing for emissions control, the funding of initiatives, the establishment of an emissions credit scheme, etc. The *Hydro Quebec* case 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.[4] 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 credit scheme.[5] It is possible that such measures would be supported by the "peace, order and good government" power (see discussion below).

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 credit 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).[6]

In order for a federal climate change law to be brought under POGG, the federal government would need to establish that climate change, or greenhouse gases, are a matter of national concern. The Supreme Court has indicated that interprovincial air pollution can be controlled as a national concern under the POGG power, if certain requirements are met.[7] The problem must 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.[8]

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. 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 provincial level without cooperation from all provinces also supports this view.[9]

A finding that reducing the emissions is a matter of national concern would confer exclusive authority upon the federal government to regulate the emissions. Alberta would still be able to regulate emissions indirectly through its authority over forestry, land use, road transport, and industrial activity.[10] But the Province could be totally excluded from important aspects of emissions regulation, in particular an emission trading scheme.

The federal treaty power

The federal government has the authority to sign and ratify international treaties.[11] This authority does not currently allow the federal government to implement treaties through legislation that interferes with provincial jurisdiction.[12] However, the Supreme Court has indicated a willingness to reconsider whether the federal government could implement treaties directly affecting provincial jurisdiction.[13]

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.

(Continued on Page 3)

(Constitutional Support Lacking for Alberta's Bill 32 . . . Continued from Page 2)

Provincial jurisdiction over greenhouse gas emissions

Since the 1930 *Natural Resources Transfer Agreement,* the Alberta Crown has owned the province's natural resources, including any public property not expressly transferred to the federal government.[14] This ownership is the primary basis for the province's regulation of its natural resources.[15] The powers of ownership are distinct from the Province's legislative authority over matters assigned to the provinces by the Constitution.[16]

The Province currently regulates the components or quality of air through the regulation of activities, and through restrictions on the release of harmful substances.[17] 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.[18]

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, however, goes further. 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 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 also 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 independent benefits 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.[19]

Bill 32's assertion that the gases are natural resources 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.[20] Other jurisdictions have enacted laws specifically regulating carbon dioxide emissions as a pollutant.[21] Carbon dioxide, methane, and the other greenhouse gas emissions are, given current atmospheric levels, best characterized as pollutants that are harming the environment.

Finally, the Bill's characterization of carbon dioxide and methane as natural resources implies that the remaining greenhouse gases are not provincially owned, and might therefore be regulated differently. On a practical level this characterization 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.

In sum, Bill 32's assertion that carbon dioxide and methane are natural resources is unlikely to extend the Province's established jurisdiction to regulate harmful emissions. Furthermore, the assertion creates unnecessary confusion over the regulation of greenhouse gases that the Bill fails to address.

Conclusion

Bill 32 is unlikely to be challenged on constitutional grounds in the absence of a federal emissions reduction law.[22] A constitutional challenge is likely to focus on forthcoming federal law regulating greenhouse gases. In such a challenge, a finding by the courts that the gases are a matter of national concern under the POGG power would provide the federal government with exclusive authority to regulate some or all aspects of the issue. It is likely that such a finding would considerably reduce the scope of provincial jurisdiction.

To ensure that the Province is not totally excluded from important aspects of any emissions reduction plan, Bill 32 should be revised to acknowledge overlapping jurisdiction with respect to target-setting and emissions trading in particular. The Bill should demonstrate, as a priority, that Alberta is willing to reduce 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.

At present, greenhouse gases are a matter of shared jurisdiction. Effective legislation to reduce the gases must acknowledge the need for, and provide the tools to facilitate, provincial-federal cooperation. The Province's interests will be best served by revising Bill 32 to provide a framework for a cooperative approach to emissions reductions, and forcefully voicing those interests within that framework.

■ **James Mallet**
Staff Counsel
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(Continued on Page 9)

In Progress

In the Legislature...

Federal Legislation

Bill C-5, the *Species at Risk Act*, (now S.C. 2002, c. 29) was passed by the Senate and received Royal Assent on December 12, 2002. The Act will come into force by Order-in-Council, anticipated early in 2003. Regulations required under the Act, including regulations on compensation, are currently being developed. With its passing of the Act, the Senate released a unanimous report advocating how the Act can be strengthened at its five year review or earlier. The recommendations include adding measures to ensure interim protection of critical habitat; adding timelines for the completion of Action Plans; extending mandatory protection to transboundary species and their critical habitat; and extending the scope of the legislation to prohibit the killing of a species at risk or destruction of its critical habitat anywhere in Canada.

