ABC LawNet
Law for Alberta classrooms

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Youth and the Environment: An Inquiry Project

Getting Started

To teachers

Effective student inquiry is guided by teachers and follows a process or model. The following assignment can be used with students from grades 9–12 in the area of environmental issues and the law, and should take 2–3 classes to complete.

To students

Do you ever wonder if some world situations are the way they should be? Do you sometimes have a good idea you feel needs to be heard? Are you ever itching to solve a problem or to overcome a challenge? Being involved in an inquiry project can be inspirational, rewarding and fun! The assignment in this issue involves inquiry about the law, environment and youth – we want to hear from you**!**

Background

Many environmental laws can affect you as a young person, so it is important to be informed about the environmental issues and laws which are going on in the world around you.

Inquiry Question

How do the laws involving the environment affect you as a student? Can you suggest new ideas or revised laws that would positively impact youth and the environment?

Task

You will identify a topic or question important to you, write an inquiry question, discover existing situations, devise new understandings or solutions, and prepare a presentation of your findings and new solutions**.**

The presentation is not to provide the audience with facts only, but is to present your own ideas or understandings about youth, law, and the environment.

Presentation format

For this assignment you will examine environmental laws, identify issues of special interest to youth, and create or suggest some new and innovative advice.

The presentation of your new understandings will be to your class, and will be through a Power Point, web-based, or booklet presentation that demonstrates understanding of environmental laws and some new suggestions.

Reflection

Keep a reflective journal through each phase to jot down how much you accomplished each day and your thoughts about your learning.

Inquiry Phase One: Planning Your Inquiry

A. Planning step one: What do you know?

In chart form, in "Column A" jot down what you know about laws governing

- (a) conservation easements,
- (b) wind power and
- (c) climate change

Read the three articles which are included from LawNow magazine that address these issues. Two articles refer briefly to environmental laws, while the other one offers an opinion about laws and universal ethics. Note: all articles are from 2007. The law may have changed somewhat since then. You may learn of such changes in your research. Be sure to note them.

Now in "Column B" of your chart, write facts or understandings that you learned from the readings. Did you learn something that you didn't know?

	Column A. What you know	Column B: What you learned
conservation easements		
wind power		
climate change		

B. Planning step two: Define your question

Define a broad topic for your inquiry and write an initial inquiry question below. Remember, this is just an initial question and may easily be revised or changed as you proceed with your project.

Broad Topic or Area of Interest

_____

_____

Example:
Conservation Easements or Wind Power

Initial Inquiry Question:

_____

_____

Example:
- How can youth benefit from existing laws surrounding conservation easements? Is there a need for new laws that would impact youth?
- Should youth become involved in laws surrounding alternative power such as wind power? What laws are necessary?
- Should schools and recreational buildings be governed by laws that positively affect the environment? What should the laws or policies be?

Guidelines for questions to guide your inquiry

_____

_____

Example:
- Your question should address more than just finding facts.
- Try writing questions beginning with how, should, or why. For example, "How does the law about _____ relate to my life? My farm? My parents?"
-

C. Planning step three: Identify information sources

You will be able to find information for your inquiry from various sources. Use the articles mentioned, but also remember that using proper search and brainstorming techniques will help you efficiently locate other resources.

Inquiry Phase Two: Information Retrieval

This is the stage where you get your information. During your information retrieval phase, you might:

- Use notes or graphic organizers and retrieve information useful to you. Use retrieval to:
  - discover what "exists" that affects youth in your area of interest and think of some positive solutions; and
  - discover the existing laws governing the environment in your area of interest.
- Find specific examples of what is working and what is not – you might want to talk to community members for insights. Remember you may find evidence of changes in the law since 2007. Be sure to note these changes.

Note: In this stage of inquiry students are often overwhelmed. This is normal! Just hang in there and everything will fall into place!

Inquiry Phase Three: Information Processing

Here is where you start pulling out areas that will focus your question and presentation. Now re-word your question into a statement and describe your presentation plan.

Re-worded focus	Presentation
Example: I think that youth should be given summer jobs to assist citizens in understanding the laws on conservation easements.	PowerPoint and table display depicting the role youth could play in conservation easements and the law.
Example two: I think that laws should be changed to encourage hockey rinks to be powered by wind or solar power.	A Web Page depicting the current alternative energy sources for hockey rinks.

Inquiry Phase Four: Creating

Create your final product for presentation to the class and perhaps to appropriate others.

