Environmental Law Centre
UNIVERSITY OF VICTORIA

Murray & Anne Fraser Building
PO Box 1700 STN CSC
Victoria, BC V8W 2Y2
Phone: 250.721.8188
Email: elc@uvic.ca
Web: www.elc.uvic.ca

ELC ASSOCIATES TELECONFERENCE BACKGROUNDER
APRIL 23, 2012

BC Environmental Laws: What Needs to Change?

The Environmental Law Centre is working with other groups to produce a pre-election book that will highlight key proposals for environmental law reform. The book -- tentatively titled *Maintaining SuperNatural BC for Your Children: Reforming BC Environmental Laws* – is roughly modelled on *Law Reform for Sustainable Development in BC*, a pre-election book that helped trigger significant law reform when a new government took power in 1991.

The book will summarize key provincial law reform recommendations that have been made in recent years by West Coast Environmental Law Association, Ecojustice, the ELC and others. The idea is to create a short op-ed style article on each issue that: identifies the problem; briefly recaps key recommendations for reform; and links to the original law reform report dealing with the issue, and other resources. The book will be user-friendly, with cartoons illustrating each article.

Ultimately, the book will be published – and posted online. Many of the individual articles may also be published in newspapers. This book could be an important educational resource for environmentalists, bringing together reform proposals from some of BC's leading environmental law practitioners.

The book could also become a basic primer for: opinion leaders and other citizens who want to work for reform; the electorate as whole; politicians and civil servants who are interested in improving environmental protection; and an incoming government looking for reform ideas.

We currently propose articles on the following issues: Environmental Assessment laws, Regulating Cumulative Effects; Reforming Land Use Planning; Forestry Regulations; Oil and Gas Regulations; Fracking Regulations; Contaminated Sites Laws; Mining Laws; Mineral Tenure Laws; Inspection and Enforcement of Mines; Water Act; Riparian Areas Regulations; Run of River Projects; Reinventing Rainwater Management; Regulating Sewerage Systems; Improving Regional Sustainability Strategies; Acquiring and Protecting Natural Areas in Communities; Greenways Systems; Species at Risk; Park Laws; Carbon Budgeting Laws; Carbon Taxes; Hydro Rate Regulation; Access to Justice for Public Interest Groups; Enhancing Citizen Enforcement Powers; SLAPP Suits; Environmental Bill of Rights; an Environmental Commissioner; Reliance on Qualified Professionals in Environmental Regulations; Freedom of Information; Reforming Environmental Tribunals; and Whistleblower Protection.

We invite your thoughts on how this book can be improved.

A Few Sample Articles (Draft Only)

The Lesson from Fish Lake: Reform BC's *Environmental Assessment Act*

By Mark Haddock, Chris Tollefson and Ethan Krindle

Ottawa's rejection of the first Prosperity Mine proposal did more than just stop one ill-conceived plan to destroy Fish Lake. The decision also vividly demonstrated the problems with BC's environmental assessment law.

Indeed, the initial plan to drain Fish Lake sailed through the provincial assessment process without a hitch. Yet federal Environment Minister Jim Prentice came to the opposite conclusion, and nixed the idea. Prentice noted:

> *Fish Lake would be drained, and there would be the loss of all the associated wetlands and a number of streams. Really, it was the loss of the whole ecosystem...*

Prentice's decision was based on a detailed analysis done by a panel of experts appointed under the federal environmental assessment law. The Panel concluded that the Prosperity Mine would:

- create high magnitude and irreversible effects on fish, and significant effects on grizzly bears;
- destroy an important cultural and spiritual area of the Tsilhqot'in people; and
- create long term impacts on the physical and mental health of the Tsilhqot'in.

This federal decision stood in marked contrast to the approach taken by BC's Environmental Assessment Office. The Provincial Office rejected expertise from its own Ministry of Environment and recommended approval of the project. This was consistent with the BC Office's record – it has *never* recommended that a project be rejected (although it has recommended further studies).

Furthermore, the flawed provincial process fell far short of the promises made to First Nations in 2005 when the BC government announced its commitment to a "New Relationship."

A recent Auditor General report has highlighted deep flaws in the Environmental Assessment process. The government watchdog strongly criticized the lack of rules governing mitigation and compensation for adverse environmental effects once a project is approved; the lack of measurable and enforceable conditions in EA certificates; and lack of compliance and enforcement.

It is time for a major overhaul of BC's *Environmental Assessment Act*, a law that was severely weakened by the Campbell government in 2002. The Environmental Law Centre (ELC) recently published a comprehensive study on how the Act can be improved to protect places like Fish Lake and still encourage sustainable development. In addition, the law needs to be made more efficient and effective.

