ENVIRONMENTAL LAW CENTRE

Submission of the Environmental Law Centre to the Alberta Utlities Commission

Re: Regulatory Process for Hydroelectic Power Generation Development

Application No. 1606021

Proceeding ID. 561

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Executive Summary

The importance of having a robust regulatory process to determine the appropriate development of hydroelectric power generation within the province cannot be understated. A robust and effective regulatory process is one that mandates incorporation of relevant information from a broad spectrum of stakeholders and facilitates an evaluation of if and how projects are in the public interest. The regulatory process must also recognize the complexity of hydroelectricity development that result in interjurisdictional impacts and the relevance of federal constitutional powers in determining whether projects may proceed.

The determination of whether a specific hydroelecticity develompent is in the public interest is squarely within the mandate of the Alberta Utilities Commission. A review of legal precidents, other tribunal decisions, and related policy documents do little to inform the determination of whether a project will be in the public interest. In this regard, directives or standards of procedure should be pursued to dictate criteria to be considered in public interest decisions. Enviromental criteria for discerning the public interest in hydroelectic projects are proposed.

The public interest is also directly informed by participation in the formal processes of the AUC. Regulatory processes must ensure that regulators are making decisions with appropriate information and this in turn requires appropriate regulatory tests to determine which parties have formal legal standing before the Commission. Narrow approaches to standing pursued by other regulatory agencies have given rise to increased litigation and an inability to truly meet their mandates to determine whether projects are in the public interest. A “genuine interest” test for standing in hydroelectric power generation proceedings is proposed.

The nature of water flows and the ecosystem they foster lead to an increased relevance of interjurisdictional issues and federal government oversight of hydroelectic power developments. Therefore, regulatory processes for hydroelecticity development must be cognizant of extraprovincial impacts and related constitutional issues, as failure to do so may lead, in certain instances, to litigation and related interprovincial conflicts. In this regard, extraprovincial harms must be considered in regulatory processes and this in turn entails a need to ensure the concerns of stakeholders in other

provinces are heard, considered in the public interest determination, and that their concerns are thereby avoided or mitigated.

Similarly, regulatory processes must recognize the constitutional reality of hydroelectric project development. This includes the highly relevant federal government role in regulating inland fisheries, fish habitat, and navigable water ways.

Introduction

(1) The Environmental Law Centre (ELC) was established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. Its vision is a clean, healthy and diverse environment protected through informed citizen participation and sound law and policy, effectively applied.

(2) The Centre's mission is to ensure that laws, policies and legal processes protect the environment. In pursuit of this mission, the Centre seeks the following ends:

- enactment and effective enforcement of sound environmental laws and policies; and

- informed public participation in environmental regulatory, law-making and decision-making processes.

(3) The Alberta Utilities Commission reasoning for holding the inquiry dovetails with the ELC's mission, particularly in relation to ensuring regulatory processes consider the interests of all Alberta stakeholders, and that hydroelectricity development, where it is deemed appropriate to occur, is regulated in an environmentally sound fashion.

(4) The ELC's submission deals with three parts. Part I reviews the role of the public interest in decision making, considers existing laws and policy impacts on public interest decisions and proposes some environmental criteria that can be included in the public interest determation. Part II reviews legal rights to participate in regulatory processes and outlines the importance of having sufficiently inclusive standing rules. Part III sets out interjurisdictional aspects of hydroelectric development and evaluates the possible constitutional and interjurisdicitonal conflicts that may arise.

Part I: The public interest in hydroelectric power projects

A. Statutory consideration of the public interest

(5) The Alberta Utilities Commission (AUC) is the main regulator of hydroelectric power generation in Alberta. When conducting a hearing or other proceeding on an application to construct or operate

a hydroelectric development, the AUC is required to consider, in addition to any other matters, whether the proposed development is in the public interest. In making this consideration, the AUC must take into account the social, economic and environmental effects of the proposed development.[1] In addition, every Commission member of the AUC is required to "act honestly, in good faith and in the public interest" in exercising their powers and carrying out their functions and duties.[2]

(6) The *Hydro and Electric Energy Act* (*HEEA*) deals directly with the development of electricity generation, including hydroelectric energy.[3] The purposes of this Act include:[4]

- "economic, orderly and efficient" development and operation of hydro energy and electricity generation and transmission, in the public interest;
- safe and efficient practices, in the public interest, for development of hydro energy and electricity generation, transmission and distribution; and
- assisting in controlling pollution and ensuring conservation of the environment.