Inquiry Phase Five: Sharing

Share your findings in a way appropriate to your audience. Develop a part for feedback and questions from your audience. Prepare notes if you think you will need them.

Inquiry Phase Six: Evaluating

Be sure you understand all the evaluation rubrics discussed with the teacher. This is an *example of a rubric for this unit.*

Level / Criteria	4 Excellent	3 Proficient	2 Adequate	1 Limited	Insufficient/Blank
Researches Appropriate information	Plans and conducts an efficient search that critically evaluates the validity of the information.	Plans and conducts a complete search that logically evaluates the validity of the information.	Plans and conducts a basic search that simplistically evaluates the validity of the information.	Plans and conducts a partial search that misinterprets the validity of the information.	No score is awarded because there is insufficient evidence of student performance based on the requirements of the assessment task.
Analyzes information	Develops significant and pertinent conclusions with convincing support.	Develops meaningful and relevant conclusions with appropriate support.	Develops credible and related conclusions with general support.	Develops vague or erroneous conclusions with irrelevant support.	
Develops solution	Develops a thoughtful and comprehensive action plan to solve problems connected to environmental law and youth.	Develops a detailed and inclusive action plan to solve problems connected to environmental law and youth.	Develops a rudimentary but workable action plan to solve problems connected to environmental law and youth.	Develops a sketchy or improbable action plan to solve problems connected to environmental law and youth.	
Presents position	Presents an insightful and persuasive position that enhances solutions connected to environmental law and youth.	Presents a comprehensive and logical position that displays understanding of solutions connected to environmental law and youth.	Presents a clear and plausible position that displays basic understanding of solutions connected to environmental law and youth.	Presents a confused or illogical position that displays minimal understanding solutions connected to environmental law and youth.	

Project Part Four: Extension – Relating Local and Global Issues

Extension Assignment

Many of the responsibilities of a local municipal government involve issues that affect all citizens in the world.

Visit the global site for educators sponsored by the national peace corps at http://peacecorpsconnect.org/content/education.

You will there find links to up-to-date information about global issues.

Using these links for resources, create a graph, chart, or writing illustrating how the issues you researched are related to a broader global issue.

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The Ethical Upside of Climate Change

Even this cloud will prove to have a silver lining if it forces humanity to pull together

Margaret Somerville

Future generations may look back on climate change as a fortunate sorrow if it proves to have been an early wakeup call for the need to find shared ethics for an interconnected world. Shared ethics are not the same as universal ethics—the idea we will all agree on all our values—which are not feasible. But finding some basic human values we can agree on, instead of always focusing on our disagreements, is important well beyond climate change.

Among the reasons climate change might function this way is, first, that it affects all of us, making us all personally identify with the harms and risks. Personal identification with a threat is a powerful trigger for ethical concern.

Second, the dangers of climate change are universal—they cross social, cultural, and religious barriers and the North/South divide.

So, as individuals and societies, everyone must respond to the ethical issues those dangers raise. That openly challenges the intense individualism that has become dominant in contemporary liberal Western democracies.

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In a recent article at http://www.opendemocracy.net, politics professor Andrew Dobson pointed out that for climate-change solutions to be effective, they must encourage, and certainly not undermine, that moral sense. So not only might climate change provide an opportunity to develop shared ethics, but developing those ethics may help us to find solutions to climate change.

Third, climate change problems are not just theoretical and abstract; they are practical and concrete—another powerful trigger for ethical concern. It's much easier to ignore or dismiss ethical issues raised by situations we don't physically experience.

Fourth, we can start from an agreement that climate change is alarming, rather than starting from disagreement, as is more common in ethical analysis. Starting from agreement makes it much more likely we will identify the values we hold in common—something we routinely fail to do—and, as a result, reinforce and promote those values.

Fifth, responses to climate change will need to be based in *earned trust*, not *blind trust*. Earned trust ("Trust me because I will show you can trust me") is an egalitarian concept that requires sharing of information and decision-making. Blind trust ("Trust me because I know what is best for you") is a paternalistic concept that depends on authority, status and power. Using earned trust to address the ethical challenges of climate change will promote such trust in general, and augment social trust on a global scale.

Sixth, dealing with climate change provides an important example of science in the service of ethics. It makes us aware that science can help us to find solutions to ethical problems, not just create new problems. Still, a pure technological fix will not be sufficient. We must freely choose to change our behaviour to favour more the common good—including of future generations. Ethics can help us make that choice and change.