The ELC report finds that our current provincial law is remarkably weak, compared to many other jurisdictions. Citing precedents from other countries and provinces, the ELC report recommends the following measures:

- Adopt a "traffic light" (green/amber/red) approach that addresses big picture issues such as Aboriginal title and rights, land use planning and community suitability up front -- before millions of dollars are invested in detailed engineering and feasibility studies. This would provide more certainty to industry and avoid situations like Fish Lake, where the company invested 17 years and millions of dollars in vain;
- Utilize "strategic-level" environmental assessments of overall regional development, government programs, policies and laws -- instead of requiring everything be addressed by proponents at the "project-level";
- Develop sustainability-based criteria for decisions on whether projects should be approved. The law should do more than set out procedural steps – it should require that a project actually meet substantive sustainability criteria;
- Spell out policies and procedures for determining the acceptability of proposed mitigation and compensation measures;
- Set out rules regarding the use of qualified experts in the environmental assessment process -- and require more rigorous and objective fact-finding procedures when company experts disagree with government experts;
- Require that careful consideration be given to whether the project is needed -- and what less harmful alternatives to the project may exist;
- Compel a rigorous and comprehensive assessment of *cumulative* environmental impacts of major projects;
- Enable the public to participate in assessments in a meaningful, constructive, timely fashion; and
- Ensure that measurable environmental performance conditions are placed on approved projects, so that proponent promises can be monitored and enforced over time.

The BC government has led an effort to convince Ottawa that provincial environmental assessments are "equivalent" to ones under federal law, and that Ottawa should simply defer to provincial processes. Indeed, Ottawa recently announced it intends to allow provincial assessments to replace federal assessments. However, the Fish Lake example illustrates the risk of such an approach. If the current flawed BC process becomes the sole assessment of projects, BC's environment will be in jeopardy. After all, the BC assessment actually supported the draining of Fish Lake.

It is clear that the federal government should not defer to provincial processes -- especially when BC's environmental assessment process falls so far short of best international practices. One of the BC Government's "Five Great Goals" has been clearly articulated:

> *Lead the world in sustainable environmental management, with the best air and water quality, and the best fisheries management, bar none.*

We support that goal, and call on the new premier to now implement it. BC's natural environment is first class – our environmental laws should be as well. The BC *Environmental Assessment Act* cries out for reform.

For more information, see: [*There will be links to reports on EAs and other resources.***]**

Modernizing the 100 Year Old *Water Act*

By Jenn Cameron and Deborah Curran

Water is a vital element of the environment, the economy and the daily life of British Columbians.

The blue and green veins running deeply through the province are the life-blood of Nature. No plant or animal can survive without it. Biological communities are richest and most diverse along streams, rivers, wetlands and other water bodies. An adequate supply of clean water is essential to human life and health.

At the same time, an adequate supply of water is necessary for our economic well-being. Water is essential for agriculture and fisheries – and for hydroelectric production, pulp mills, smelters, manufacturing and service industries. While healthy streams are obviously critical for tourism, adequate water supplies are also necessary for residential development, waste disposal and other economic endeavours. Water is a public resource whose preservation and wise use is crucial for future prosperity.

Unfortunately current water use in BC is increasing at a rate that exceeds population growth. Canadians are only second (behind the United States) in global water consumption, on average consuming two to four times more water per person than in Europe. Unlike the United States, where average water consumption is decreasing, our water use continues to rise. BC municipalities are also increasingly reporting water shortages. In 2003 severe droughts affected the Okanagan valley and Vancouver Island. In 2006 the 'wet' area of Tofino ran out of water during the height of tourist season. Continued industrial, agricultural, and urban growth will further increase pressure on already stressed water systems in different regions.

The BC *Water Act* (the 'Act') is not equipped to deal with current and emerging problems. The Act is one of the oldest laws in the province and was designed to promote industrial and agricultural growth when water was plentiful and human impact minimal. It focuses on allocating water for private uses through licensing and does not mandate ecosystem flows, conservation and long term planning. It falls short on "adaptive management" provisions – provisions that could allow flexible responses to changing environmental conditions and increasing demands on a finite water supply. As recognized by the Government of BC in its *Living Water Smart* commitments, BC needs a comprehensive scheme that treats water first as the foundation of ecological health, and not just an entitlement held by licence. We need a scheme that treats water the way people perceive it: as a public resource that should be safeguarded for ecosystems first -- and then made available through regional water planning for a variety of high efficiency uses.

