# *The Biofuels and Gasoline Tax Amendment Act*

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## I. INTRODUCTION

Bill 2, *The Biofuels and Gasoline Tax Amendment Act*, is enabling legislation that provides for a gasohol sales mandate to be established by regulation and applied to Manitoba fuel suppliers.[1] Gasohol is gasoline blended with ethanol, normally at 90 per cent gasoline, 10 per cent ethanol. A governmental news release on 24 April 2003 stated that by September 2005, it will be required that 85 per cent of gasoline sold at the pumps be blended with 10 per cent ethanol.[2] Whether the government is still committed to this timeline is not clear, although Bill 2 states that it is possible for the mandate to begin anytime after 31 August 2005.

Bill 2 also stipulates, by way of an amendment to *The Gasoline Tax Act*, a tax reduction, or 'preference', on Manitoba gasohol sold at retail gas stations.[3] Currently, for every litre of gasoline sold at the pumps, the consumer pays 11.5 cents in taxes to the provincial government. When Manitoba gasohol is sold at the pumps, the 11.5-cent levy will be reduced by:

- two cents for a purchase before September 2007
- one and a half cents for a purchase after August 2007 and before September 2010
- one cent for a purchase after August 2010 and before September 2013

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1 Bill 2, *The Biofuels and Gasoline Tax Amendment Act*, 2nd Sess., 38th Leg., Manitoba 2003 (introduced for first reading by the Minister of Energy, Science and Technology, Tim Sale, and seconded by the Minister of Agriculture, Rosann Wowchuk.).

2 Manitoba News Media Services, News Release, "Province Introduces Proposed Legislation to Mandate 10 Percent Ethanol Blends by 2005", 24 April 2003.

3 *The Gasoline Tax Act*, C.C.S.M. c. G40.

'Manitoba gasohol' is defined as 'gasohol that contains no denatured ethanol manufactured outside of Manitoba'.

Bill 2 was submitted for first reading in the Manitoba Legislative Assembly on 21 November 2003. Six days later, Bill 2 went through second reading and was referred to committee hearings for 2 December 2003. The government made no secret of the fact that it was trying to push this legislation through the legislature as quickly as possible, to help make the Manitoba ethanol industry qualify for federal grant money.[4] On 4 December 2003, Bill 2 went through third reading and was passed. The bill provides that the *Act* will come into force on a day fixed by proclamation.

It was the second time the bill was introduced to the legislature. On 23 April 2003, nine days before Gary Doer called an election, *The Biofuels Act*[5] was introduced. The call of the election killed the original bill. While there are some notable differences between the two bills, in substance the two bills are very similar.

Bill 2 is an important piece of legislation, with significant financial implications for the petroleum industry, Manitoba consumers and taxpayers, and rural farmers. Yet Bill 2 was hurried through the legislature, without significant debate or opposition. I will attempt in this paper to explain why this has happened. I will also look at the background and purpose of the legislation, and try to answer the question of whether this legislation is a good idea for Manitoba. I have come to the conclusion that only time will tell whether *The Biofuels and Gasoline Tax Amendment Act* is an excellent, average or terrible idea. It could be any of the above. That is why the lack of significant debate and opposition to Bill 2 was surprising.

## II. BACKGROUND

The government says that a gasohol mandate is in the economic and environmental interests of Manitoba.[6] On the economic side, the Manitoba economy currently loses $430 million annually in income transfers because of its imports of gasoline from other jurisdictions.[7] If

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4 Manitoba, Legislative Assembly, *Hansard*, Volume LIV No.6, (27 November 2003) (Hon. Tim Sale)

5 Bill 11, *The Biofuels Act*, 4th Sess., 37th Leg., Manitoba 2003 (introduced for first reading by the Minister of Energy, Science and Technology, Tim Sale, and seconded by the Minister of Agriculture, Rosann Wowchuk.)

6 *Supra* note 1, preamble.

7 Manitoba, Ethanol Advisory Panel, Ethanol: Made in Manitoba – Manitoba Energy Development Initiative at 2, online: <http://www.gov.mb.ca/est/energy/ethanol/pdf/ethanolteal.pdf>.

ten per cent of gasoline gets replaced with locally produced ethanol, this would save the province up to $43 million annually.[8] This would be combined with savings of $14 million in federal excise taxes.[9]

Furthermore, Manitoba currently only has one ethanol producer, a Husky plant in Minnedosa that produces 10 million litres of ethanol a year. This is considered a small plant. The government's stated gasohol mandate would require the production of over 140 million litres of ethanol a year in Manitoba. This would obviously require the expansion of the existing plant or the construction of new plants, or both, to meet production targets. Moreover, ethanol production will quadruple in the next four or five years in Canada,[10] and demand for ethanol will likely more than double in the U.S. in the next ten years, so any extra ethanol production could potentially be exported.[11]

Several rural communities have expressed support to the government for the development of the ethanol industry, with several regions hoping to land an ethanol plant.[12] Legislation would thus be the catalyst to economic activity and job creation in rural communities. It would create an extra market for the wheat produced by Manitoba farmers.