(7) In some instances, the Natural Resources Conservation Board (NRCB) may have a role in relation to proposed hydroelectric developments. Part of the NRCB's mandate is to review designated non-energy natural resource projects to determine whether they are in the public interest, giving consideration to the social, economic, and environmental effects of those projects.[5] The NRCB is limited to considering "reviewable projects", as defined by legislation, regulation, or Cabinet. Proposed hydroelectric developments may qualify as reviewable projects if they are considered either a water storage structure or a water diversion structure for which Alberta Environment has ordered an environmental impact assessment report.[6]

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[1] *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2, s. 17.
[2] *Ibid.*, s. 6(1)(a).
[3] R.S.A. 2000, c. H-16.
[4] *Ibid.,* s. 2(a) – (c).
[5] *Natural Resources Conservation Board Act,* R.S.A. 2000, c. N-3, s. 2.
[6] *Ibid.,* s. 1(j).

(8) Hydro-related activities that automatically require an environmental impact assessment report are:[7]

- dams greater than 15 metres in height;
- water diversion structures and canals with a capacity greater than 15 cubic metres per second;
- water reservoirs with a capacity greater than 30 million cubic metres; and
- hydroelectric power generating plants with a capacity of or exceeding 100 megawatts.

(9) Cabinet may also order natural resource projects to be reviewed by the NRCB.[8]

(10) In relation to federal government engagement in regulation of hydroelectric power generation, the public interest is most directly addressed under the *Dominion Water Power Regulations*, which provide a system for the licensing of power developments under the *Dominion Water Power Act*.[9] This Act deals with energy generated from flowing or falling water that occurs on federal public land or federal property under the administration of the Minister of Indian Affairs and Northern Development.[10] In licensing proposed power developments, the Minister and other officials must consider whether the project is in the public interest, but no further guidance is provided on what comprises the public interest.[11]

(11) The federal government may also become engaged in a public interest determination in hydroelectricity developments through the environmental assessment process mandated under the *Canadian Environmental Assessment Act* (CEAA).[12] While CEAA does not cite the public interest directly, the environmental assessment process is focused on facilitating public participation in decisions and "integrating environmental factors into planning and decision-making

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[7] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93, Sched. 1, (c) – (e), (l).
[8] *Supra* note 5, s. 4.
[9] *Dominion Water Power Regulations*, CRC, c. 1603.
[10] *Dominion Water Power Act*, R.S.C. 1985, c. W-4; see ss. 2-3.
[11] *Supra* note 9, ss. 4(7), 6(2), 7(1), 7(3), 8(1), 23(5), 27(3), 49(3), 49(7) and 59(3).
[12] S.C. 1992, c. 37.

processes". [13] In addition, the environmental assessment process under CEAA closely resembles public interest decisions undertaken by provincial regulators, insofar as the "need for" and "purpose of" projects are subjected to review.[14] The relevance of CEAA is discussed further in Part II in relation to public participation in environmental assessment and Part III, in relation to the federal government's role in hydroelectric power generation in the province.

B. Criteria for determining environmental aspects of the public interest

(12) In regulatory decision-making, the public interest must encompass two elements:[15]

- the substantive element, which addresses the content sought and criteria applied in determining the public interest (what makes up the public interest?); and
- the procedural element, which deals with how the public interest is determined (who contributes to determining the public interest?).

(13) This section of the submission will focus on the substantive element of the public interest for hydroelectric power generation, while a central aspect of the procedural element is addressed in Part II.

(14) Both the AUC and NRCB are legislatively directed to consider the social, economic and environmental effects of a proposed project in determining whether it is in the public interest. On its face this leaves both bodies with a significant amount of discretion in making that determination. In addressing potential environmental criteria, this section will review how the public interest has been addressed in previous Alberta hydroelectric regulatory decisions, look to other legislation and policy documents for potential guidance, and discuss other criteria that could be applied. This discussion will also take into

[13] *Ibid*. at Preamble.
[14] *Ibid*. at s.16.
[15] Jodie L. Hierlmeier, "'The Public Interest': Can it Provide Guidance for the ERCB and NRCB?" (2008) *18 J. Envtl. L. & Prac*. 279 at 295.

account that much of Alberta's future hydroelectric development may occur as "add-ons" to water management and storage projects.[16]

Previous consideration of the public interest in hydroelectric projects

(15) The most recent and relevant decisions have been two dealing with the proposed Dunvegan hydroelectric project, the first denying the application and the second approving a revised application.