The blueprint for reforming the *Water Act* has five elements:

- **Protect stream health and aquatic environments by establishing legally enforceable minimum environmental flows in each watershed system.**

Low flows can threaten the water cycle in a region. They can mean water bans for consumptive uses such as lawn watering, impacts on fish and wetland wildlife, pollution build up, and diminished recreational opportunities. Under current law decision makers are not required to take specific ecosystem or water quality criteria into account when making water licensing decisions. Establishing minimum flows will create more transparent decision-making and, if enforced, will ensure that licensees are not taking too much water from any source.

- **Improve water governance arrangements by creating regional *Watershed Agencies* that have a clear mandate and financial capacity to engage in water management activities and decision making.**

Water governance in BC developed in an *ad hoc* fashion and there are now a wide range of local governments and administrative bodies involved in water management. However, they are not operating under one land use and water management regime, even if located in the same watershed. The result is sharing a water supply but not planning or operating together for sustainable water management. Given that all water systems – surface and groundwater - are connected, it is essential that planning and management occur comprehensively across an entire watershed. Implementing watershed planning and management regionally allows the governance system to be more responsive to changing local conditions.

- **Improve the water allocation system**

The *Water Act* is based on the historical principle of "first in time, first in right" -- meaning that older licenses take priority over newer licences. The purpose was to ensure certainty of water supply for licence holders as they developed their farms, industries, and mines. However, applying this priority doctrine today fails when many streams are over-allocated, actual water use is not monitored, and the most senior license holder does not necessarily use the water for the highest and best use in that region.

Water allocation must *first* be based on maintaining minimum instream flows to ensure ecosystem function. Allocation must also allow some flexibility to respond to annual or seasonal environmental change. This requires monitoring, enforcement and drought planning. Review and amendment of existing licenses as part of regional water planning, as well as cost recovery from water use are also key needs for the new regime.

- **Regulate ground water use by requiring licensing in all areas of the province.**

BC is one of the only jurisdictions in North America and one of the last in the world that does not regulate groundwater use. This ignores the basic functioning of the water cycle; ground water and surface water are one interconnected resource. To stop the practice of landowners drilling a well five metres distance from a stream that is over-allocated, comprehensive groundwater licensing is imperative.

- **Enshrine the Public Trust Doctrine in the *Water Act* by acknowledging water as a public resource that the provincial government holds in trust for the public that must be preserved and maintained for future generations.**

Water is widely viewed as a public resource; however, the *Water Act*'s main focus is to allocate water to private users. Thus, there is no recourse for holding the provincial government accountable when water shortages affect ecosystems and the public interest. The solution is to make public use and conservation a priority, and enable the public to enforce these goals.

The current *Water Act* is overdue for fundamental changes. It simply does not reflect modern values or socio-economic challenges. The BC government has recognized the need for change and initiated the *Water Act* Modernization project. Now the public has the opportunity to shape the new water governance regime. Any new regime must ensure that environmental flows take priority through local water management. It must ensure that water cycles in BC take care of ecosystems, the people that live in them, and industry for generations to come.

Designing the Green City: Reinventing Rainwater Management

By Calvin Sandborn

Shakespeare had it right -- rain is a gentle blessing that 'drops from heaven upon the place beneath.' Rain quenches thirst and sustains all life on earth. It greens our world. Without rain, we would inhabit a stark desert.

But we've built our cities in a way that turns rainfall into blight. When it rains in our cities, water sweeps over roofs, streets and parking lots, picking up a multitude of pollutants on the urban landscape. Then a network of curbs, gutters and pipes deliver that tainted water at high speed and volume into sensitive water bodies.

This stormwater runoff carries vast quantities of oil, gasoline, heavy metals, solvents, old lead paint chips, pesticides, herbicides, fertilizers, and PAHs into our streams and ocean. It also delivers fecal contaminants, leading to public health advisories for our beaches.

Stormwater has destroyed our urban salmon streams. Its high velocity erodes stream banks and destroys spawning beds. Its toxins kill fish. And stormwater culverts block fish migration.

At one time salmon in Victoria's Colquitz Creek were so thick farmers speared them and scattered them on fields for fertilizer. Over thirty streams in Vancouver were chock full of the big fish. But stormwater has turned these bountiful creeks into drainage ditches. Local restoration groups regularly see their efforts washed away by stormwater surges and toxins.

Polluted runoff has also closed many of the shellfish beds near our cities. In addition, stormwater runoff has now been documented as the chief source of PCB contamination in orcas -- one of the main threats to survival of that endangered species. Stormwater washes PCBs off of roofs and other surfaces and delivers the chemicals to fish at the bottom of the orca's food chain. Recent scientific studies draw the link between runoff and survival of this region's most majestic animal.