Ethanol is a high octane, water-free alcohol made from sources of starch such as wheat, corn and barley. Alternatively, it can get made from fibre or cellulose sources such as straw and wood. Wheat currently appears to be the feedstock of choice for ethanol production in Manitoba, although the province is open to using fibre or cellulose feedstock, if that option becomes commercially viable.[13] The kind of wheat that gets used as a feedstock is lower quality, high starch wheat. To produce 140 million litres of ethanol would require 420 000 tonnes of wheat, if wheat is the only feedstock used.[14]

In addition, the production of ethanol creates marketable co-products, the most significant of which is distillers dried grain (DDG). This

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8 *Ibid.*, at 2 ($55 million at today's prices, as per Minister Sale, *supra* note 4.)

9 Ethanol: Made in Manitoba, *Ibid*.

10 Canadian Renewable Fuels Association, "Ethanol and the Canadian Economy", online: <http://www.greenfuels.org/ethanol/canada.htm>.

11 *Ibid.*

12 *Supra* note 4. (Hon. Tim Sale) "...I have met with the communities of Killarney, Roblin, Russell, Minnedosa, Beausejour, Dauphin, Roblin, and in fact, even some folks from the Pas, and I know my friend the Minister of Agriculture has met some people from Swan River."

13 Ethanol: Made in Manitoba, *supra* note 7; *Supra* note 4, also indicates that cellulose feedstock researcher Iogen is in discussions with the town of Killarney, Manitoba, as to the establishing of Iogen's first plant in that community. (Hon. Tim Sale)

14 Ethanol: Made in Manitoba, *Ibid.* at 15.

product can be used in a number of ways,[15] but most notably as a feed for the finishing of various livestock. Manitoba currently exports up to 300 000 cattle annually for finishing, and imports approximately 200 000 tonnes of high protein feed.[16] Up to 150 000 tonnes of DDG could be produced in the making of ethanol at plants in Manitoba capable of producing 160 000 million litres of fuel ethanol, thus potentially displacing some of the need to import high protein feed and exporting livestock for finishing.[17]

Environmentally, Canada under the Kyoto Protocol has committed to reduce Green House Gas (GHG) emissions by six per cent from 1990 levels by the years 2008 to 2012. Manitoba is strongly committed to helping Canada meet its Kyoto obligations.[18] The Manitoba government argues that the burning of gasoline blended with ten per cent ethanol will cut GHG emissions by five per cent, or 135 000 tonnes.[19] The government also argues that the use of ethanol-blended gasoline reduces non-GHG carbon monoxide and smog-forming particulate emissions from vehicles.[20] Finally, the government argues that less energy goes into the production of ethanol than the energy that comes out of it.[21]

## III. JURISDICTIONAL INFLUENCES

In 1997, Minnesota became the model jurisdiction for ethanol blended mandates when it introduced statute 239.791,[22] which provided that after October 1, 1997, all gasoline sold or offered for sale in that state must contain at least 2.7 per cent oxygen by weight.[23] This legislation was in response to a federal amendment to the *Clean Air Act* in 1990, which designated certain portions of Minnesota carbon monoxide non-attainment areas. Since ethanol contains an oxygen molecule, an ethanol

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15 Bob McNabb, Minnedosa Ethanol Producers Group (MEPG), Presentation To The Standing Committee on Social and Economic Development On Bill 2, *The Biofuels and Gasoline Tax Amendment Act*, (2 December 2003), The MEPG gave numerous examples of uses, including cat litter, fertilizer and even human consumption.

16 Ethanol: Made in Manitoba, *supra* note 7 at 6.

17 *Ibid.* at 20.

18 Manitoba, Province of Manitoba Climate Change Action Plan, Kyoto and Beyond: A Plan of Action to Meet and Exceed Manitoba's Kyoto's Targets, at 4.

19 Ethanol: Made in Manitoba, *supra* note 7 at 11.

20 *Ibid.* at 13.

21 *Ibid.* at 11-12.

22 Minn. Stat. S. 239.791 (1992).

23 Minnesota, "Minnesota's Ethanol Programs," online: <http://www.mda.state.mn.us/ethanol/about.htm>.

blend at 7.7 per cent with gasoline would meet the requirements of the statute, however ethanol generally gets blended with gasoline at ten per cent. Statute 239.791 was amended in 2003 to provide that 10 per cent of 'denatured' ethanol by volume, rather than 2.7 per cent oxygen, be blended with gasoline.[24] Unlike the Manitoba legislation, statute 239.791 and the amendment to that statute in 2003 both provide for a specified blend with gasoline within the statute, rather than through regulation.