An Act to amend the International Boundary Waters Treaty Act, (S.C. 2001, c. 40) assented to on December 18, 2001, is in force as of December 9, 2002. The amendment is intended to better implement the Treaty. Specifically, the Amendment prohibits bulk water removals from water basins in which boundary waters are located and requires persons to obtain licences from the Minister of Foreign Affairs for water-related projects that affect the natural level or flow of waters on the United States side of the border. At the same time, the *International Boundary Waters Regulations* came into force. The Regulations elaborate on the prohibition of bulk water removals as well as outline the information that must be included in a licence application.

Prime Minister Chretien signed the Kyoto Protocol on December 16, 2002 following its approval in both the House of Commons and the Senate. Canada is the 99th country to ratify the Kyoto Protocol.

Cases and Enforcement Action...

The Supreme Court of Canada, in a decision released on December 5, 2002, *Harvard College* v. *Canada (Commissioner of Patents)* determined that the Harvard mouse fails to meet the definition of an invention in the *Patent Act* and therefore cannot be patented.

A Provincial Court Judge in British Columbia ordered Western Pulp Ltd. to pay $80,000 to the Habitat Conservation Trust Fund after the Company pled guilty to releasing chlorine into the environment and bypassing the treatment system at its Port Alice pulp mill. The charges were under the province's *Waste Management Act*. Of the assessed penalty, $50,000 was for the release of chlorine and $30,000 for bypassing the treatment system.

A British Columbia Provincial Court Judge sentenced McLeod's By-Products of Vernon to a total of $46,000 after the company pled guilty to one count of violating a pollution abatement order under the *Waste Management Act*. The Company is a rendering company that renders the carcasses of dead animals into proteins and oils that are mixed with grain to create animal feed. Of the penalty, $39,000 is for the Habitat Conservation Trust Fund, $1,000 is a fine, and $6,000 is a victim services levy.

The joint Alberta Energy and Utilities Board/Natural Resources Conservation Board Review Panel denied the application by Glacier Power Ltd. to construct and operate a hydroelectric dam on the Peace River. The Panel determined that "significant uncertainty remains ... between the potential benefits and costs of the project." It went on to note that the potential negative "cumulative effect clearly outweighs the social and economic benefits to the local community, as well as to Albertans in general." The Panel also noted that they were not convinced that the potential negative effects could be mitigated appropriately.

An Alberta Provincial Court Judge sentenced Shell Canada Products Limited to penalties totalling $50,000 after the Company pled guilty to charges of unlawfully importing gasoline with a benzene concentration above the regulatory limit in violation of the *Benzene in Gasoline Regulations* under the *Canadian Environmental Protection Act, 1999*. Of the $50,000, $43,000 is a creative sentence designated toward environmental research at the Faculty of Environmental Design at the University of Calgary.

A Territorial Court Judge assessed the City of Dawson a $5,000 fine after the City pled guilty to charges of depositing a deleterious substance into the Yukon River, in violation of s. 36(3) of the federal *Fisheries Act*. The sentence includes an order that the City construct and have a fully operational secondary sewage treatment plant by September 1, 2004 and allows for a additional fine of $5,000 for each month that the City fails to meet the timeline.

■ **Dolores Noga**
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In Progress reports on selected environmental activity of the government, courts and tribunals. A more complete report on these matters can be obtained by subscribing to *The Regulatory Review*, a monthly subscription report prepared by the Environmental Law Centre. To subscribe or obtain further information call (780) 424-5099 or visit our website at <www.elc.ab.ca>.

Public Participation and Bill 32, the Proposed *Climate Change and Emissions Management Act*

The *Climate Change and Emissions Management Act* is currently being debated as Bill 37 in the Spring session 2003 of the Alberta legislature. After it was introduced in November 2002, the Government requested public comment on the Bill. There was a very short period for comment, and no formal consultation took place. Albertans have been asked to review and comment on the new proposed greenhouse gas emissions management scheme, yet the Bill itself is missing the main elements that make up an efficient and fair process: transparency and accessibility.

The Bill presents a limited framework that reflects the Alberta climate change plan for action, yet omits to legislate one of the core principles that was outlined in the plan, that is, informed consultation with the public. It is well recognized that an open and transparent process is the only effective way to ensure legal and regulatory protection of the environment. The public needs to have access to information, opportunities to state concerns and be heard on decision making matters, an opportunity to appeal, and a right to ask to have their costs covered where appropriate.

The Bill provides for new management tools for reducing greenhouse gases, more specifically, emissions trading and the use of sectoral agreements to meet the gas emission targets. However, the broad discretion provided to the decision makers in the Bill has the potential to affect public consultation processes with respect to these new tools. Without mandatory consultation provided for in the Bill, public involvement in the decision making process could be minimal at best. The Bill should include provisions that require public consultation with respect to the development of regulations on air emissions similar to the *Environmental Protection and Enhancement Act*.[1]

The only recognition the Bill gives to public access to information is the potential for creation of a public registry related to emissions trading. A public registry system meets one aspect of involving the public by providing information, thus contributing to a more open and effective system. There should be an obligation on the Minister to create the registry and ensure its accessibility. An accessible system includes flexibility as to hours of operation, forwarding or faxing materials to those unable to go to a central location, and free services or at least reasonable costs if they are necessary.