All the above problems are the legacy of our obsolete 19th century stormwater management system – a system that fails to respect natural systems and water cycles. However, rainwater management practices have recently been developed that make the 21st century Green City possible.

Instead of relying heavily on pipes and concrete, this new approach relies upon soil, trees and open space to naturally absorb, store, evaporate and filter rainwater. This Low Impact Development (LID) approach mimics the natural water cycle -- allowing water to infiltrate down through the soil and slowly release into the watershed.

Engineers, developers, and governments across North America are adopting green rainwater management techniques – including porous pavement, brick pavers, narrower streets, sidewalk planter boxes, replacing curbs and gutters with grassy boulevards and swales, improving soil absorption, retention ponds, rain gardens, and green roofs. Such LID techniques are now required for all new development in western Washington State.

Often cheaper than conventional pipes and concrete, LID provides additional benefits – it adds urban green space and recreational areas, cleans water and air, and makes the community more attractive. In fact, a Philadelphia study concluded that the LID approach provided ***23 times*** the total social, environmental and economic benefits of conventional stormwater management. The City of Philadelphia recently launched the most ambitious LID effort in North America – a comprehensive plan to "peel back the pavement" and convert the city into an urban oasis.

Our Provincial and local governments need to adopt a similar strategy. For its part, the Province needs to encourage local governments to move forward on this issue. The Province should:

- Follow the example of Washington State, and require Low Impact techniques for all new developments -- and create a long-term plan to retrofit developed urban areas with green infrastructure.
- Mandate each region and municipality in the province to establish I*ntegrated Watershed Management Plans* for dealing with rainwater through modern green techniques. Planning must take place at a watershed scale -- it won't work if Oak Bay protects Bowker Creek and Victoria and Saanich fail to protect their portions of the same watershed.
- The watershed plans should integrate planning for stormwater with planning for water supply and sewage, to ensure the most efficient use of the precious water resource.
- The watershed plans should be required to set the following mandatory targets:
    - Elimination of stormwater discharges rated "high" for public health concern by 2017
    - Elimination of discharges rated "high" for environmental concern by 2017
    - Making fish and shellfish near urban areas edible by 2035.
- To meet the targets, we must fix the old pipes that allow sewage to mix with storm water and flow onto our beaches. LID will reduce this problem, but money is still needed to fix the pipes. Cities such as Portland have successfully shifted such stormwater financing from property taxes to a "user pay" system -- which encourages homeowners to reduce their runoff, saving both the homeowner and government money. The Province should encourage this approach.

It is clearly time for a change in the way that we manage stormwater. If we act now, our grandchildren will benefit dramatically. They'll be able to walk on beaches free of stormwater fecal contamination. From those clean beaches they'll be able to spot the occasional orca, still wild in the Straits. They will walk along the banks of local urban streams, awed by the magic of restored salmon runs. They will harvest shellfish from long-closed shellfish beds.

We can do all of this – but the Province and local governments must take action and establish a rainwater management strategy.

Implementing Regional Sustainability Strategies

By Deborah Curran

The liveability of most of BC's communities is tied to the spectacular natural environment in and around them. What makes Beautiful British Columbia beautiful attracts more and more people to relocate largely to urban centres, which makes managing urban growth a key challenge. The province's population increases by approximately 60,000 people each year and will be home to over 5 million people in just a few years, 80 per cent of whom will live in urban areas. This is problematic because much of this growth occurs in our most ecologically sensitive and agriculturally productive valley bottoms. For example, 80 per cent of our population -- and 80 per cent of farm gate receipts -- are both found on the same 2% of our landscape, in the southwest corner of the province.

The best way to manage this growth is to take a regional perspective at coordinating land use, transportation, environmental protection and other values that are most efficiently addressed at a regional scale. BC provides the planning mechanism of regional growth strategies (RGS) to allow municipalities and regional districts in a region to coordinate regional approaches on important issues. Currently 10 regional districts in BC have completed RGS. Metro Vancouver has just updated its Livable Region Strategy Plan, and the Capital Regional District is converting its RGS into a regional sustainability strategy (RSS). Key aspects of all of the RGS in the province are a commitment to containing urban areas, protecting agricultural lands and sensitive ecosystems, and coordinating regional transportation.

However, the RGS legislation does not require local governments to follow any well-established planning principles. Nor does it set provincial goals for creating sustainable communities. While it sets out some guidelines, there are no specific metrics that local governments must meet and no explicit enforcement mechanisms for RGS. Finally, rather than focusing on managing growth, RGS can be retooled to address sustainability within the context of regional local government jurisdiction.