Minnesota has also provided significant funding and tax breaks to corn farmers, fuel blenders and ethanol producers. Minnesota passed legislation giving producers of ethanol a 20-cent per gallon payment for ethanol produced, which provided security for investors in ethanol plants. Minnesota has also provided some $550 million in start-up costs, with many more millions of dollars raised by private investors.[25] Furthermore, one of the goals in Minnesota was the creation of new generation cooperatives, which are local, farmer-owned ethanol plants, designed to give farmers greater direct cash returns for their crops. Twelve of the fourteen ethanol plants in Minnesota were started as new generation cooperatives. The result of all these initiatives is that Minnesota now claims to produce 380 million gallons of ethanol a year, which has created $587 million in output and 2 562 jobs.[26]

Moreover, prominent South Dakota federal Democrat Senator Tom Daschle has been trying to enact legislation that would create a Renewable Fuels Standard across the U.S. The consequence of such legislation, amongst other things, would triple U.S. biofuel production in the next decade.[27] This statute has been hailed as a means of partially remedying U.S. reliance on foreign oil imports. Daschle has said, “"Ethanol comes from American farmers, passes through American refineries, and fuels American energy needs. No soldier has to fight overseas to protect it. And no international cartel can turn off the spigot on it."[28] President George W. Bush has indicated approval for a Renewable Fuels Standard.[29] The proposal is currently held up in Congress, but is expected to soon be passed into law.[30]

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24 Minn. Stat. § 239.791, subdivision 1(b)., online: <http://www.revisor.leg.state.mn.us/stats/239/791.html>.

25 “Minnesota's Ethanol Programs,” *supra* note 23.

26 “Minnesota's Ethanol Programs,” *supra* note 23.

27 “Ethanol and the Canadian Economy”, *supra*, note 10.

28 Tom Daschle, U.S. Senator for South Dakota, News Release, “Daschle Introduces Bill to Nearly Triple Use of Renewable Fuels, Reduce Dependence on Foreign Oil” (13 February 2003).

29 Ben Pryor, “Senate Bill Includes Renewable Fuels Standard” Southwest Farm Press, online:

Saskatchewan is the first Canadian province to enact legislating bringing forth an ethanol mandate, when it passed *The Ethanol Fuel Act*,[31] which was proclaimed on 15 July 2002. Like Bill 2, this statute is enabling legislation that does not specify in the statute the per cent of ethanol to be blended into gasoline, nor does it specify in the statute the prescribed date that the mandate would begin. Rather, these details are provided for in regulations[32] that became effective as of 24 October 2002. The regulations provide that from 1 April 2004 to 31 December 2004, there will be a five per cent blend of ethanol in gasoline. Starting 1 January 2005, the ethanol blend will be 7.5 per cent. Interestingly, the Saskatchewan government, like the Manitoba government, clearly envisioned a ten per cent ethanol blend prior to the enactment of the legislation.[33]

Ontario and Quebec have yet to establish mandating legislation however in both jurisdictions there is greater ethanol production than in either Manitoba or Saskatchewan, and there are many proposals for more ethanol plants.[34] The Premier of Ontario, moreover, appears to be committed to an ethanol mandate[35] in his province. Thus ethanol production is not solely a prairie-province phenomenon.

With other ethanol producers in Canada comes an increased competition for federal grant money for ethanol producers. The federal government is the most significant jurisdictional influence on the Manitoba ethanol legislation. The federal government has yet to enact legislation creating an ethanol mandate in Canada. Nevertheless, Canada's ratification of the Kyoto Protocol compelled the federal government to establish a target for 35 per cent of fuel sold in Canada containing a 10 per cent ethanol blend by 2010, and it is putting up $100

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<http://www.keepmedia.com/pubs/SouthwestFarmPress/2003/07/03/170150?ba=a&bi=1&bp=12>.

30 *Supra* note 4 (Hon. Tim Sale).

31 *The Ethanol Fuel Act*, S.S. 2002, c. E-11.1.

32 S. Reg. 115/2002.

33 Saskatchewan, Industry and Resources, "Greenprint for Ethanol Production in Saskatchewan: An Industry for Saskatchewan," online: Sk gov., <http://www.ir.gov.sk.ca/Default.aspx?DN=3288,3286,2937,2936,Documents>.

34 *Supra* note 10. Ontario produces 173 million litres at two plants, while Quebec produces 17 million litres, but both provinces are constructing or are proposing construction of plants that could produce hundreds of millions of litres of more ethanol.

35 Dalton McGuinty, "Ontario Liberal Leader Dalton McGuinty Promotes his Clean Fuels Plan Using Corn and Soybeans", online: The Soy Daily <http://www.thesoydailyclub.com/BiodieselBiobased/OntarioLiberal01142003.asp>.

million in funding to expand ethanol production in Canada.[36] Most importantly, the deadline for proposals for $60 million of that funding was set to expire by 19 November 2003, two days prior to the first reading of Bill 2. It is implicit in Minister Sale's comments in the Legislature that Manitoba would have a better chance at landing federal grant money if there was mandating legislation in place.[37] Minister Sale explained that this was the significant factor for the legislation being in 'hurry up' mode:

> The federal proposals were seriously, we think, disadvantaging Manitoba in favour of plants that would be built in eastern Canada. We intervened with the federal proposals. I shared the interventions Manitoba made with my honourable colleagues opposite. We asked for more time. The federal government granted one more month for the conclusion of the required agreements to April of 2004.[38]

In short, the Manitoba government was guided in the legislative process of Bill 2 in large part to better compete for federal grant money.