The Bill should also facilitate a public process that allows for public input into the emissions being traded in the system and the mechanisms by which the targets are set. This could be met in numerous ways such as providing public notification for comments, inviting individuals or groups to be part of planning or management committees, or asking for public review of draft documents. There may be other management tools that could be implemented in addition to emissions trading and the public should be consulted for its input on these options.

One of the Bill's main difficulties is that it is written to keep economic growth a priority, while consideration of the environment and public health, both areas in which public input should be highly regarded, falls behind. The Bill's preamble mentions a commitment to protecting Alberta's environment, yet is very clear about preserving economic growth and maintaining a competitive system. It would be quite difficult to keep the status quo and maintain environmental integrity, and it will be even less possible if mandatory consultation is not prescribed in the Bill. Public input into the development of an emissions trading system would assist implementation of important initiatives that encourage environmental protection while promoting emissions reduction.

Sectoral agreements are proposed as a means to implement gas emission targets specified in the Bill. There is, however, no provision in the Bill for a public role in the development of these agreements. The Bill refers only to the Minister and sectors entering into negotiations to establish objectives for emission reduction and set targets. The Bill should address both the required elements for agreements and a procedure for developing the agreements that includes a public component. There is no mention of access to these documents for public review or comment, both of which are important for public acceptance and accountability.

The Bill provides for establishment of climate change programs and a climate change fund. Both of these initiatives should engage the public in their development and management. For example, there should be public representation on committees formed to manage the development of programs and reduction measures. The Minister should be obliged to include public input into program development to increase alternative energy and energy conservation initiatives, including renewable energy sources and energy efficiency measures.

Overall the Bill should identify the legal means by which the public will have a say in the decision making processes to make it a fairer and more efficient system. A transparent system would provide for more interaction between government, industry and the public and lead to greater understanding and accountability. Providing access to information and an opportunity to contribute to the decision making process is important in enacting an environmental law that is based on contribution by all directly affected parties. The Bill should be changed to clearly provide for mandatory public input and draft regulations that can provide the specific details on such input.

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[1] R.S.A. 2000, c. E-12 s. 122(2).

Centre Reviews Alberta's Proposed Climate Change Legislation

In November 2002, the Alberta government introduced Bill 32, the *Climate Change and Emissions Management Act*, which was intended to establish the legislative framework for implementation of the provincial climate change plan.[1] The Bill was not passed in the fall 2002 legislative sitting, and has been newly introduced as Bill 37 in the spring 2003 legislative sitting.[2] The Environmental Law Centre took the opportunity to provide its comments on Bill 32 by submitting a detailed brief that reviewed the Bill and made over 30 recommendations for revision and improvement.[3] This article provides an overview of the changes between Bill 32 and Bill 37, in light of the Centre's comments.

Bill 32 – the starting point

In essence, Bill 32 sought to lay the blueprint for implementing the Alberta climate change strategy, by minimally setting out basic legislative requirements and granting broad regulation making powers to flesh out the details. Major hallmarks of Bill 32 included broad discretion in government officials and Cabinet, minimal public involvement and little detail on the ultimate shape of the provincial climate change plan. This Bill also sought to clearly claim provincial jurisdiction to regulate climate change matters and to minimize the potential federal role in the area by claiming ownership of greenhouse gases as natural resources and constituting provincial targets and limits as the only applicable numbers within Alberta.

The Centre's comments

An initial matter raised by the Centre was 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*.[4] Virtually every element of Bill 32 could be achieved through limited amendments to that Act, which also offers the advantages of a time-tested framework and a primary focus on environmental protection. The Centre's brief also discussed the constitutional aspects of Bill 32 and climate change regulation as a whole and suggested that the most likely constitutional resolution of this matter would be one of shared jurisdiction and cooperation between the federal and provincial governments.[5]

The Centre also suggested that major improvements were needed in the province's climate change legislation. These suggestions included:

- Explicit recognition of environmental protection as the legislation's primary goal;
- Greater detail for processes related to regulatory and policy development and implementation of the legislation, especially in relation to emission reduction tools;
- Reduction in the amount of discretion in the legislation and imposition of more limitations on any remaining discretion;
- Expanded and stronger structure for compliance and enforcement of the legislation; and
- Changes to clarify and guarantee a strong public role in various elements of the legislation.

Bill 37 – the positives

While much of Bill 37 mirrors the content of Bill 32, some notable changes have been made. Consistent with the Centre's analysis and recommendations on constitutional matters, Bill 37 has been modified to take a more conciliatory and cooperative approach to addressing climate change. This includes explicit provisions enabling cooperation with other jurisdictions and removal of references to ownership of greenhouse gases as natural resources. The importance of environmental protection as a facet of climate change management has been recognized in the preamble to Bill 37. The new Bill also provides a broader scope for emissions reduction tools, beyond trading systems, and recognizes the need to be compatible with regulatory schemes of other jurisdictions.