Recommendations for strengthening this important regional sustainability tool include:

- **Make regional sustainability planning mandatory**

Most high growth areas have addressed coordinating growth in some way by adopting an RGS. There may still be areas, such as mid-Vancouver Island, where RSSs are necessary. Where population or the growth rate reaches a specified threshold level, local government can be mandated to undertake regional sustainability planning to ensure that coordination and growth management issues are addressed before problems occur.

- **Establish provincial minimum requirements for regional sustainability strategies**

Although the RGS legislation sets out goals, such as creating compact communities and protecting the environment, it does not mandate minimum sustainability targets that local governments must meet. These could include the per centage of a watershed that must remain in a natural state, urban containment boundaries, minimum density targets before new greenfield sites can be used, and greenhouse gas reduction goals through land use and attached housing forms.

- **Create enforcement mechanisms for regional sustainability strategies**

Regional districts have no ability to enforce the requirements of the Local Government Act with respect to municipal implementation of the RGS. For example, regional districts have no ability to mandate that a municipality submit a regional context statement to it. Likewise, if a municipality takes action that is contrary to a RGS a regional district's recourse is to challenge that decision in court. Part 25 of the *Local Government Act* needs to have explicit enforcement mechanisms and a non-litigious dispute resolution process.

Protecting Species at Risk

By Jacqueline Lebel

My most vivid childhood memory is of my brother weeping over a picture of the Dodo bird in our children's encyclopedia. His grade three assignment had been to read about an extinct species, and he chose the giant, cartoon-like bird driven to extinction in the 17th century. The tears came when he realized that the Dodos were no more, that all had died. He would never see a real Dodo.

An Ecojustice report, *The Last Place on Earth,* has described the importance of protecting British Columbia species at risk:

> *British Columbia has the richest biodiversity of any Canadian province. It is home to 76 percent of Canada's bird species, 70 percent of its freshwater fish species, and thousands of other animals and plants. Well over 3,600 species call BC home, and many of these, such as mountain goat and mountain caribou, live mostly – or only – in the province. For others, such as the migratory trumpeter swan and sandhill crane, BC is a critical wintering ground or stopover. Unlike most Canadian and US jurisdictions, BC still has all the large species that were present at the time of European settlement, including grizzly bears, wolverines, wolves, and cougars.*

However, scientists tell us that more than 1,600 species – from mountain caribou to Vancouver Island marmots, from Swainson's hawks to peregrine falcons, from sharp-tailed snakes to spotted owls, from maidenhair ferns to grizzly bears -- are currently at risk in BC.

Yet the majority of BC species at risk receive no legal protection. Eight-nine per cent of known threatened and endangered species are not protected under BC's laws or policies **or** under the federal *Species at Risk Act*. The federal law generally only protects aquatic or migratory bird species and species on federal land (one per cent of BC). And only four per cent of BC's species at risk receive legal listing under provincial laws. Furthermore, existing provincial laws do not require protection of a species' habitat – despite the fact that habitat loss is by far the biggest threat to species. In fact, habitat protection of some species at risk is actually *prevented* by provincial law that gives priority to industrial logging. BC and Alberta remain the only Canadian provinces – and some of the only jurisdictions in North America – that have not yet implemented a dedicated law to protect endangered and threatened species.

Why should we care? Species at risk are an invaluable – and irreplaceable – public resource. Our home would not be SuperNatural British Columbia if we lost our endangered and threatened species like the mountain caribou, the spotted owl, and the Vancouver Island marmot. Species at risk like the grizzly bear have enormous economic, tourism, social and cultural value to British Columbians. Without the

mountain caribou and the grizzly, what would distinguish us from Chicago or Sacramento? In California, the last remaining grizzly bear is the one stitched on the state flag.

Environment Canada has described the importance of protecting endangered species in stark terms:

> *The disappearance of a species from the earth marks not the beginning but the end of the process of deterioration. It is a sign that the ecosystem in which the species played its integral role has also been damaged. At some point, the ecosystem itself may be so destabilized by the loss of interactive species that it will lose its integrity and collapse. Should the actions of man place that sort of stress upon the biosphere, then the human species, for all its inventiveness, could well be the author of its own extinction.*

Furthermore, rare species can offer valuable contributions to agriculture, industry and science. For example, approximately half of all prescriptions written contain naturally derived ingredients – and scientists have examined only a minute fraction of the world's species for medicinal properties. As species become extinct, we lose untold medical and scientific breakthroughs. For example, we only discovered in recent years that a chemical extracted from BC's rare Pacific Yew tree is one of the most useful treatments for cancer.