## IV. Too Good to be True?

The picture presented so far is that of Manitoba trying to get in on a booming industry with nothing but economic and environmental benefits for the province. This could in fact be the case. On the other hand, while support for Bill 2 appears to be strong in rural Manitoba, there have been some that have questioned in whole or in part the government's ethanol strategy. Others have raised issues that would deflate the purpose of the legislation.

For example, the government has been clear that it would like to replace ten per cent of gasoline imports by way of locally produced ethanol. However two University of Manitoba academics, James Rude and Daryl Kraft, have pointed out that Manitoba is currently a net importer of the type of wheat feedstock that would go into ethanol production. Once the mandate begins, the academics posit that Manitoba will increase its imports of American corn to supply the ethanol industry.[39] The government replies by saying that farmers will adapt to the opportunity the new market presents, and that currently wheat production is under capacity compared to years past.[40] The government's argument has some merit, since the Minnedosa ethanol plant, for example, is supplied

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36 Government of Canada, News Release, "Government of Canada Launches Ethanol Expansion Program" (20 October 2003).

37 *Supra* note 4 (Hon. Tim Sale).

38 *Ibid.*

39 Daryl F. Kraft and James I. Rude, "Feed Grains and Ethanol Processing in Manitoba: Presentation to Manitoba Ethanol Advisory Panel," 19 Sept. 2002.

40 *Supra* note 7 at 16.

by locally produced wheat feedstock.[41] Intuitively, however, it seems that the ease and self-interest in importing cheap heavily subsidised American corn would be too irresistible for an ethanol producer to pass on. The result would be imported gasoline being replaced by more imported corn.

It is also yet to be seen whether the ethanol industry can survive without substantial government subsidies. In Minnesota, Governor Pawlenty's proposal to cut or eliminate millions of dollars in subsidies to thirteen of the fourteen state ethanol plants was met with anger from farmers and producers, with some plants saying they could not survive without the subsidy. Gov. Pawlenty thinks the ethanol plants *can* survive without the subsidy, but it has yet to be seen.[42] Manitoba currently gives a tax credit of 25 cents[43] for each litre of manufactured ethanol, which is combined with a 10-cent federal tax credit.[44] Saskatchewan, Ontario and Quebec, B.C. and Alberta all offer varying amounts of subsidies for each litre of ethanol produced.[45] The effect of Bill 2 will be to reduce the Manitoba subsidy to 20 cents, 15 cents, and then 10 cents, during the dates specified in s. 20(10). While the ethanol industry is relatively new and probably needs some help to get started, it will be interesting to see what the reaction and result is if and when the government ever decides to end the tax credits.

In addition, the ethanol proposal pits the interests of rural Manitobans against the interests of all Manitobans who will be subsidising the industry. The Turtle Mountain Sustainable Development Ventures, a regional economic development group representing several towns and registered municipalities in Manitoba, stated explicitly that this legislation will help retain youth in rural areas in addition to diversifying and increasing farm incomes.[46] While perhaps a laudable goal, all Manitobans, rich and poor, will be the ones ultimately helping diversify and increase farmer incomes. Nevertheless, despite the tax

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41 *Supra* note 15.

42 Michael Khoo, "The Ethanol Debate," online: Minnesota Public Radio News <http://news.minnesota.publicradio.org/features/2003/01/27_khoom_ethanol/>.

43 *Supra* note 3, s. 2(24).

44 "Fueling a New Economy: Exploring the Opportunities of Ethanol Production" online: SK government <http://www.climatechangesask.ca/images/Ethanol.may9.pdf>.

45 *Ibid*.

46 Rick Verspeek, Turtle Mountain Sustainable Ventures, "Renewable Energy Production in Manitoba" Presentation to the Standing Committee on Social and Economic Development, Bill 2, 2 December 2003.

consequences for all Manitobans, there were no taxpayer lobby groups who came out against this legislation.

Other seemingly significant economic issues, such as whether gasohol will be more expensive than gasoline at the pumps, and the consequences of maybe having a giant ethanol corporation monopolise all the business in the province have not been discussed or debated in any serious way. In Saskatchewan, for example, the U.S. Broe corporation got what appears to be the exclusive right to work with the government to build and get an equity interest in several ethanol plants in Saskatchewan.[47] In the U.S., there are debates back and forth as to whether gasohol is more or less expensive than gasoline.

As for the environmental arguments in favour of the legislation, they diminished at the time of the passing of the legislation. In fact, Opposition Critic Ron Schuler noted the reduced emphasis on the environmental arguments during second reading of Bill 2.[48] Meeting Manitoba's obligations under the Kyoto Accord might soon be irrelevant considering Prime Minister-designate Paul Martin has expressed concern that Canada might not meet its Kyoto obligations.[49] If the Kyoto Accord dies because of Russia's refusal to ratify the agreement, Canada will be compelled only by moral as opposed to legal considerations as to whether it should meet its previously intended Kyoto targets.