Other changes are also consistent with Centre recommendations. Bill 37 has made modifications to the structure of the Climate Change and Emissions Management Fund by giving its administration to the Minister of Finance and providing the ability for the government to appropriate monies for the Fund. The Bill also provides some minor softening of provisions related to imposition of sectoral agreements by regulation.

Bill 37 – the concerns

While positive changes were made with the introduction of Bill 37, many of the concerns expressed by the Centre with respect to Bill 32 remain. Bill 37 still provides for broad grants of discretion and regulation making power for many important elements such as structure and process. As a whole, Bill 37 continues to separate creation of the bulk of Alberta's climate change management system from open and public debate and scrutiny.

Bill 37 also lacks a clear role for the public in climate change management. It does not provide for public consultation or participation related to any of its important key elements. A new provision dealing with confidentiality of information is of concern because it raises the spectre of *less*, rather than more, accessible information. Section 17 empowers the government to prescribe types of information provided to it that would have restricted access and length of time that access could be restricted, while overriding the provisions of the *Freedom of Information and Protection of Privacy Act*.[6]

While changes to the provision dealing with ownership of carbon sinks removes the confusing wording of Bill 32, the new provision leaves the whole matter of ownership to the regulations, creating less certainty for those who might own such sinks, for example, farmers and woodlot owners.

(Continued on Page 9)

Government Set to Restrict Recreational Access to Public Lands

Ranchers, recreational users, and the oil and gas industry will soon face new rules for access to public lands if and when Bill 16, *Agricultural Disposition Statutes Amendment Act, 2003*[1] becomes law.

The Bill, which has passed second reading and has been referred to committee, would replace the *Agricultural Disposition Statutes Amendment Act,* given royal assent in May, 1999 but never proclaimed in force.[2] Alberta Sustainable Resource Development has indicated that the new Act and related regulations could come into force as early as June, 2003.[3]

The Bill makes important amendments to the *Public Lands Act*, the *Occupiers' Liability Act*, and the *Petty Trespass Act.* Consequential amendments would be made to the *Administrative Penalties and Related Matters Statutes Amendment Act, 2002.*

This article will examine amendments affecting recreational access, occupiers' liability, and remedies for trespass.

Right of Access by Recreational Users

More than one-half of public land in the White (settled) area of the province is under grazing disposition.[4] These lands attract thousands of recreational visitors every year, including hikers, hunters, off-road vehicle users, and others.

At present, rights of access for these visitors are unclear. Casual recreational access to lands under agricultural disposition is not currently addressed in the *Public Lands Act* or the regulations under the Act. Current Public Lands Division policy provides that, depending on the disposition, recreational users are required to obtain consent from the disposition holder before entering lands under disposition.[5]

Bill 16 amendments

Bill 16 attempts to clarify the rights and obligations of disposition holders and recreational users. Clause 3(23) of the Bill adds the following section (62.1) to the *Public Lands Act*:

> The holder of an agricultural disposition shall, in accordance with the regulations, allow reasonable access to the land that is the subject of the disposition to persons who wish to use the land for recreational purposes.[6]

What constitutes "reasonable access" is left to be determined in the regulations, as is the definition of "agricultural disposition". Also left to the regulations is the establishment of a review procedure for disputes over access.[7]

Draft regulations not available to public

Public Lands Division has indicated that the regulations for recreational access are nearly complete, but will not be available for public comment before they come into force.[8]

Pubic Lands has also indicated that the new regulations will be based on the draft regulations set out in the government's *Discussion Document on Draft Regulations,* released to stakeholders in connection with the earlier, 1999, Act.[9] The 1999 draft regulations indicate that recreational visitors will likely be required to obtain consent of access from the holders of any farm development lease, cultivation permit, grazing lease or grazing permit. These disposition holders may be entitled to bar access where a recreational activity would involve

- Use of bicycles, animals for transportation, or motor vehicles,
- Access to, or hunting within a reasonable distance of, a fenced pasture unit containing livestock,
- Access to lands on which a crop is growing,
- Camping,
- Access to land in relation to which a fire ban has been issued, and
- Use that is contrary to a recreation management plan or an access order.[10]

Disposition holders will also likely be entitled to impose terms and conditions on recreational use in connection with the above matters.[11]

Holders of dispositions entitled to exclude recreational users will be required to provide Alberta Sustainable Resource Development with contact information. The information is to be included on a departmental webpage designed to facilitate contact between recreational users and disposition holders.[12]

Public Lands has indicated that the new Act and regulations could come into force as early as June, 2003. Public Lands also expects that contact information may not be available on the departmental webpage for several months after that. In the meantime, the webpage will provide instruction on how to obtain leaseholder contact information.[13]

It is unfortunate that the provincial government has decided not to make the draft regulations available for public comment. This is especially so given that Bill 16 provides only a framework for regulating access, with the substance of the legal requirements left to regulations.