The Province needs to create stand-alone legislation that protects BC's biodiversity. Effective endangered species legislation must:

- enshrine the principle that healthy ecosystems are essential to healthy human societies and economies -- and that biological diversity (especially diversity of species) is essential to healthy ecosystems;
- identify, protect and recover at-risk biodiversity across BC;
- protect and recover biodiversity by protecting habitat;
- identify, assess and develop recovery strategies for at-risk biodiversity on the basis of sound science; and
- identify and protect ecosystems that are at risk, as well as species that are at risk.

In addition, legislation should be passed to establish a permanent endowment to fund species at risk and other environmental initiatives. Funding could be drawn, for example, from lottery funds, from a tax or royalty imposed on Crown resources extracted in BC, or from a one percent tax on sporting goods, as has been done in the US.

BC's ongoing failure to pass a stand-alone law to protect its at-risk biodiversity puts it well behind most jurisdictions in the industrialized world. It's time to address this glaring gap in our provincial environmental laws, and ensure that BC's incredible natural heritage doesn't share the fate of the Dodo.

We Need a Provincial Carbon Budget

By Andrew Gage

BC has received much public praise for adopting strong greenhouse gas emissions reductions targets, while Ottawa has been blasted for setting weak ones. But one thing is true of both the provincial and the federal governments – it is unclear whether and how they will meet their respective targets.

In 2007 the BC government established the Climate Action Team, a blue-ribbon panel of experts to set interim greenhouse gas reduction targets and to make recommendations on what the government needed to do to meet those targets. However, many of those recommendations remain unimplemented, and the panel was disbanded in 2008 after submitting its recommendations report. Unfortunately, the expected expansion of oil and gas operations (subsidized and authorized by the province) and the construction of new highways could increase emissions -- canceling out the reductions that the province's ground-breaking carbon tax and other initiatives may have achieved.

Meanwhile, Environment Canada's scientists are warning the federal government that Canada is unlikely to achieve its own already weak greenhouse gas emissions target.

We need to get more serious about meeting such targets. Imagine a government that promised to cut its financial deficit significantly over the next five years. The public would naturally expect the government to have budgets and other plans describing how this goal was to be achieved. They would expect the government to have fully costed measures intended to raise or save money. It would be surprising (although not, unfortunately, unheard of) if the government designed programs to reduce government spending without understanding how those programs would meet the specific budgeted deficit cuts.

Reducing greenhouse gas emissions, like cutting the deficit, is complicated and involves value judgments about how best to meet targets. Budgets are one of the best models we have for dealing with these types of complicated decisions about values and allocations of limited resources.

BC has promised to achieve a six per cent reduction in greenhouse gas emissions by 2012 (relative to 2007 levels), and an 18 per cent reduction by 2016. If we treated those goals with the seriousness that we treat financial planning, the government would periodically table a Carbon Budget, describing what the government was going to do to achieve that goal, and how those government actions would help achieve the emissions levels allowed under the budget. The government would need to quantify the emissions that that it anticipates different sectors of society will generate, and how government laws, policies and programs would help ensure that those goals would be achieved. The public would be able to assess how realistic and responsible the government was being. And at the end of the budget period a group of carbon auditors would be able to assess whether the government had achieved the reductions that it had promised.

Sound farfetched? Not really – in 2009 the United Kingdom became the first country in the world to establish carbon budgets in law – tabling three budgets setting out how much carbon dioxide the country plans to emit between 2008 and 2022. A fourth budget, tabled by the current Conservative government, was adopted in June 2011, and covers the period from 2023 to 2027. These budgets were developed with the advice of an expert committee – the Climate Change Committee – which also audits the government's performance to evaluate whether the budgets are being achieved.

Carbon budgeting is only part of the solution to climate change. But it is an important one. Right now both the federal and provincial governments have established greenhouse gas emissions targets (albeit inadequate ones at the federal level) and have developed laws, policies and programs intended to reduce greenhouse gases. What's missing is the budgeting process, where governments demonstrate that those programs will actually achieve the targets that they have set.

We are recommending that the BC government, and the federal government, adopt a carbon budgeting model. This approach could include:

- A requirement that carbon budgets be introduced in the Provincial Legislature and federal Parliament every 4 years that describe how much carbon dioxide and other greenhouse gas emissions will be emitted and which government ministries and programs will take the lead on achieving the necessary cuts;
- A scientific committee, with expert representation from each of the provinces, with a mandate to advise both the federal and provincial governments on the development of the carbon budgets and to audit whether or not those budgets are being achieved and the relative effectiveness of different measures; and
- A legal requirement that government ministries and agencies re-evaluate their policies and laws, and make their decisions, in light of its carbon budget constraints.

Right now we are "overspending" – in the sense that we are living beyond our means and emitting carbon at levels we cannot sustain. It's time that we treated that problem with the same seriousness that we apply to financial planning.