(16) The first Dunvegan decision was issued by a joint panel of the Energy and Utilities Board (the AUC's predecessor) and the NRCB.[17] The panel discussed its approach to the public interest as being one of balancing broad economic, social and environmental benefits and costs, with a focus on the relevant regulatory standards and guidelines and the applicant's adherence to those standards, as an aid to determining whether potential adverse impacts would be acceptable. Where potential impacts were not addressed by standards or guidelines, the panel put the onus on the applicant to show that reasonable mitigation measures would be taken. It also indicated that conditions regarding mitigation plans could be imposed as an "integral part" of the project's approval.[18]

(17) The panel denied the application and seemed to take a precautionary approach, citing significant uncertainty in relation to any balance between the project's potential costs and benefits. Concern was expressed that evidence was lacking, particularly in relation to potential effects on fish populations, and that there was no clear agreement between expert witnesses and modelling in relation to potential ice and flooding impacts. The panel indicated that the cumulative effect of the potential negative economic, social, and environmental effects outweighed the social and economic benefits that might accrue to the local community.[19]

(18) Dunvegan's applicant, Glacier Power, submitted a revised application that was approved by a joint panel of the AUC, NRCB and federal

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[16] Hatch Ltd., *Update on Alberta's Hydroelectric Energy Resources* (Calgary: Alberta Utilities Commission, 2010), online: Alberta Energy < http://www.energy.alberta.ca/Electricity/pdfs/AUCHydroelectricStudy.pdf>.
[17] Glacier Power Ltd., Dunvegan Hydroelectric Project, Report of the EUB-NRCB Joint Review Panel, Decision 2003-020, 25 March 2003 (Glacier #1).
[18] *Ibid.,* 7.
[19] *Ibid.,* 60.

government.[20] While not explicitly stated in the decision, it appeared that the panel took a similar approach to the first decision in looking to a balancing of benefits and costs based on meeting relevant standards and guidelines. Glacier Power provided evidence that sought to meet the gaps identified by the first panel, particularly in relation to ice modelling, likely flooding, and potential fish impacts. It appears that a key factor influencing the second panel to approve the project was general government policy direction seeking less greenhouse gas intensive power sources: "Given Alberta's dependence on energy derived from fossil fuels, the Panel views green power generation, which emits minimal greenhouse gases, as increasingly important and in the public interest." [21]

(19) While the second panel did not address the public interest aspect in the same level of detail as the first panel, the decisions are not inconsistent and both reflect the emphasis put on regulatory standards, guidelines and broad government policy and priorities.

Legislative directions or limitations and the public interest

(20) Some guidance has been provided by Alberta legislation, although it is unclear how much of it relates directly to environmental considerations. As part of its public interest considerations generally, the AUC is enjoined from considering whether critical transmission infrastructure, as defined in the *Electric Utilities Act*, is required to meet Alberta's needs.[22] Additionally, the *Hydro and Electric Energy Act* prevents the AUC from considering need for electricity when dealing with an application for a generating unit, as defined in the *Electric Utilities Act*.[23] This may prove problematic as it splits the public interest determination between two independent administrative bodies and may be viewed as biasing the public interest determination of the AUC.[24] It is essential that the AUC's discretion operates independent of the need determination, at the same time recognizing its relevance to the decision-making process.

(21) Directions or limitations on the public interest may also be provided by the regional land use plans developed under the *Alberta Land*

[20] Glacier Power Ltd., Dunvegan Hydroelectric Project, Report of the Joint Review Panel, Decision NR 2008-03, 19 December 2008 (Glacier #2).
[21] *Ibid.,* 12.
[22] *Supra* note 1, s. 17(2).
[23] *Supra* note 3, s. 3.
[24] It may also create expectations of proponents that the AUC should not be placing substantive conditions or rejecting a project as not being in the public interest, where the need has already be validated by Cabinet.