Seventh, climate change is a powerful reminder of our obligation to hold our world, nature and the natural (including our humanness) in trust for future generations. The new technoscience, with the unprecedented powers it gives us to change all life, means we must do that in ways no previous generations have had to contemplate. We must reconnect with nature and be guided by ethics that respect nature and the natural, and constantly ask ourselves: What do we owe our great-great-grandchildren? What are our obligations to far distant generations? Can the future trust us?

We must reconnect with nature and be guided by ethics that respect nature and the natural, and constantly ask ourselves: What do we owe our great-great-grandchildren? What are our obligations to far distant generations? Can the future trust us?

Eighth, climate change is a particularly appropriate context in which to develop a concept of "anticipated consent" as a guide in decision-making. That requires us to ask: Can we reasonably anticipate that future generations would consent to what we both do and don't do now? If not, ethics demand that we change our behaviour. A concept of "anticipated consent" will be ethically valuable far beyond dealing with climate change.

In many respects, climate change presents us with a unique opportunity to see whether we can put our ethics into practice on a global scale. Reducing its harms could become a common ethical cause we can all buy into and, in doing so, allow us to bridge all our divisions. Most of all, I propose that dealing with it ethically requires acting with profound respect for all life and what sustains it.

And that requires having an acute sense of the finitude and fragility of the Earth, wise ethical restraint and the courage to say "no"—especially to ourselves—when ethically necessary.

Whether we can do that will be an important trial of whether we can do the same when it's required in relation to many future ethical issues that we are likely to face.

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Conservation Easements Can Benefit Everyone

Jason Unger

A conservation easement is a legal tool that allows landowners to preserve the natural attributes of their land. Landowners in Alberta have donated or sold conservation easements covering 29,882 hectares, and donated or sold fee simple title covering 40,928 hectares to conservation organizations. Of these lands 19,110 hectares qualified as ecological gifts and were valued at $41.85 million as of June 2006.

Landowners may seek legal advice in relation to either sale or gifts of conservation easements. These materials provide legal practitioners with information to effectively guide and advise clients in the conservation easement process.

Conservation easements: value beyond conservation

Landowners can choose to protect the natural aspects of their lands through the conservation easement provisions of the *Environmental Protection and Enhancement Act (EPEA)*. Entering into a conservation easement agreement benefits the local ecology and may provide additional benefits to the landowner including:

- tax benefits by way of reduced capital gains taxes and income tax deduction or credit;
- the ability to retain substantive use of and rights to the land while ensuring future preservation of the land; and
- a potential increase to property value, particularly where there are contiguous adjoining lands with conservation easements.

Placing a conservation easement on land does not immunize the lands from mineral development or expropriation. Oil and gas companies continue to enjoy the right to the minerals below the surface and can obtain a right-of-entry order from the Surface Rights Board to access the land and develop those rights.

Not all easements are equal

Conservation easements are statutory tools created by *EPEA* that must be distinguished from a typical easement or covenant. In particular, conservation easements can be registered on title notwithstanding the fact that they fail to meet certain statutory and common law criteria applying to typical easements or covenants. This is a result of EPEA exempting conservation easements from application of portions of section 48 of the *Land Titles Act*. This exemption allows the conservation easement to run with the land and to be enforced whether it is positive or negative in nature.

Conservation easement legislation

Legislative purpose

Conservation easements may be granted for the following purposes:

- protection, conservation and enhancement of the environment, including biodiversity;
- protection, conservation and enhancement of natural scenic or esthetic values; and
- recreational use, open space use, environmental education, research and scientific study of natural ecosystems, so long as the use is in accordance with the conservation and protection purposes outlined above.

The landowner (or grantor)

The grantor is defined as the person who grants the conservation easement and includes a successor and assignee.

The qualified organization (or grantee)

Only specific bodies can hold conservation easements and they are referred to as "qualified organizations". *EPEA* defines a "qualified organization" as:

- a body corporate that is a registered charity that has as an object of incorporation, the acquiring and holding of an interest in land for a conservation purpose, and whose bylaws indicate that any interest held will pass to another qualified organization on winding up;
- the government or a government agency; or
- a local authority, which includes municipalities, the Minister responsible for the *Special Areas Act* or an improvement district, and Métis settlements.

Typically conservation easements are donated or sold to a qualified organization with a conservation mandate or to the local municipality.

Legal status of the grant

A conservation easement constitutes an interest in land in the qualified organization as grantee. This is significant as the grantee obtains a recognized interest whereby his or her participation in decisions relating to land will be legally recognized. Thus, the grantee has recognizable rights before administrative bodies such as the Alberta Energy and Utilities Board or the Environmental Appeals Board.