Furthermore, the National Farmers Union (NFU) has strongly challenged the assertions of the government that the energy balance in the production of ethanol is positive. It has brought forth numerous studies showing that the energy balance is negative. The highest profile study the NFU cites is by Cornell University's David Pimentel. The NFU claims that studies put forward by the government leave out factors such as the energy used to produce farm equipment, energy used in the construction of ethanol plants, irrigation, waste water treatment and pollution control.[50] The government has countered with several other studies that declare a positive energy balance, which at the same time discredit Pimentel's work.[51]

On some final notes, the NFU claims it is not ethical, when there are hungry people in the world, to use food to make fuel.[52] The NFU also

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47 "Saskatchewan Votes 2003", online: CBC News <http://www.cbc.ca/sask/story/liberal_ethanol031010.html> The deal has apparently fallen apart because of lack of financing on the part of Broe.

48 *Supra* note 4 (Mr. Ron Schuler – MLA Springfield).

49 Steven Chase, Mark Mackinnon, and Patrick Brethour, "Martin Goes Cool on Kyoto" The Globe and Mail (3 December 03) A1.

50 Kenneth Sigurdson, "Evaluation of Ethanol Manufacturing", 20 November 2002.

51 *Supra* note 7 at 12.

52 *Supra* note 50.

asserts that the financial cost of each individual ethanol plant job vastly outweighs the benefit of creating that job.[53]

## V. THE ETHANOL ADVISORY PANEL

By April 2002, the government had made clear its intentions for an ethanol mandate in Manitoba.[54] On 2 July 2002, the Manitoba government established the Ethanol Advisory Panel (EAP). The goal of the EAP was:

> Undertaking public and industry consultations and producing a report containing recommendations for a "Made in Manitoba" approach that would balance social, environmental, financial and economic development considerations associated with introducing a mandate for ethanol blended fuels consumed in Manitoba.[55]

The EAP had three panellists: Garth Manness, Teri Nicholson, and the late Costas Nicolaou. Mr. Manness is C.E.O. of the Credit Union Central of Manitoba, Ms Nicholson is a grain farmer and economic development officer in the Shoal Lake area, and Mr. Nicolaou was an economics professor at the University of Manitoba. The three panellists toured ethanol facilities in Manitoba, Saskatchewan and Minnesota and talked to consumer groups, agricultural producers and rural economic development groups throughout the province.

There were 30 presenters to the EAP. Ms Nicholson said " the presenters had a very significant impact on the decisions the panel made."[56] Ken Sigurdson, who presented to the EAP on behalf of the NFU, however, described his experience with the EAP like this:

> The meetings that were held were poorly attended about 10 people in Swan River for example. There were two presentations there and a third presentation by a staff member of Manitoba Agriculture (very patronizing). The mandate of the ethanol panel was not if but how we proceed with ethanol in the province.[57]

Of the seven presenters that replied to my e-mails, however, only Mr. Sigurdson spoke against the government's proposed ethanol mandate.

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53 *Ibid.*

54 Manitoba Energy Science and Technology Department, "Climate Change – What's New" (22 April 2002) online: <http://www.gov.mb.ca/est/climatechange/news.html>. "The Provincial Budget address delivered by the Hon. Greg Seliger in the Legislature on 22 April 2002 contained a commitment to conduct public consultations to move towards a mandate of 10 percent ethanol in all gasoline."

55 *Supra* note 7 at 2.

56 E-mail, Teri Nicholson, 2 November 2003.

57 E-Mail, Ken Sigurdson, 3 November 2003.

The EAP submitted a list of 32 recommendations to the government, which were all accepted. Chief among the recommendations was that by 1 September 2005, 85 per cent of gasoline sold at Manitoba pumps be blended with 10 per cent ethanol. In addition, the EAP made recommendations with regards to preferred ownership models (new generation cooperatives[58] or other cooperatives), preferred legislation (enabling), research on co-products and high-yielding wheat feedstock, and tax incentives. Furthermore, the EAP strongly emphasised the need for an effective government communications strategy with regards to the benefits of expanding the ethanol industry. The EAP recommended the creation of The Ethanol Office, whose role, in part, would be to develop a strong campaign focused on the economic and environmental impact of increased ethanol production and consumption in Manitoba.

## VI. THE *ACT*

The word 'biofuels' in the *Biofuels and Gasoline Tax Amendment Act* is original. The title of the Saskatchewan legislation, for example, is *The Ethanol Fuel Act*. Both the Manitoba and Saskatchewan legislation, however, are clearly gasohol mandate legislation. Jeff Kraynyk of the Manitoba Ethanol Office was directly involved with bringing forth both Bill 11 and the subsequent Bill 2. He said that the word 'biofuels' was intentional; because there are other biomass products besides ethanol that Manitoba is interested in developing.[59] The EAP, for example, recommended that in the future, the government investigate the potential for encouraging the production and use of bio-diesel, E-diesel and E-85 in Manitoba. While E-diesel and E-85 are blended fuels that contain ethanol, bio-diesel does not contain ethanol. Bio-diesel is diesel fuel blended with renewable biomass resources such as soybean oil or canola oil. Thus, the bill's title can be considered an original title that reflects a forward-looking approach, not limited to the idea of an ethanol mandate.