Stewardship Act (*ALSA*).[25] These regional plans are intended to bind the AUC, NRCB and other regulatory decision makers by requiring that their decisions are consistent with the applicable regional plan.[26] Terms of reference for the two plans currently under development indicate that social, environmental, and economic factors will all be considered in the regional plans, with specific areas of focus and priorities set by Cabinet in the terms of reference for each particular land use region.[27] However, no regional plans have yet been completed or made public in draft format, thus there is little guidance to be gained at this time.

The impact of policy documents on determining the public interest

(22) Given the broad discretion held by the AUC and NRCB in relation to their public interest determinations, both bodies can have reference to policy documents. It is clear from the Dunvegan decisions that this was the case. The first decision made reference to regulatory standards and guidelines, many of which are policy documents.[28] The second decision, while not citing a specific policy document, made it clear that a key consideration was government policy position in relation to energy sources and greenhouse gas emissions.[29]

(23) It is important to remember, however, that policy documents are not legally binding on either the AUC or NRCB's decisions unless given such authority by relevant legislation. This was addressed in recent academic research related to Alberta's Energy Strategy:[30]

> Absent amendments made to legislation governing or administered by the ERCB and or the AUC and rooted in

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[25] S.A. 2009, c. 26.8.
[26] *Ibid.,* s. 15; see also *supra* note 1, s. 8.1 and *supra* note 5, s. 2.1.
[27] Government of Alberta, *Terms of Reference for Developing the Lower Athabasca Regional Plan* (Edmonton: Government of Alberta, 2009), online: Land-use Framework <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/TermsOfRefDevLowerAthabascaRegionalPlan-Jul2009.pdf>; Government of Alberta, *Terms of Reference for Developing the South Saskatchewan Region* (Edmonton: Government of Alberta, 2009), online: Land-use Framework <http://www.landuse.alberta.ca/RegionalPlans/SouthSaskatchewan/documents/TermsofRefDev-SouthSaskatchewanRegion-Nov26-2009.pdf>.
[28] *Glacier #1, supra* note 14 at 7.
[29] *Glacier #2, supra* note 17 at 12, 107-108.
[30] Cecilia A. Low, *The Provincial Energy Strategy – An Integrated Approach: The Challenges Raised by a Two-Board Model for Energy and Utility Regulation* (Calgary: Canadian Institute of Resources Law, 2009) at 6.

the Energy Strategy, the Energy Strategy cannot, in and of itself, affect how the ERCB and the AUC discharge their duties except to the extent that the ERCB and the AUC have regard to the Energy Strategy in considering the scope and details for the broad public interest in applications before them.

(24) Similarly, any of the legislative limitations discussed above would override policy documents due to their legally binding nature.

Environmental criteria to be applied to the public interest determination

(25) One element, which is not specified in provincial legislation but was embodied in the first Dunvegan decision, is that of a precautionary approach. In that decision, the joint panel put the onus on the applicant to provide sufficient evidence of mitigation to address potential adverse impacts, and resolved evidentiary gaps or uncertainties in favour of denying the project application. This approach puts the evidentiary duty squarely on the applicant to provide sufficient information to allow for the public interest determination to occur. Where the proponent fails to provide information and there is uncertainty around a project's environmental effects and/or mitigation, the administrative body rightly finds that a public interest determination is elusive. To ensure consistent use of this approach, it should be legislated either in the governing legislation of both the AUC and NRCB or in relevant directives, regulations, or other legally binding documents created by those bodies.

(26) There is a range of environmental criteria that should be considered by both the AUC and NRCB, as applicable, in relation to hydroelectric development. These include:

- Assessment of the proposed hydroelectric project against other alternatives based on net environmental impacts, not simply on the basis of greenhouse gas emissions;

- Maintenance of flows to sustain ecosystems structure and function;

- Protection of water quantity and quality for downstream water users;

- Sediment management;
- Effects on water flow from ice break-up;
- Site selection;
- Fish mobility;
- Cumulative effects of associated infrastructure; and
- Reservoir effects.

(27) These elements could be set out as standards in joint or separate directives or other binding documents of the AUC and NRCB. These standards or directives would provide clarity to all parties and, if derived with stakeholder involvement, would increase procedural efficiency in dealing with project applications.

(28) There are also some procedural criteria that should be applied to assist in determining whether a project is in the public interest and in maintaining the long-term public interest aspect of projects that are approved. These should apply whether a project is being developed from the outset as a hydroelectric project or as a water management or storage project with the possibility of hydroelectric capacity being added in the future.