Like other covenants, a conservation easement does not constitute an encumbrance on land. The easement typically exists in perpetuity although it can be for a set term as well.

Termination and modification

A conservation easement may be modified or terminated by:

- agreement between grantor and grantee;
- order of the Minister if the Minister is of the view that to terminate or modify an easement is in the public interest; or
- a court order pursuant to the *Land Titles Act*.

Land Titles registration

To be a recognized interest in land, the conservation easement agreement must be registered with the Land Titles Office. Prior to registration, notice of the intent to register the agreement must be given to the local authority (municipality or the Minister of Municipal Affairs for easements in an improvement district or in the special areas).

Effect of registration

Subsection 48(4) of the *Land Titles Act* is applicable to conservation easements and dictates that every transferee of land is deemed to be affected with notice of the easement on title. The transferee is bound by the terms of the conservation easement agreement.

Common landowner concerns

Concerns that may often be raised by landowners about conservation easements include:

- the terms and restrictions in the conservation easement agreement;
- the potential for mineral development on conservation easement lands; and
- the modification or termination of the easement in the future.

The easement agreement – allowable land use

The terms and conditions governing the grantor and grantee are expressed in a negotiated agreement, the "conservation easement agreement". The terms of the agreement can be quite flexible, constrained only by the need to uphold the purpose of the easement and the objectives of the qualified organization.

Conservation easement agreements may deal with the following rights and responsibilities of the landowner:

- the right to unhindered use and enjoyment of the land to the extent that this is not limited by the terms of the agreement;

- restrictions on interfering with the ecological characteristics that are the focus of the agreement;
- a requirement to give notice to the grantee if any dispositions of rights to land are being contemplated or any damage is done to the land;
- restrictions on building or developing on land that is the target of the easement;
- restrictions on depositing harmful or waste materials;
- restrictions on excavating or removing land or water;
- restrictions on the use of the easement land for agricultural uses (although grazing or haying may be allowed);
- a requirement to maintain insurance on the land covered by the easement;
- a requirement to indemnify the qualified organization for damages to the land arising from landowner activities;
- a requirement to take reasonable steps to stop and repair damage caused by others;
- the right to post signs and to provide access for a given purpose that does not degrade the intent of conservation easement, such as recreational uses; and
- the right to transfer, sell or otherwise assign an interest in property, although there may be a requirement to give notice to the grantee and to the future landowner of the easement.

Conservation easement agreements may give the qualified organization (the following rights and responsibilities:

- to create a management plan and administer that plan; usually the agreement will allow the grantee to amend the plan with notice being given to grantor and time for feedback;
- access to the property for the purpose of monitoring and enforcement;
- the right to erect signage;
- a right to a portion of compensation where expropriation occurs or other activities occur affecting the conservation area;
- limited liability of the qualified organization in terms of maintaining ecological nature and integrity of the property; and
- the right to enter property and perform activities for habitat enhancement.

Other conservation easement agreement provisions

Several other conservation easement agreement provisions of importance include:

- arbitration clauses;
- the term of agreement (typically in perpetuity); and
- requirement to seek independent legal advice.

Conservation easements, mineral development and expropriation

Placing a conservation easement on land does not immunize the lands from mineral development or expropriation. Oil and gas companies continue to enjoy the right to the minerals below the surface and can obtain a right-of-entry order from the Surface Rights Board to access the land and develop those rights. The qualified organization may have the ability to participate in (and oppose) oil and gas development or expropriation before administrative bodies. The qualified

organization may also be entitled to compensation where activities adversely impact the conservation easement area, depending on the terms of the conservation easement agreement.

Modification and termination of easements by court order

The two instances where a covenant or easement may be discharged through operation of section 48(4) of the *Land Titles Act* are:

- where the modification or termination will be beneficial to the persons principally interested in the enforcement of the covenant; or
- where there is a conflict between the easement and a land use bylaw or statutory plan.