Access to Justice for Public Interest Groups

By Erin Pritchard and Calvin Sandborn

The environment cannot be protected if the case for clean air, pristine water and healthy wildlife is excluded from the halls of justice. Unfortunately, environmentally concerned citizens are often shut out of these halls. While industry has unfettered access to tribunals and courts to promote private rights, citizens are often unable to enter those same tribunals to argue for public rights. For example:

- Forest companies can appeal government Allowable Annual Cut decisions -- but environmental groups and members of the public may not.
- Citizens can't appeal when an industry gets a water licence (unless the citizens own waterfront land or land that will be physically affected by the new licence). This excludes salmon enhancement groups and recreation groups from appealing on behalf of nature.
- In 2005 the law was changed to eliminate the right of neighbours to appeal potentially hazardous proposed sewerage (septic) systems.
- In 2003 the public's right to appeal pesticide use permits was effectively lost, when the requirement to obtain such permits was dramatically reduced. From 2003-2010 there were no public-interest based appeals.

Access to Courts

Lawsuits against companies that create a public nuisance (e.g., by polluting the air or a river) could be a powerful tool. However, citizens can't generally sue for public nuisance unless the damage done to

them was different than the damage done to society at large. Otherwise, the Attorney General controls such lawsuits.

The Ontario Law Reform Commission recommended that citizens be given the right to sue for public nuisance, without having to show that they suffered a special loss of their own. The Ontario *Environmental Bill of Rights* today enables citizens to obtain standing to sue for 'public nuisance.' Similar reform in BC would recognize that concerned citizens are sometimes better positioned to provide the courts with better evidence and arguments than the Attorney General.

Cost Awards – One of the Main Barriers to Access

If you lose a court case, the traditional Canadian approach has been that you can be ordered to pay the other side's legal costs. As a result, many environmentalists decline to pursue valid cases, fearing a negative costs award. The citizens may want to save their local lake or airshed -- but they don't want to lose their house.

Cost awards can devastate public-spirited citizens who are not seeking private profit or gain, but are simply trying to protect our shared environment. More important, the spectre of such awards may systematically stifle lawsuits that could halt harmful activities.

The Canadian approach to costs is borrowed from Great Britain. There the prevailing rules have come under increasing criticism for undermining access to justice. For example, the European Environment Commissioner recently stated:

> *The Commission is concerned that United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing challenges is preventing NGOs and individuals from bringing cases...*
> *When important decisions affecting the environment are taken, the public must be allowed to challenge them… [and] these challenges must be affordable. I urge the UK to address this problem quickly as ultimately the health and wellbeing of the public as a whole depends on these rights.*

In response to these criticisms and spiraling litigation costs, England has now embarked on radical reform of its costs rules. Canadian courts are beginning to develop a more progressive body of case law, and it is important to maintain judicial discretion in this area. However, some legislative guidance may be needed to allow public interest groups to enter proceedings without trepidation.

Professor Chris Tollefson, who has written about costs issues in public interest cases since the early 1990s, has advocated legislation that would insulate responsible public interest litigants from adverse costs liability. He has also proposed 'citizen suit' legislation that would give citizens the right to sue polluters and public agencies that violate environment law, and allow them to recover their costs where such suits are successful. Such legislation has been an essential feature of US environmental and civil rights law since the 1970s.

Another barrier is the frequent requirement that public interest groups post large security before being granted an interim injunction to stop a harmful activity. American courts have generally declined to stifle public interest litigation with such onerous security requirements.

Recommendation

Government should comprehensively review the issue of public access for environmental justice and implement necessary reforms. Reforms should include:

- Expand the right of public interest groups to have legal standing in tribunals and courts
- Enhance the ability of public interest groups to bring public nuisance cases
- Address the barriers to access created by legal cost awards and security requirements for injunctions.
- Provide for citizen suits to enforce environmental laws (See "Enhancing Citizen Enforcement Powers", next.)

[Note the following chapter will discuss enhancing citizen enforcement powers, through "citizen suits", bounties for those that lay prosecutions, etc.]

Mining Reform

By Emma Hume

BC needs strong laws to ensure mining is environmentally, socially and economically sustainable – and puts people and the environment first. Unfortunately, our current mining laws fail to do this, and the rapidly expanding mining industry continues to spark controversy and conflict across the province.

Debate rages in Fanny Bay over the proposed Raven coal mine. Ottawa rejected the Prosperity Mine plan to drain and kill Fish Lake but is now considering another version of the mine despite continued public and First Nations resistance. The proposed Ajax mine in Kamloops is facing local opposition, as is the expansion of the Quinsam coal mine outside Campbell River.