(29) The first of these is to stringently enforce application requirements to ensure that full information is before the AUC, NRCB, and all participants in project reviews. This does not necessarily require legislative or regulatory changes as much as a possible shift in approach and implementation of current application requirements. However, a legislated commitment should also be made to providing public access to all subsequent information supplied by a project applicant in response to deficiency requests or other gaps identified by the regulators. This would ensure that all parties participating in review of the application have the same information in hand and are making their submissions from the same knowledge base.

(30) Another procedural criterion, which dovetails with both the precautionary approach and ensuring full application information, is to minimize the number of conditions attached to finding a project in the public interest and approving it. In the past, such conditions have often addressed information gaps or incomplete development of project plans (such as reclamation, decommissioning, wildlife

management, and monitoring), which should be addressed by denying an application if a precautionary approach were followed. Where conditions are attached, legislation should be modified to require the AUB and NRCB (as applicable) to monitor for compliance with those conditions on an ongoing basis, publicly report the results of such monitoring, and take enforcement action as necessary. This is particularly important given the long life of hydroelectric projects.

C. Process recommendations

(31) The public interest determination will be facilitated by the following recommendations:

1. The onus should be placed on the proponent to satisfy the decision maker that sufficient information exists to determine whether the project is in the public interest.

2. Where there is uncertainty as to specific impacts or the validity of mitigation measures, the decision maker should reject the project application. Projects should only be conditionally approved where requirements are in place to monitor, report, and enforce on those conditions.

3. Environmental criteria to guide the public interest decision and reasoning should be enumerated in prescriptive directives or rules. Some criteria are provided, *supra* para 26.

Part II: Public participation and standing in regulatory processes

(32) This part of the ELC's submissions addresses the procedural aspect of the public interest. The procedural aspect has many legal elements, including:

- Notice of applications and hearings;
- Standing and hearing participation;
- Costs and participant funding;
- Consultations and informal processes; and
- Access to information.

All these elements are central to effective public participation in regulatory processes, but this submission focuses specifically on legal standing to initiate and participate in hearing processes.

(33) Standing is commonly understood as the right to a hearing. Hearings involve different types of participants, but participants with standing are crucial as only they can make the hearing occur. A determination of whether a party has standing is a preliminary matter to be disposed of prior to the hearing of substantive issues. The AUC currently calls this party an "intervener". The term "intervener" is largely a matter of form. AUC "interveners" are true "parties" to the proceeding in that their status gives rise to further procedural rights.

(34) Public participation is crucial to meeting the AUC's public interest mandate. The narrower the approach to standing the more elusive a public interest determination becomes. Narrow participation rules may also lead to increased litigation and conflicts in joint proceedings. The AUC has taken positive steps to improve the public participation regime within its own jurisdiction and the ELC recommends further reform to increase the robustness of decisions.

A. The relevance of public participation to the public interest

(35) The World Commission on Dams calls the construction of large dams "one of the most intensely debated issues in sustainable development."[1] Indeed one of the most significant public interest disputes in Canadian legal history is Alberta's Oldman River Dam. The Dunvegan proceedings prove that even a run of river project can attract intense debate.

(36) The Dunvegan project spanned approximately 9 years and attracted broad public participation.[2] Some but not all of these participants were:

- Several local residents and businesses;
- "CROSS" (a citizen's group specifically concerned with all season river crossings);

[1] World Commission on Dams, online: World Commission on Dams, <http://www.dams.org/about/debate.htm>.

[2] *Glacier Power Ltd., Dunvegan Hydroelectric Project*, Report of the EUB-NRCB Joint Review Panel, Decision 2003-020, 25 March 2003 and *Glacier Power Ltd., Dunvegan Hydroelectric Projec*t, Report of the Joint Review Panel, Decision NR 2008-03, 19 December 2008.

- A “Coalition” of environmental organizations;
- Further special interest or locally focused conservation groups;
- Multiple municipalities, Counties, and regional Chambers of Commerce;
- Aboriginal Peoples including: Paddle Prairie Métis Settlement, Athabasca Chipewyan First Nation, and The Dene people of Fort Resolution, North West Territories;
- The Province of British Columbia and BC Hydro Corporation;
- Alberta Transportation and Alberta Environment; and,
- The Government of Canada.