The modification or discharge of the easement must also be in the public interest in the view of the court. Section 48(4) will have limited application in modifying or terminating conservation easements for the following reasons:

- A modification or discharge will rarely benefit the persons principally interested in enforcement, namely the qualified organization (grantee). The qualified organization will have the stated objective of acquiring an interest in land for a conservation purpose. Any modification that is detrimental to that conservation purpose or the termination of an easement would not be to the qualified organization's benefit. Where the qualified organization is the government or a municipality (or other local authority) the determination of what is considered "beneficial" to the grantee will likely be interpreted more broadly.
- A conservation easement will rarely be found to be in conflict with land use bylaws or statutory plans. Case law indicates that a conflict will only be found where compliance with the covenant requires a violation of the bylaw, that is to say where it is impossible to comply with both the covenant and the bylaw. A conservation easement, typically a non-use or nondevelopment of land, would rarely conflict with a bylaw in this manner.
- If either of these tests for termination or modification is met, the court must also find that it is in the public interest to modify or terminate the easement. Case law has indicated that the public interest in modifying an easement may be met where the character of a neighbourhood has changed so significantly that the modification of the easement no longer violates the rights of other landowners.

Landowner liability and costs

Liabilities related to land ownership persist to varying degrees once a conservation easement has been placed on the land. For example, the *Occupier's Liability Act* defines an occupier as someone in physical possession of land or a person who has responsibility for and control over certain aspects of land. The grantor, as the party retaining physical possession, is certainly an occupier and the grantee may be an occupier depending on the amount of management and control it has over the lands. The *Occupier's Liability Act* states that the occupier must "take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe

in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there".

An occupier's duty of care will therefore be relevant to the contents of the conservation easement agreement. The conservation easement agreement should deal with whether the landowner wishes to allow or invite access to the easement area, either through recreational trails or in a less structured manner to allow for activities such as hunting, and whether indemnification provisions are necessary. Further considerations must be given to signage and management of lands in a manner that minimizes liability.

Other potential costs and liabilities

- **Taxes and fees** – the conservation easement lands will continue to have property taxes charged against them and may have other fees associated with them. These charges are usually still payable by the grantor but terms for payment of these costs can be negotiated and should be incorporated into the easement agreement.

  Fees may include survey, appraisal and legal fees associated with creating the easement. Payment of these fees may be negotiable.
- **Insurance** – conservation easement agreements will generally require that adequate insurance be maintained for the easement lands. The type and cost of insurance will vary greatly depending on the proposed use of the easement lands.
- **Indemnity** – conservation easement agreements will often have indemnity clauses relating to third party claims. In particular, the qualified organization will seek indemnity against any losses or damages sought by another party that are a result of activities undertaken by the grantor, their employee or agent, in carrying out of their obligations under the agreement. A similar indemnity can be sought in relation to liability arising from the qualified organization's activities.

Tax implications and estate planning

Tax implications of entering into conservation easements are separated into federal, provincial and municipal tax issues.

Federal taxes

Disposition of partial interests in land, such as conservation easements, carry tax implications.

The tax implications will differ significantly depending on whether the conservation easement is donated to a charitable grantee or is paid for by the grantee. The tax benefits of giving a gift of an easement on capital property fall under regular gift rules arising under the *Income Tax Act (ITA);* however, further tax benefits may be available through the federal ecological gifts (Ecogifts) program.

Sale of conservation easements

The sale of a conservation easement may give rise to a capital gain that is subject to tax at a rate of 50%. The ITA outlines the calculation of capital gains related to conservation easements with a formula that roughly equates the amount of the gain

to the proportional value of the conservation easement in relation to the fair market value of the land.

Gifts of conservation easements

The value of a donation of capital property, including a conservation easement, may give rise to a tax credit where there is a valid receipt produced. A gift, for the purpose of the ITA, must transfer the ownership of property to a qualified recipient. This can include a part of a property right such as a conservation easement. The transfer must be voluntary and cannot provide a benefit to the donor or anyone selected by the donor, with the exception of split receipting. Split receipting rules apply to conservation easements as well as to fee simple donations. The split-receipting rule allows the grantor to obtain compensation for a portion of the easement with a tax receipt being presented for the remainder.

Federal Ecological Gifts Program

The Canadian Wildlife Service of Environment Canada administers the Ecological Gifts or Ecogifts program. An Ecogift can be a fee simple gift of land or the donation of a conservation easement to a qualified recipient. There is also the ability to split receipt donations of Ecogifts to allow for partial payment for conservation easements.

Tax benefits of the federal Ecogifts program

The Ecogifts program gives rise to various income tax benefits including:

- corporations can deduct directly from their taxable income the value of the donated
  conservation easement;
- individuals get a non-refundable tax credit (16% of first $200 and 29% for the balance) for
  the value of the donated conservation easement;
- the donation may also result in reduction of provincial tax; and
- there is no limit on the amount that can be claimed through an Ecogift in a given year, that is to say it can be credited against 100% of income Any unused portion of the credit can be
  carried forward up to five years.