Bill 2, being enabling legislation, does not have exciting, novel provisions. In fact, PC MLA Glen Cummings described the legislation as such during second reading:

> The bill is entirely, except for a couple of notable exceptions, about regulatory procedure in terms of being able to govern and mandate the sale of gasohol in this province. As regulations and legislation go, this is pretty mundane stuff.[60]

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58 This proposal appears to have fallen by the wayside, as evidenced by the large fuel companies currently trying to set up ethanol plants in Manitoba. (see note 72 below).

59 Interview with Mr. Jeff Kraynyk, Manitoba Ethanol Office, (October 2003).

60 *Supra* note 4 (Mr. Glen Cummings – MLA Ste-Rose).

Part 1 of the bill is the Definitions section. The definitions are clearly intended to maximise the flexibility for regulation purposes. The word 'prescribed' is defined in the bill as meaning 'prescribed by regulation under this *Act*.' Three other definitions in section 1 of the bill contain the word 'prescribed'. For example, 'denatured ethanol' means a solution that meets *prescribed* specifications and contains ethanol derived from biomass materials. 'Gasohol' means a blend of gasoline and denatured ethanol that meets *prescribed* specifications. 'Gasohol sales mandate' means the level of gasohol sales, as a *prescribed* proportion of all sales of gasoline based fuels, that a fuel supplier must meet in order to avoid a financial penalty under Part 2 of the bill. The word 'prescribed' sets the tone for the bill as enabling legislation, allowing Manitoba similar flexibility that Saskatchewan had with its ethanol legislation.

The first subsection of Part 2 of Bill 2 is titled 'Ethanol-Gasoline' Program. It establishes enabling provisions pertaining to the licensing of the manufacturers of denatured ethanol,[61] the penalising of licensed offenders,[62] and the need for licencees to keep records in accordance with the regulations.[63] The second subsection of Part 2 is entitled 'Gasohol Sales Mandate,' which establishes that fuel suppliers will be punished should they have a shortfall in gasohol sales[64] and should they not keep records in accordance with the regulations.[65]

Part 3 of Bill 2 is titled 'Administration and Enforcement', which establishes further powers for the government to ensure that fuel suppliers and ethanol manufacturers comply with the terms of the legislation and regulations. For example, the government has powers to audit or inspect the records of such a stakeholder,[66] and there are inspectors who have power of entry to business premises[67], and to seize evidence should they have a warrant.[68]

Part 4 of Bill 2 is titled 'Miscellaneous'. Section 19 gives a list of areas where the Lieutenant Governor in Council may make regulations. Section 20 provides a long list of amendments to the *Gasoline Tax Act*, the most significant of which is the tax preference for gasohol sold at the pumps. There is a provision for both the C.C.S.M. reference once the bill

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61 *Supra* note 1, ss. 4, 5.

62 *Ibid.*, s. 5.

63 *Ibid.*, s. 6.

64 *Ibid.*, ss. 7, 9.

65 *Ibid.*, ss. 8, 9.

66 *Ibid.*, s. 11.

67 *Ibid.*, s. 13.

68 *Ibid.*, s. 15.

is passed into law,[69] and a clause stating that the *Act* will come into force on a day fixed by proclamation.[70]

Because Bill 2 is enabling legislation, it seems that it would be unlikely there would be interpretation issues arising from the French version, since the important parts will be in the regulations. Looking at the French version, the language appears to be very consistent with the language and intent of the English version. For example, 'éthanol dénaturé' is defined as '[s]olution conforme aux caractéristiques réglementaires et contenant de l'éthanol provenant de la biomasse.' This definition of 'éthanol dénaturé' is an example of the type of consistent translation that is evident in the rest of the French version of Bill 2.

One notable difference between Bill 11 and Bill 2 is the absence of an 'Ethanol Fund' in the subsequent legislation. Bill 11 provided for an Ethanol Fund, which would support the production of ethanol in Manitoba.[71] There is no whisper of an Ethanol Fund in the subsequent Bill 2, and one is left to wonder under what legislative authority the provincial government will grant money, should they grant money to an ethanol industry stakeholder.

A second difference in the legislation is s. 20(10), which amends the tax preference subsection 2(24) of the *Gasoline Tax Act*. Section 2(24) previously said nothing about where the ethanol had to be manufactured to qualify for the tax preference. The amended provision, states that the tax preference only applies to 'Manitoba gasohol', which is defined as 'gasohol that contains no denatured ethanol manufactured outside of Manitoba.' The 'Manitoba gasohol' idea was nowhere to be seen in the previous Bill 11. This new wording is clearly to encourage the establishing of an ethanol producing industry within Manitoba that will meet the mandate production requirements. Interestingly, there is no equivalent provision stating that the feedstock has to be 'Manitoba feedstock', thus leaving ethanol producers the option of importing U.S. corn to satisfy production.