(37) The public debate over hydroelectric projects is reflected in the fact that *HEEA* creates a separate authorization process for hydroelectric facilities relative to other power plants. Most power plants are authorized directly by the AUC. Hydroelectric facilities require that the AUC report to Cabinet, who must prepare a bill, which must pass the legislature, after which the AUC must authorize construction.[3] The nature of Alberta's hydroelectric process attracts special attention in *The Electric Industry in Canada*, which states:[4]

> While the conditions attaching to a hydro-electric plant seem onerous, it should be bourn in mind that these plants can have many side effects such as water supply for drinking and irrigation and fisheries considerations.

(38) These effects have historically been most relevant in Southern Alberta; however, future debates will undoubtedly include Northern Alberta. The *Hatch Report* finds that Alberta’s greatest hydroelectric potential is on the relatively undeveloped and sparsely populated Slave, Peace, Smoky, and Athabasca Rivers.[5] The report notes that developing the North will depend on a significant weighing of economic, social, and environmental factors. Such significant

[3] HEEA (s.9).
[4] Gowlings, *The Electric Industry in Canada* (Toronto: Carswell, 2009) at 6-29.
[5] Alberta Utilities Commission. *Update on Alberta’s Hydroelectric Energy Resources*, H334053 Rev. 1, February 26, 2010.

weighing of public interest factors demands significant public participation.

Informed and inclusive decisions

(39) The ELC recently conducted a study on public participation before the Alberta's Environmental Appeals Board and concluded that public participation in administrative forums: [6]

- Provide decision-makers with a greater range of information, facts, ideas, and perspectives, many of which are not otherwise available; and

- Enhance public acceptance of decisions and the credibility of the agency.

(40) These same findings have been reached by three diverse and independent projects with relevance to the hydroelectric regulatory process:

(i) The World Commission on Dams Framework for Decision-Making (WCD Framework) includes a core value of "participatory decision-making".[7]

(ii) The WCD Framework was compared against other international hydroelectric standards by the non-governmental organization, International Rivers, in a study on *Social and Environmental Standards for Large Dams.* The WCD Framework was found to be superior in matters of:

- assessment of risks to all interested parties;

- promotion of river basin wide understanding to guide decisions; and,

- pursuit of public acceptance of key decisions.

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[6] *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board*, (Environmental Law Centre, April 2006).

[7] *Dams and Development: A New Framework for Decision-Making*, The Report of the World Commission on Dams, An Overview, November 16, 2000. http://www.dams.org/

The International Rivers study suggested that "decisions made through the right process result in projects that enjoy greater public support and face fewer economic, social, environmental risks." [8]

(iii) In the domestic context, British Columbia's *Administrative Justice Project* has recognized that reform is needed to improve administrative decision-making and concluded that effective tribunals are accessible ones.[9]

Group participation

(41) Access to decision makers on the part of groups and organizations can provide enormous benefits to the decision-making process. These benefits include:

- Issue division and role differentiation;
- Special expertise and capacities;
- Assurance that the hearing is attending to issues of public concern;
- Shared responsibility for the burdens of hearing participation; and
- Increased efficiency.

(42) The hydroelectric context attracts groups far beyond environmental non-government organizations and landowners. It involves all levels of government including First Nations and municipalities. It also involves a variety of corporate interests, from project proponents to those impacted by varied flows or other project impacts. Broad participation brings balance to the process.

Participation and its importance to the AUC

(43) Not all administrative forums are the same. Regulatory agencies including the AUC, NRCB, and the Energy Resources Conservation

[8] International Rivers, *Social and Environmental Standards for Large Dams* (December 2008). Available online at: http://www.internationalrivers.org/files/International%20Rivers%20WCD_IFC_IHA%20comparison.pdf

[9] Available online: <http://www.gov.bc.ca/ajo/down/white_paper.pdf>.

Board (ERCB) are distinguishable from tribunals like the EAB that primarily play an adjudicative function. Regulatory agencies face an added challenge when called on to process disputes and make quasi-judicial decisions because adversarial processes and associated formalism must not detract from the agency's mandate.

(44) The mandate of deciding whether projects are in the public interest is different from deciding issues involving private rights. Participation rules based solely on private rights do not support a public interest mandate.