The position of the Environmental Law Centre is that public access to lands under grazing disposition should only be restricted where it would directly interfere with rights given by the disposition. More specifically, consent of the disposition holder should only be required where the latter can reasonably establish that the proposed recreational use would interfere with grazing or the grazing potential of the land.

(Continued on Page 8)

(Government Set to Restrict Recreational Access to Public Lands. . . Continued from Page 7)

Requiring recreational users to obtain permission in all cases puts an unfair burden on the visitor, and is an unnecessary restriction of the public's access to public land.

From a practical point of view, the grazing interests could be as effectively and less contentiously protected through recreation management plans for areas under agricultural disposition. Bill 16 amends the *Public Lands Act* to provide for the regulation of such plans.[14] Recreation management plans should be developed for all agricultural disposition lands through consultation with disposition holders, government, and environmental, recreational, and aboriginal groups, as appropriate.

The plans could restrict access to the land as necessary to prevent interference with the grazing disposition, without needlessly restricting such access.

Occupiers' liability

Under current law, an agricultural disposition holder owes a duty of care to recreational users to take reasonable steps to ensure their safety.[15] This duty, owed to "visitors" under the *Occupiers' Liability Act*, exposes disposition holders to broad liability relating to injuries sustained by recreational users while on the property. Bill 16 amends the *Occupiers' Liability Act* to provide that the liability of the disposition holder will be determined as if the recreational user were not a "visitor", but a "trespasser".[16] The disposition holder will only be liable for injuries where they result from his or her willful or reckless conduct.

Remedies for trespass

Bill 16 will amend the *Public Lands Act* to provide that a person who contravenes the regulations or an access order, and fails to leave land under agricultural disposition when requested to do so, is subject to arrest by any peace officer. This is a welcome improvement to the 1999 Act, which permitted arrest by the disposition holder or his representative.[17]

Bill 16 would also amend the *Petty Trespass Act* to expressly exclude its application to recreational users of lands subject to agricultural disposition under the *Public Lands Act*.[18] Currently, the *Petty Trespass Act* applies to lands under disposition, with the exception of grazing leases and grazing permits.[19]

Conclusion

Provisions in Bill 16 providing for the regulation of recreation management plans, limiting occupier liability, and narrowing the possibility for physical confrontation between disposition holder and recreational user, represent positive changes to public land law.

The imposition of a general requirement to obtain consent before entering public lands under disposition imposes an unfair and unnecessary burden upon visitors. Practically speaking, the burden of applying for review of any access dispute will also fall upon the visitor. Access issues could be more easily and fairly dealt with through recreation management plans that would set parameters within which access is permitted.

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1 Bill 16, *Agricultural Disposition Statutes Amendment Act, 2003*, 3rd Sess., 25th Leg., Alberta, 2002.
2 *Agricultural Dispositions Statutes Amendment Act*, R.S.A. 2000, c. 1 (Supp) (unproclaimed).
3 Author's conversation with Keith Lyseng, Director, Rangeland Management, Public Lands Division (19 March 2003).
4 Alberta Sustainable Resource Development, "About Public Lands: Recreational Access and Use of Public Land," online: Alberta Sustainable Resource Development <http://www3.gov.ab.ca/srd/land/publiclands/publan14a.html> at 2.
5 *Ibid.*
6 *Supra* note 1 at cl. 3(23).
7 *Ibid.*
8 *Supra* note 3.
9 *Supra* note 3; Government of Alberta, *Agricultural Dispositions Statutes Amendment Act (Bill 31) Discussion Document on Draft Regulations, November 1999* (Edmonton: Government of Alberta, 1999)[hereafter 'Discussion Document'].
10 *Ibid.*, Discussion Document at 14, 15.
11 *Ibid.* at 15.
12 *Supra* note 3.
13 *Ibid.* The webpage is not yet available.
14 *Supra* note 1, cl. 3(23).
15 *Occupiers' Liability Act*, R.S.A. 2000, c. O-4, s. 5.
16 *Supra* note 1, cl. 1(3).
17 *Supra* note 2, s. 20.
18 *Supra* note 1, cl. 2.
19 *Petty Trespass Act*, R.S.A. 2000, c. P-11, s. 1(1)(b).