Taxable capital gain treatment of Ecogifts

Capital gains realized through a donation that qualifies as an Ecogift were made tax exempt as of May 2006. It is expected that a new tax form will be produced to replace T1170 (05) *Capital Gains on Gifts of Certain Capital Property* to facilitate the tax-exempt gift.

Qualifying as an Ecogift

To qualify for the Ecogift program and related tax treatment requires:

- a donation receipt from the recipient organization;
- the recipient organization to be a "qualified recipient"; and

- certification of the fair market value and the "ecological sensitivity" of the property by the federal Minister of Environment or a designated authority.

The determination of what will be considered "ecologically sensitive" is based on the current and future contribution of an area to biodiversity and environmental heritage in Canada and is outlined by the Canadian Wildlife Service.

Ecogifts must be given to a qualified recipient and this is most often a registered charity with the Canada Revenue Agency. The organization must have included in its purpose "the conservation and protection of Canada's environmental heritage" or a statement of similar intent acceptable to the Minister of Environment (or a delegate) and they must apply to Environment Canada to be eligible.

Provincial Taxes

Provincial taxes may also be affected by the sale or donation of a conservation easement. Where taxable income is affected through capital gains realized through the sale or donation of the easement, easement, where income is affected through capital gains realized.

Municipal property taxes

There are no consistent rules or guidelines in place for property tax assessments of conservation easement lands. Municipalities may decide to apply property tax at a level commensurate with agricultural land or that of developable land. Where the land was previously taxed as agricultural land, and is then assessed as developable land, an increase in property taxes is likely to occur. How the municipality will characterize the conservation easement land for tax purposes is therefore central to determining whether entering into a conservation easement will be beneficial, detrimental or neutral in relation to property tax assessments.

Conservation easements and estate planning

Conservation easements can be tools to facilitate conservation goals of a testator while bringing tax benefits to the estate.

When incorporating a conservation easement into a will, it is important to leave specific instructions for the executor in relation to the terms of the conservation easement agreement. The executor will execute the easement agreement on behalf of the estate and if the contents of a will are too vague a court may find them void.

Conclusion

Conservation easements are likely to continue to be used by landowners, qualified organizations and municipalities to protect the naturally and ecologically significant aspects of land in Alberta. The legal, financial and ecological consequences of conservation easements must be understood by landowners who may place conservation easements on their land or future purchasers of that land.

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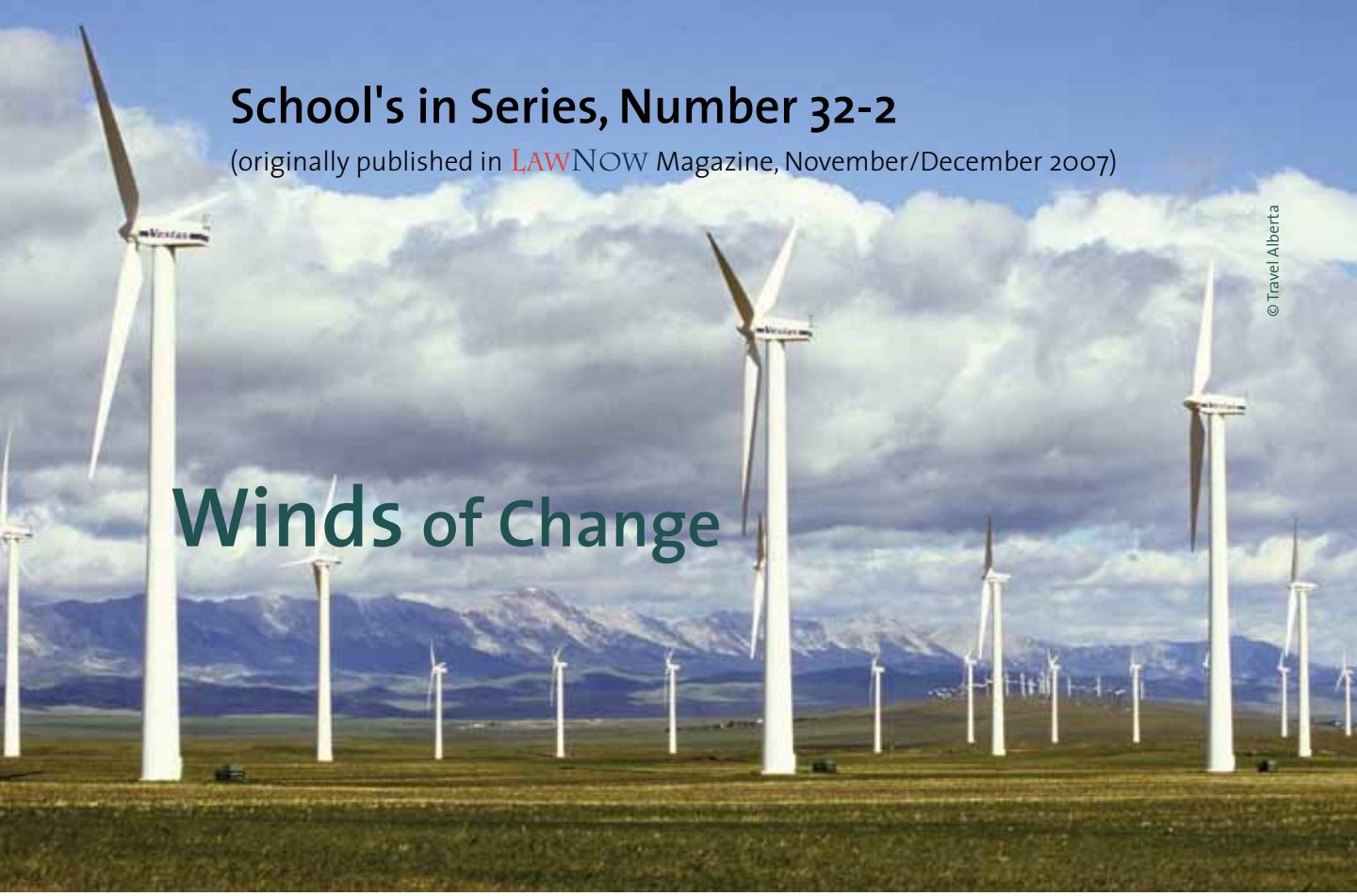