## VII. MEDIA COVERAGE

On 22 November 2003, one day after Bill 2 was submitted for first reading, there was a related front-page story in the Winnipeg Free Press.[72] The story detailed the unveiling of the legislation by the Manitoba government, and explained that two of Canada's largest fuel

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69 *Ibid.*, s. 21.

70 *Ibid.*, s. 22.

71 *Supra* note 3, ss. 10, 11.

72 Dan Lett, "Clean Energy Plants on Way," The Winnipeg Free Press, (22 November 2003) A1-A2.

companies, Husky Energy and Commercial Alcohols, have asked Ottawa for money to help build ethanol plants in Manitoba. The journalist did a good job of describing in general terms the government's proposed ethanol mandate and the industry's desire for federal grant money. He also briefly mentioned some of the criticism directed at the ethanol industry.

Since 20 April 2002, there have been at least three well-researched articles by Winnipeg Free Press Science reporter Helen Fallding related either to the proposed government scheme or actions by stakeholders under that scheme.[73] The Free Press also published a letter to the editor by NFU regional co-ordinator Ken Sigurdson, relating directly to the government's ethanol scheme.[74] Furthermore, there has been debate on the radio, featuring both sides of the ethanol debate.[75]

Despite this coverage, I can't help but feel that the average Manitoban does not fully appreciate the significance of the government's legislation. For example, since the 22 November 2003 article, there has been no subsequent story or comment in the editorial pages. It must have not registered strongly enough in significance either for a reader to write a letter to the editor or for an editor to allocate space for such a letter. Furthermore, when the initial Bill 11 was introduced for first reading on 23 April 2003, there was no reference to the legislation in the Free Press on 24 or 25 April. For a bill that will have significant tax ramifications amongst other things for Manitobans, one would expect a more boisterous public debate.

## VIII. Political Opposition

The Opposition PC Party was not in a position to oppose Bill 2. Fifteen of its twenty MLAs come from rural ridings. The party has representatives from Minnedosa and Turtle Mountain, both regions that are actively seeking to be a part of Manitoba's ethanol expansion. To oppose this bill would be to alienate a sizable and important chunk of the PC Party's constituency.

Because the PC party was in a no-win situation to criticise the substantive aspects to Bill 2, several members who spoke during second reading chastised the NDP government on the peripheral issue of the way the bill was handled. Opposition Critic Ron Schuler wondered openly about the necessity of the 'hurry up' mode of the legislation, since

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73 I.e. Helen Fallding, "$35M to fund 'clean' gasoline Drivers to go green under NDP scheme," The Winnipeg Free Press, (20 April 2002).

74 Kenneth Sigurdson, Letter to the Editor, The Winnipeg Free Press, (2 May 2003).

75 As told by Professor Schwartz, Legislative Process class, University of Manitoba Law School, 3 November 2003.

the legislation could have been taken care of long ago. He also wondered about the quality of the legislative process, saying, "one of my concerns about this being in a hurry-up mode is that debate does not have the opportunity to really be fleshed out in its full form."[76] Several other PC representatives spoke on this same line of thought. No PC MLA, though, outright criticised the legislation.

Because the NDP government has a majority government, the PC opposition has no legislative power to amend Bill 2 or any other legislation. It did, however, have the power to stall the legislation between first and second reading, but it would have been politically dangerous, considering its rural constituency, to choose such a strategy. The PC party's rural constituency left it powerless to vocalise opposition to the NDP's ethanol strategy, if the PC party had any such opposition.

Furthermore, the PC opposition is an outsider like the public to the government's implementation of its ethanol strategy. Mr. Schuler said he, as an opposition member, is not privy to the private negotiations that occur with the government and private stakeholders in the ethanol industry.[77] The NDP government has free rein to implement its ethanol strategy without the input of the opposition. It will be interesting to see which areas get awarded ethanol plants.[78]

As for the provincial Liberals, leader Jon Gerrard spoke briefly during second reading and repeated the opposition mantra that this legislation could have been dealt with long ago, but that he would reserve his primary comments for third reading.[79]

## IX. COMMITTEE HEARING

After second reading, the Standing Committee on Social and Economic Development met at 6:30 p.m., 2 December 2003, to hear public presentations on Bill 2, to be followed by clause-by-clause consideration of the bill. The format was for each presenter to speak for ten minutes, followed by five minutes of questions from the committee. The committee announced that it was expected to stay until 12:30 a.m., because it had several other bills to consider. There were 14 presenters for Bill 2.

The committee process came across as unnecessary as far as it pertained to Bill 2. It was foregone that the bill was in 'hurry up' mode and would

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76 *Supra* note 2 (Mr. Ron Schuler).

77 Interview with Mr. Ron Schuler, MLA Springfield, 1 Dec. 2003.

78 *Supra* note 11, about half of the towns listed are represented by NDP MLAs, the other half are represented by PC MLAs.