(45) These two features of the AUC – its status as a regulatory agency and its public interest mandate – demand participatory decision-making. Participatory decision-making in the hearing context requires broader standing compared to adjudicative tribunals or courts.

Public participation needs to evolve

(46) Transcripts from a 1978 seminar on *Effective Participation in Alberta's Energy Planning* showed consensus on two issues: First was that participation is a good and necessary part of the energy planning process, particularly its quasi-judicial aspect.[10] Second was a concern with obstructionist or undisciplined parties and the need for "responsible", "effective", or "optimal" intervention. Whether sub-optimal interventions were the result of motives or circumstances is unclear. Consider this submission and its relevance in 2010: [11]

> ". . . the type of intervention or the type of application being made to [the board] today is quite distinct from those made 20 or 30 years ago. The volume of material amassed is greater, the technical knowledge required has changed markedly, and we have an apparent shortage of expert lawyers to appear before the board".
>
> (Al Romanchuk, Mayor of Grande Prairie)

(47) One suggested response to these realities of contemporary hearing participation was to promote support processes to assist interveners. Another response was to promote group participation.

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[10] *Effective Participation in Alberta's Energy Planning* – seminar – 1978 October 16, 1978, St. Albert, Alberta,
(Department of Consumer and Corporate Affairs, Government of Alberta) Vol 1 – transcript

[11] *Ibid*.

(48) Likewise in 1977, Ontario's *Royal Commission on Electric Power Planning* found that direct public involvement was essential to the activities of government agencies attempting to ensure that plans meet the needs and wishes of the people.[12] The Commission proposed that potential participants should include "...citizen groups with a self-identified interest in power planning, groups affected by Hydro planning but not presently involved...and individual members of the "general public"."[13]

(49) At the time of these two concurrent provincial initiatives, Alberta was a leader on some public participation issues, particularly the practice of awarding intervener costs. Today, the primary criticism of Alberta's public participation regime is that standing tests are too narrow in light of regulatory public interest mandates.

B. Current approaches to standing

(50) Most approaches to determining standing fall on a continuum. At one end is a rights-based approach. This approach is legalistic and narrow. A middle option is an "interest-based' approach. This approach is still legalistic but broader. At the other end is open participation, which is non-legalistic and very broad. Numerous alternative approaches to standing fall outside of this continuum.

Alberta regulatory agencies' approaches to standing

(51) Section 9(2) of the *AUCA* requires a hearing:

> "if it appears to the Commission that its decision or order on an application may directly and adversely affect the rights of a person".

(52) The AUC may also review any facility decision if there were directly affected persons and no hearing, or those persons did not receive notice of a hearing.[14]

(53) The NRCB and ERCB have similar standing requirements and public interest mandates to the AUC. The Environmental Appeals Board also

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[12] *Royal Commission on Electric Power Planning*, (Ontario), The Decision-Making Framework and Public Participation Issue, Paper #8 May 1977.
[13] *Ibid*.at 3.
[14] *Alberta Utilities Commission Act*, R.S.A. 2000, c.- A 37.2 at s. 10; *Rule 016: Review and Variance of Commission Decisions* at 4.

uses the directly affected test for standing but it has a distinguishable mandate. Interpretation of what is meant by "directly affected" has been similarly construed by most administrative tribunals in Alberta to relate to specific pecuniary or related property interests and the potential for direct impacts on human health.

(54) Specific intervener rights and requirements are prescribed in the AUC Rules. The ERCB prescribes intervener rights and requirements under Board Directives. NRCB rules are prescribed by regulation. [15]

(55) The AUC Rules currently rely on private property rights and geographic proximity to the project. *Rule 007* provides that:[16]

> All persons whose rights may be directly and adversely affected by a proposed development must be informed of the application and have an opportunity to voice their concerns and be heard."

(56) For power plants, public notice is due to all occupants, residents, and landowners within 2000 meters of the proposed site. For major power plants, proponents should consider extending public notice to populated areas outside the 2000 metre radius. Personal consultation is due to all within 900 meters of the site.

Lessons learned from other tribunals

(57) The ERCB articulates factors that it will take into account in determining directly affected. These include:

- Will the proposed project potentially affect safety or economic or property rights?
- Is the person affected in a different or greater way than the general public?
- Is there a clear and direct connection between the proposed project and the rights the person claims will be affected?