Winds of Change

Roy Davidson

Very few lawyers in Canada have had much to do with wind development contracts. With the growing wind industry, some have been taken a little by surprise when an agricultural client comes into their office and says, "I've got some guy who wants to put up a bunch of wind mills and I want you to have a look at it." What do you do? Most lawyers are familiar with commercial leases and development agreements, but something new can be a little intimidating especially for the rural practitioner who is most likely to encounter these.

The typical wind development starts with a developer poring over public maps and wind data to try to find a likely area for a development. Searches of land titles in promising areas are followed by a visit to the farmer by the developer's agent promising sizeable payments for the use of a relatively small amount of land. And, "Oh, by the way, don't tell anyone."

When one understands that spacing requirements for most turbines limits them to only two to four per quarter section, a sizeable wind development is going to require quite a bit more land than this farmer may own. For that reason, some developers

Once the neighbours find out what is going on, and they will, it becomes more and more difficult for the land agent to deal with all the demands from such a great number of landowners.

in the West have targeted Hutterite colonies and other large land owners in order to tie up large blocks of land belonging to one owner rather than having to deal with a lot of individual land owners. However, where such large blocks of land are not available in prime wind areas, the land agent must deal with enough land owners to secure a land base which can comprise up to thirty quarters or more. Once the neighbours find out what is going on, and they will, it becomes more and more difficult for the land agent to deal with all the demands from such a great number of landowners. Many of them deal with this by trying to get the farmer to sign a confidentiality agreement before the negotiation really gets going. Although developers like to maintain a standard contract, it seems each farmer manages to negotiate something a little different. The developers sometimes don't like to let one farmer know what they have done for another.

Once the real talk starts, most developers have their standard form contract with a standard rate which they pay for production once the project reaches that stage, but each one seems to deal with *the extras* in a different fashion. One might expect the farmer to receive a royalty in the range of something less than five percent of production, and the contracts are all pretty similar when it comes to that, but prior to production they are all different. Typically, things start out with a testing stage, followed by an option to move to a long term development or production stage. The wind data that is available from government charts and mapping is not, alone, sufficient to determine if a site is going to be suitable. Site specific testing is necessary in order to determine suitability and proper location of turbines. This is where such things as entry fees and annual lease payments for meteorological testing may arise as a preliminary to development. Some companies give signing incentives and bonuses at this stage in order to entice the farmer to lock up his land.