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(Constitutional Support Lacking for Alberta's Bill 32. . . Continued from Page 3)

1 Bill 32, *Climate Change and Emissions Management Act*, 2nd Sess., 25th Leg., Alberta, 2002.
2 Environmental Law Centre, *In Response to Bill 32: The Climate Change and Emissions Management Act* (Edmonton: Environmental Law Centre, 2003). The brief may be downloaded from the Centre's website at <www.elc.ab.ca>. Print copies are available by contacting the Centre.
3 *R. v. Hydro Quebec*, [1997] 3 S.C.R. 213. The criminal law power is provided in the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(27).
4 *R. v. Hydro Quebec*, *ibid.* at 296.
5 For further discussion on this point, see C. Rolfe, *Turning Down the Heat* (Vancouver: West Coast Environmental Law Research Foundation, 1998) at 357.
6 The "peace, order and good government" power is set out in the opening words of s. 91 of the *Constitution Act, 1867*, *supra* note 3.
7 *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *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.
8 *R. v. Crown Zellerbach Canada Ltd.*, *ibid.* at para 33.
9 *Ibid.* at paras 33 and 38.
10 For discussion see Rolfe, *supra* note 5 at 364-365.
11 *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.
12 *A.G. Can. v. A.G. Ont.* (Labour Conventions Case), [1937] A.C. 326 (P.C.).
13 *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 at 171-72; *R. v. Crown Zellerbach Canada Ltd.*, *supra* note 7 per La Forest J., dissenting.
14 *Natural Resources Transfer Agreement, Constitution Act, 1930*, R.S.C. 1985, Appendix II, No. 26 (Schedule); *Constitution Act, 1867*, *supra* note 3, 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.
15 Hogg, *supra* note 11 at 28.3.
16 *Constitution Act, 1867*, *supra* note 3, s. 92; Hogg, *supra* note 11 at 28.2.
17 See for example Alberta's *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.
18 *Constitution Act, 1867*, *supra* note 3, ss. 92A, 92(5) and 92(13).
19 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....".
20 *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.
21 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).
22 In *R. v. Lake Ontario Cement Ltd.* (1972), 11 C.C.C. (2d) 1 (Ont. H.C.J.), the appellate court held that the POGG power can only be used to declare the validity of a federal law, not to attack the validity of a provincial law.

(Centre Reviews Alberta's Proposed Climate Change Legislation . . Continued from Page 6)

Conclusion

The changes made in Bill 37 are, for the most part, positive in nature. However, there is much in the Bill that still merits improvement. It should be amended to provide greater detail and structure to processes for developing the details and implementation of the legislation. Amendments are also needed to reduce the amount of discretion given to government officials and limit what discretion remains, provide explicit processes for public participation, consultation and access to information, and create more structure for the compliance and enforcement system.

The provincial government should also release draft regulations for public review and consultation, ideally before enacting Bill 37. If such a step is not taken, a commitment should be made to publicly review draft regulations before implementation of the new climate change legislation, to allow a full and fair public airing of the entire climate change management system for Alberta.

■ **Cindy Chiasson**
Executive Director
Environmental Law Centre

1 Bill 32, *Climate Change and Emissions Management Act*, 2d Sess., 25th Leg., Alberta, 2002.
2 Bill 37, *Climate Change and Emissions Management Act*, 3d Sess., 25th Leg., Alberta, 2003.
3 The full text of the Centre's brief, *In Response to Bill 32: The Climate Change and Emissions Management Act*, is available as a free download from the Centre's website at <http://www.elc.ab.ca>. Print copies of the brief can be purchased from the Centre.
4 R.S.A. 2000, c. E-12.
5 For a more complete review of the constitutional matters, see "Constitutional Support lacking for Alberta's Bill 32" on page 1 of this issue.
6 R.S.A. 2000, c. F-25.

New Environmental Law Centre Publications

The Environmental Law Centre is pleased to announce the addition of the following new publications to our publication catalogue. These publications are available for purchase (or in some cases download) and can be ordered by telephone at (780) 424-5099 or Alta. Toll Free at 1-800-661-4238, by fax at (780) 424-5133, by e-mail at elc@elc.ab.ca or on line at our website – <www.elc.ab.ca>.

Legal and Institutional Responses to Conflicts Involving Agricultural Development and the Protection of Biodiversity on Forested Public Lands of Northern Alberta, by Robert R.G. Williams - $10.00

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In Response to Bill 32: The *Climate Change and Emissions Management Act* - $7.50
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A brief responding to Alberta's Bill 32, the Climate Change and Emissions Management Act.

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A brief discussing conflicts between petroleum operations and the agricultural sector on the same land base in northern Alberta, legal and institutional frameworks, and possible solutions.

The ABC's of Environmental Jurisdiction: An Alberta guide to federal, provincial and municipal responsibility - $15.00
(Also available as a free download from the ELC website – www.elc.ab.ca)

This alphabetical guide is designed to assist the public, environmental groups, and others to determine how environmental issues are regulated in Alberta. The Guide includes 52 Entries, each describing how a particular activity or environmental issue is regulated in Alberta. Also included in the Guide are six Primers which provide short, general introductions to issues that often arise when looking at environmental jurisdiction.