First Nations are increasingly concerned about mineral exploration and mining. In a ground-breaking decision last summer, the BC Court of Appeal ruled that exploration threatening caribou on the West Moberly First Nation's traditional territories could not continue until adequate consultation occurred.

The Premier's new Jobs Plan promises quick and dramatic expansion of mining activities across the province. However, if this is to occur, it is vital that mining laws be reformed to meet the needs of all British Columbians, support local communities, recognize First Nations' rights and protect the environment for future generations.

What follows is a summary of potential recommendations for reforming the system of granting mineral tenures, providing better environmental protection, and generally reforming BC mining law.

Mineral Tenure: Privileging Mines Before They Are Even Proposed?

Mineral tenure rules -- that determine where mining can and cannot occur -- is governed by the free-entry system. These laws basically create a two-zone mining policy that opens the vast majority of the province, except for a few protected areas, to mineral exploration and development.

First Nations' traditional territories, valuable ecological areas, private property and lands slated for other uses in land-use plans are open for mineral exploration and development. This free-entry system fails to respect First Nations' rights and title, undermines detailed strategic land-use plans, puts miners' interests before those of other land users, and fails to ensure environmental conservation and protection.

The free-entry system is over 100 years old and was developed at a time when mining was used to pave the way for other land uses on the 'frontier.' Since these laws were introduced, this province, and our thinking, has changed dramatically. Our laws should too.

Ontario, which has a similar system, has taken significant steps to modernize its laws. Within the last decade prospecting in cottage country sparked outrage amongst private land owners. First Nations embroiled in legal challenges actively asserted their constitutional rights. A coalition was formed, creating a powerful voice that resulted in an ongoing process of modernizing Ontario's mining laws.

Ontario is now reforming their legal system in the areas of mineral tenure and private property rights (including automatically withdrawing mining rights from some land), aboriginal consultation (including outlining consultation requirements, requiring environmental rehabilitation and introducing a new system for permitting exploration activities) and reforming the mineral exploration and development framework. At a minimum, BC needs to do the same.

The current free-entry system prioritizes mineral exploration over all other land uses in a variety of ways.

Mineral claims and leases privilege the interests of miners in the early stages of mine development by providing them with access to land before considering other important land uses and interests.

With a Free Miner Certificate, obtained for a nominal fee, individuals may explore for minerals on private and public land. The vast majority of land, except land not subject to the free entry system such as ecological reserves and mineral reserves, is open to mineral staking.

Mineral claims are staked on-line, on a first-come, first-served basis. Claims can even be staked on private land without the consent of the land owner, granting the claim holder the right to use, enter and occupy the land for exploration and development purposes. On Crown land similar rights apply. Compensation and minimal notice are required before mining activities can occur on private property, but land owners do not have the right to refuse mining on their land.

Once a mineral claim is staked the holder has the right to convert it to a mineral lease. This offers long term security for the right to further explore and exploit minerals.

Government has no discretion in converting mineral claims to leases. This means important considerations such as land-use plans, environmental protection, alternative means of conducting mining activity and other community needs are not heard until much later in the mine development process -- when significant resources have already been invested. Furthermore, the existing process of granting mineral claims and leases limits the ability to use land for other purposes -- or set it aside for protection -- without government compensating mineral rights holders for expropriation.

As we move forward with increasing mineral development in BC, reform of this antiquated system is critical. Reforms to the *Mineral Tenure Act* and the *Mines Act* are long overdue.

Recommendations, first tabled by Ecojustice and West Coast Environmental Law, to reform this system include:

- Replacing free-entry with a discretionary mineral tenure system that requires government to consider other interests in the land, as well as the environment, in allocating access to mineral rights.
- Requiring consultation with, and consent from, First Nations before mineral rights are granted and mining activities begin.
- Requiring consultation with, and consent from, private land owners before mining activities begin.
- Granting of mineral tenure only after consideration of relevant land-use plans. If such plans do not yet exist, no mineral tenure should be granted until a land-use plan is developed.
- Requiring environmental assessments before any significant exploration activities begin. ..

[Chapters on general mining law reform and enforcement issues follow]

Questions for Discussion:

1. **Are there issues other than those listed on p. 1 (paragraph 5) that should be included in the book?**

2. **If you could change BC laws, what three changes would be on the top of your list?**

3. **How would you reform the laws on :**

    - **Environmental Assessment**
    - **Cumulative Effects**
    - **Land Use Planning**
    - **Forestry**
    - **Oil and Gas**
    - **Mining**
    - **Other issues (including those listed on p. 1)?**