If, by the time he brings it to a lawyer, the client has not yet signed the agreement, this is a time to have him negotiate with the developer. During testing, not much will be taking place on the land besides a few met towers and maybe some geotechnical testing. Remember, though, that if the project goes on to development, there will be some pretty big equipment on the land, and now is the time to see if the farmer can get the developer to do a little extra. A dugout, a new roadway or approach, and fencing are all things that the developer will usually be prepared to do while they have the equipment on site. The farmer should try to get the developer to put it into the agreement.

The other thing that is somewhat unusual in these contracts is their length. Typically, the first development term is twenty to thirty years, renewable for ten, twenty, or thirty years after that. Without a functional crystal ball, it is pretty difficult to imagine what changes may occur over that period of time.

One of the challenges for the farmer, though, is picking the winner. There has now been a lot of land tied up for proposed wind development, but a relatively small number of these projects have actually gone ahead.

When a lawyer is looking at the deal being offered to the farmer, there are some things that are pretty important but not so obvious. These turbines are typically sitting on a base of twenty to thirty feet of solid concrete. While the life expectancy of these things can easily extend beyond twenty or thirty years, what will the farmer (or likely his or her children or grandchildren) do with all that concrete when the turbine is finally removed? It is probably a deal breaker if you expect it to be removed. That is like asking someone to move a small mountain. However, it is not out of reason to expect the developer to remove the top few feet and reclaim the surface. Most farmers seem to be comfortable with such a solution, but it begs the question, will there be funds and someone to do all this at the end? It might be prudent to set aside sufficient funds or a bond for this, and the reclamation of the entire site although the scrap value of the metal towers would likely exceed the cost of reclamation.

The other thing that is somewhat unusual in these contracts is their length. Typically, the first development term is twenty to thirty years, renewable for ten, twenty, or thirty years after that. Without a functional crystal ball, it is pretty difficult to imagine what changes may occur over that period of time. Thirty years ago, such things as full quarter irrigation pivots and huge tractors capable of pulling 60 to 80 feet of equipment behind them guided by a satellite GPS system which enables the operator to control it within two or three inches of the last pass, even in the dark, were unheard of. Today they are commonplace. What other advances, especially with technology, will take place in the next thirty years? Of course, nobody can know, so it is a good idea to incorporate a clause which enables the parties to adapt to such changes.

Most farmers are intimately familiar with their land, of which they are very careful stewards. Any time the soil is disturbed for this type of construction, weed control is one of the first issues in their minds. A simple clause that uses words such as "… best efforts to control weeds" is, in my view, unsatisfactory. What seems like adequate weed control to a developer, or should I say, the amount the developer has budgeted for weed control, may be completely inadequate to a farmer whose land is his life. Tamper with his land by allowing an infestation of weeds and he or she will be very unhappy. I suggest the farmer should insist on a baseline study showing the state of the land before construction. Thereafter, it should be the responsibility of the developer to at least maintain that baseline level. Most farmers are, likewise, pretty particular about the chemicals which they will permit to be utilized on their land, which leads, as well, to consideration for environmental contamination.

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The promises made by the land agent seem almost too good to be true. Very little of the farmer's land is to be taken out of production, and the rewards seem huge, yet if the development actually goes ahead, they are very real. One of the challenges for the farmer, though, is picking the winner. There has now been a lot of land tied up for proposed wind development, but a relatively small number of these projects have actually gone ahead. Some farmers have signed up with companies which have never erected a wind turbine and likely never will. Others signed up at the same time, with another company, and are already putting money in the bank from the royalty revenues. What is the difference?

Some developers have no intention of developing the projects. Hoping to be able to secure the best wind sites, they intend to assign their rights in the farmer's land to a company which has the capability of developing the project, making a quick buck along the way. Check these companies out. What is their track record? What is the status of their financing? How long will it take them to get their funding in order? Are they actually going to proceed with a project, or are they just speculators? Make sure that they are obligated to move along quickly from testing to development.

In Alberta, the wind industry is relatively new and came on at a time when the provincial government was deregulating the electrical industry. Wind developers, eager to capitalize on rising energy costs, moved ahead quickly, but the regulators and the electrical transmission system are lagging behind. Some parts of the province lack adequate transmission lines, and a number of developments are on hold waiting for them to be built.

This wind development project will be one of the most significant opportunities a farmer ever encounters. Don't blow it for him. A wind development will mean a significant, consistent cash flow and may mean that he or his family does not have to seek off-farm employment. Farmers cannot be unreasonable in their demands or the developer will go elsewhere. I believe that, rather than being overly cautious in addressing these contracts, one needs to be innovative, practical, and use the good, common sense with which so many agricultural clients are imbued.

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