Good Riddance: Waste Management Law in Alberta, 2nd Edition, by Andrew R. Hudson - $24.95

This book is an updated version of the original text published in 1990. It addresses the current state of waste management law in Alberta, covering both common law and statutory aspects. Topics include hazardous, non-hazardous, agricultural, biomedical, nuclear and oilfield wastes; recycling; import and export of wastes; the Swan Hills Hazardous Waste Plant; and suggestions for waste management law reform. This book will be a helpful reference for anyone dealing with waste management in Alberta.

Demystifying Forestry Law: An Alberta Analysis, 2nd Edition, by Brenda Heelan Powell - $24.95

This book is an updated version of the original text published in 1990. It addresses the current state of forestry law in Alberta. Topics include ownership of Alberta's forests; disposition of Crown timber; forest management planning and reforestation; and a detailed review of forest management agreements. New material includes public participation; environmental concerns; non-regulatory enforcement, and law reform.

2002 Mactaggart Essay Prize Winner

Karrie Wolfe

The Environmental Law Centre is pleased to announce the winning essay for the 2002 Sir John A. Mactaggart Essay Prize in Environmental Law. First prize was awarded to Karrie Wolfe from the University of Victoria for her essay: *Greening the International Human Rights Sphere? An Examination of Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment.*

Members of the 2002 volunteer selection committee were: (chair) Elizabeth Swanson, Trans Canada Pipelines, Steven Kennett, Canadian Institute of Resources Law, and Jennifer Scott, Barrister and Solicitor.

The capital for this prize was donated by the Mactaggart Third Fund. Additional contributions were made by Carswell and the charitable donors to the Environmental Law Centre.

For further information, contact the Environmental Law Centre at 204, 10709 Jasper Avenue, Edmonton, AB T5J 3N3, by phone at (780) 424-5099 or 1-800-661-4238, by fax at (780) 424-5133, by email at elc@elc.ab.ca, or check the Environmental Law Centre website at <www.elc.ab.ca>

By Cindy Chiasson, *Executive Director, Environmental Law Centre*

Environmental Farm Plan Designed to Help Agricultural Sector

In February 2003, the Alberta Environmental Farm Plan (AEFP) program was officially launched. Administered and delivered by Alberta Environmental Farm Plan, a non-profit corporation, the AEFP program is a voluntary initiative aimed at assisting Alberta farmers and ranchers to assess the environmental impacts of their agricultural operations. The program is based on Ontario's EFP program and was developed in Alberta through preparation of an EFP manual for regional concerns and conditions and pilot testing with agricultural operators.

In essence, the AEFP program assists operators in conducting an environmental assessment of their operations and developing an environmental management system to maintain and improve their operations. Operators participate in two workshops delivered by local AEFP facilitators, who are also agricultural operators, which guide them through the process of environmentally reviewing their operations and developing subsequent action plans for improving their practices. Workshops are free of charge and participants receive a free copy of the AEFP manual, a binder that deals with environmental matters related to all aspects of farm operation in Alberta. The manual covers the spectrum of environmental matters, highlighting best practices and providing references to contacts and print information resources. Operators who complete the AEFP workshops receive a farm gate sign and certificate to acknowledge their participation and their interest in environmentally sustainable agriculture.

Over the course of development of the AEFP program, operators expressed concerns about confidentiality of individual farm plans and potential liability that might arise from participation in the program. The program does not require participants to submit their completed farm plans to any body or agency; operators keep these plans as part of their ongoing agricultural operations. At law, it is likely that environmental farm plans will be treated as a form of environmental audit for the purposes of accessibility and confidentiality. As such, the plans would carry no inherent confidentiality or privilege, although some limited solicitor-client privilege could apply if a plan were prepared specifically in anticipation of litigation or enforcement action, for the purpose of obtaining legal advice.

From a regulatory perspective, approaches to access to and confidentiality of environmental audits and documents of a similar nature, such as environmental farm plans, vary depending on the particular regulator. Alberta Environment, the regulator responsible for enforcing the *Environmental Protection and Enhancement Act* and *Water Act*, takes a very guarded and limited position. Under the *Enforcement Program for the Environmental Protection and Enhancement Act*, information from a voluntary environmental audit may be used to order remedial action. The policy also indicates that, while Alberta Environment will not seek access to voluntary environmental audits for use as evidence in prosecutions, the final decision regarding evidence in environmental prosecutions will rest with Alberta Justice. On the federal front, the *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* seeks to encourage the use of environmental audits by indicating that access to audits will only be sought in very limited circumstances, under the authority of a search warrant, during investigations.