79 *Supra* note 2 (Hon. Jon Gerrard).

proceed to third reading because the opposition had neither the power nor the will to amend the legislation. Nevertheless, the committee chairwoman asked the committee at the outset whether the committee would like to hear public presentations, and the committee unanimously agreed, I assume in respect for legislative tradition.

Of the 14 presenters, four spoke against Bill 2. Three of these four, Ken Sigurdson, Fred Tait, and Glen Koroluk, are all members of the National Farmers Union, and all three spoke strongly against the legislation.[80] A fourth, Edward Hiebert, speaking as a private citizen, thought the bill failed in large part because of a questionable energy balance in the production of ethanol. A fifth presenter, Ted Stoner on behalf of the Canadian Petroleum Products Institute, argued in favour of a more financially favourable 'pool average' calculation for fuel blenders, instead of a ten per cent mandate by volume.[81] Mr. Stoner's presence was interesting, in light of the obvious negative effect the legislation will have on the petroleum industry. Minister Sale admitted during second reading that the reason for a mandate is because the oil and gas industry:

> Would not willingly substitute 10 per cent of their market for a product which they do not make and which would cost them at least as much as the raw materials for gasoline would cost them.[82]

Mr. Stoner was trying to make the best out of a bad situation, and his arguments might have some weight on the regulations that come out. A sixth presenter, Chris Lorenc, on behalf of the Manitoba Heavy Construction Association (MHCA), cautioned that tax money that benefits the ethanol industry should come from general revenues and not fuel tax revenues designated for the groups he represents. The MHCA, however, called the legislation 'good social policy'.[83]

The other eight presenters all supported the legislation to one degree or another. There were several regional economic development group presenters. A few of them came across less as commenting upon the legislation and more as lobbying the politicians that their area was the best place to build an ethanol plant. In fact, one of the more telling moments of the committee process occurred upon completion of the

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80 Mr. Koroluk and Mr. Tait, however, spoke as private citizens and not on behalf of the National Farmers Union.

81 The Canadian Petroleum Products Institute – Comments on Bill 2 – *Biofuels and Gasoline Tax Amendment Act*, presented to the Manitoba Standing Committee at 4.

82 *Supra* note 2 (Hon. Tim Sale).

83 Manitoba Heavy Construction: Bill 2, *The Biofuels and Gasoline Tax Amendment Act*, Presentation to the Standing Committee on Social and Economic Development at 4.

Agassiz Agri-Ventures presentation. Lac du Bonnet PC MLA Gerald Hawranik, whose riding would likely benefit from the government's choosing the Agassiz proposal, went off on a five-minute 'question' whereby he extolled the virtues of the region for such a project. He never did ask a question, yet several of his colleagues thought his speech was quite humorous.

It was difficult to endure all the presentations, since so many were repetitive and repeated the same points that previous presenters raised. Only two presenters referred specifically to provisions in the Bill,[84] whereas others were directed either to the general policy behind the legislation, and/or the future decisions made under the regulations. Over three hours later, all the presentations were completed.

The committee had to listen to four presentations for another bill before it could finally go through a clause-by-clause review of Bill 2. It was roughly 10:40 p.m. by the time this happened. Some of the committee members looked understandably tired and weary. The amount of time that it took the Chairwoman to go through the entire bill, however, was probably under a minute. Every clause in the bill was passed quickly and unanimously. For all the presentations to the committee and all the opposition complaints about this being 'hurry up' legislation, there was nothing that was going to change a word in Bill 2 that night.

As to the form of the committee presentations, I found it frustrating that it was the politicians that got to ask the questions and not the other way around. For example, if presenters wanted to ask why there is no Ethanol Fund in Bill 2, or why there is no 'Manitoba feedstock' mandate in the bill, they would not be able to ask the politicians. In fairness to the process, however, this might lead to annoying or vexatious questioning from officious bystanders. Nevertheless, if a citizen in good faith wanted to ask a politician on the committee a truly probing question, he or she would be precluded from doing so. That did not sit well with me, especially since the opposition was not asking any probing questions when such questions were there to be asked.

## X. CONCLUSION

Bill 2 is enabling legislation that could result in many excellent benefits to Manitobans. On the other hand, there are many legitimate questions that weren't satisfactorily raised when this legislation proceeded. Part of that is due to the fact that federal grants for ethanol manufacturers compelled the provincial government to go in 'hurry up' mode. Another reason is the PC opposition's powerlessness to voice opposition to the bill, for fear of alienating a large part of their constituency.

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84 Glen Koroluk and Mr. Stoner.

It appears that once the government decided to proceed with an ethanol mandate, there was nothing to stop it from realising its goal. The government's desire to introduce a gasohol mandate was already decided prior to the Ethanol Advisory Panel's tour of the province in 2002. It had hardened by the time of the committee hearings on 2 December 2003. The result is that *The Biofuels and Gasoline Tax Amendment Act* will soon be passed into law, bringing to Manitoba a gasohol mandate in a few short years.