With respect to legal liability and environmental farm plans, there are no legislative provisions that constitute these plans as a defence to prosecution or other liability. However, it is possible that preparation of an environmental farm plan and action taken to follow up on that plan could be considered elements of due diligence, which can be raised as a defence to many offences under the *Environmental Protection and Enhancement Act* and *Water Act*. With respect to common law liability, section 2 of the *Agricultural Operation Practices Act* protects agricultural operators from nuisance actions, provided they are operating in accordance with generally accepted agricultural practices, as well as any applicable land-use bylaws or approvals. Preparation and implementation of an environmental farm plan could be seen as an element of meeting or exceeding these practices.

The AEFP program offers a positive, voluntary tool for Alberta farmers and ranchers to assess the environmental status and impacts of their operations and take action to achieve sustainability. It is likely that the legal status and treatment of these plans will become clearer as they become more prevalent in Alberta. For more information on the AEFP program, contact the Alberta Environmental Farm Plan program director at 1-866-844-2337 or visit the AEFP website at <http://www.albertaEFP.com>.

Ask Staff Counsel

When Smoke Gets in Your Eyes . . .

Dear Staff Counsel:
Our neighbour is trying to keep his heating costs down by using his wood fireplace to heat his home. Unfortunately, it generates a tremendous amount of smoke, most of which ends up in our yard and house. What can we do about this problem?

Yours truly,
Joe Ken Hack

Dear Mr. Hack:

A major challenge of your problem is that residential wood burning for both heating and recreational purposes is generally not regulated. While visible emissions and particulate releases from some fires are regulated by the *Substance Release Regulation* under the *Environmental Protection and Enhancement Act*, fires that are used for heat or recreation within dwellings are exempted from these requirements. Your local municipality may have a bylaw regulating burning within the community, but it will only be of assistance to you if it applies to fireplaces within dwellings or buildings. For example, the City of Edmonton has an open burning bylaw that applies to outdoor firepits and fireplaces but not to interior fireplaces. You should check with the clerk of your municipality for further information on relevant bylaws.

If the smoke from your neighbour's fireplace is causing health problems for you and your family, the *Nuisance and General Sanitation Regulation* under the *Public Health Act* may be of assistance. Section 2 of that regulation prohibits smoke emissions from chimneys that may injure or be dangerous to public health. Under section 3 of the regulation, health units (now the responsibility of regional health authorities) are obliged to investigate nuisance complaints made under section 2. To contact the regional health authority for your area, check the Regional Health Authorities Map and List on the Alberta Health and Wellness webpage at <http://www.health.gov.ab.ca/system/rhas/rhamap_current.htm> or call the Alberta Government information line at 310-0000.

Another legal option potentially available to you is a nuisance action at common law against your neighbour. Nuisance actions are intended to deal with unreasonable interference with a person's use and enjoyment of their property. The interference can be direct, such as dumping trash, or indirect, such as pesticide drift or underground movement of contaminants from neighbouring property. Remedies in nuisance actions include money damages and injunctions. An injunction is an order prohibiting the continuation of the interference with the use and enjoyment of the property. Should you wish to pursue this option, you should contact a lawyer to discuss this step in further detail in relation to your particular situation. You may wish to consider trying mediation with your neighbour before pursuing litigation, as court action can be costly and time consuming. Some municipalities offer mediation programs or services to assist in resolving neighbourhood disputes; check with your local municipality. You can also obtain information on mediation from the Alberta Arbitration and Mediation Society (phone 1-800-232-7214; webpage <http://www.aams.ab.ca>) or from your lawyer.

While there is little regulation of this topic, there is information available on health and environmental effects of wood burning and efficient wood burning that you may want to pass on to your neighbour. The federal government, through Natural Resources Canada, has publications dealing with residential heating by wood burning. These can be accessed through the Natural Resources Canada webpage at <http://www.canren.gc.ca/prod_serv/index.asp?Cald=124&Pgld=740>. Available titles include *A Guide to Residential Wood Heating* and *An Introduction to Home Heating with Wood.* Natural Resources Canada is also providing support to Burn It Smart, a campaign to promote safer, cleaner and more efficient wood burning practices for those heating their homes with wood or burning it for recreational purposes. The Burn It Smart webpage, at <http://www.burnitsmart.org>, includes fact sheets, frequently asked questions and an "Ask the Experts" section, and provides information on newer wood burning technology that can significantly reduce harmful emissions.

Ask Staff Counsel is based on actual inquiries made to Centre staff. We invite you to send us your requests for information c/o Editor, Ask Staff Counsel, or by e-mail at elc@elc.ab.ca. We caution that although we make every effort to ensure the accuracy and timeliness of staff responses, the responses are necessarily of a general nature. We urge our readers, and those relying on our readers, to seek specific advice on matters of concern and not to rely solely on the information in this publication.

Prepared by:
Cindy Chiasson
Executive Director

Alberta LAW FOUNDATION