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[15] *Rules of Practice of the Natural Resources Conservation Board Regulation*, Alta. Reg 77, 2005

[16] Participant Involvement Program Requirements, *AUC Rule 007 Appendix A: Rules Respecting Applications for Power Plants, Substations, Transmission Lines, and Industrial System Designations*.

(58) The ERCB approach to standing is unduly narrow, but standing decisions follow a clear regulatory process. Submissions on affected rights have been requested of participants in advance of pre-hearing conferences. Pre-hearing conferences have expressed a clear purpose of determining standing. Preliminary Reports give reasons for acceptance or denial of standing applications.[17] Reports partly articulate the practice of awarding "discretionary participation" to participants that do not pass the standing test. The ERCB will award "some degree of participation" to persons who "offer information that is relevant and material" to the applications.[18]

(59) ERCB standing has been provided to holders of grazing leases on public land based on an interpretation of "occupation". Discretionary participants have included outfitters, guides, environmental organizations, resident's associations, and individuals. The board has awarded full participation rights to a Municipal District that did not pass the standing test but was involved in the emergency response plan for a project.[19]

(60) The value of clear decisions from the ERCB is tempered by concern with the soundness of decisions made in the absence of full public participation.

The "genuine interest" approach to standing

(61) This "genuine interest" approach to standing requires that the participant demonstrate a genuine, legitimate, tangible, or bona fide interest or concern in the matter to be decided. The genuine interest test strikes a balance between bringing issues forward and screening out frivolous, unmeritorious challenges. The Supreme Court of Canada holds that:[20]

> …the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue.

(62) The legal test for a genuine interest approach to determining standing before the courts is settled and comprises of three aspects:[21]

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[17] Petro-Canada, Prehearing Meeting, April 16, 2008 (ERCB decision 2008-029)
[18] *Ibid.*
[19] *Ibid.*
[20] *Canadian Council of Churches v. R.* [1992] 1 S.C.R. 236.
[21] *Finlay v. Canada* [1986] 2 S.C.R. 607.

- a serious issue;
- a genuine or legitimate interest in the decision; and
- no other reasonable or effective way for the matter to be heard.

Courts do not grant public interest standing on issues that can be addressed by private litigants.

(63) Demonstrating genuine interest generally requires a history of involvement in an issue or an established record of "legitimate concern" for the interest to be represented. An example in the Alberta context is provided by *Western Canada Wilderness Committee v. Alberta*.[22] A non-governmental organization was found to have a genuine interest in a timber resource agreement between government and a private party because the organization was incorporated for purposes related to wilderness in western Canada, including education, information distribution, preservation, conservation, and protective status.

(64) The British Columbia Utilities Commission (BCUC) is legislated to provide standing to "any person whom the commission determines to have an interest in the matter".[23] Like the AUC, the BCUC has a mandate to determine the public interest in project approvals and makes binding decisions in quasi-judicial proceedings. Standing has been granted to environmental organizations under the BC rule.

(65) The "genuine interest" approach could be imbedded in the "directly affected" approach currently used by administrative tribunals in Alberta. The direct and adverse effect on public interest organizations is, in some instances, more poignant as project impacts often have direct connections with the central matters of concern of these organizations, i.e. the decisions fundamentally impact an organization's *raison d'êtres*.

Beyond "genuine interest", the federal environmental assessment approach

[22] *Western Canada Wilderness Committee v. Alberta (Provincial Treasurer)* [1994] 108 D.L.R. (4th) 495; 2 W.W.R. 378.
[23] *Utilities Commission Act*, RSBC 1996, c.473, s.1, 86.

(66) Participation in a federal review panel pursuant to *CEAA* is not subject to legal tests or formal standing decisions. Any person may register as a participant, and any registered participants may cross-examine all other registered participants.

(67) Some criteria for participation in federal proceedings, though not critical to standing, are provided in the Federal Participant Funding Program. Generally, eligibility is determined based on a demonstrated interest in the issues and potential contribution to the hearing process. This policy is favourable to groups and organizations. The invitation to apply for federal funding in the Dunvegan proceedings was extended to:[24]

> Individuals, Aboriginal groups and peoples, and incorporated not-for-profit organizations who are able to demonstrate that they met at least one of the following criteria:
>
> > "have a direct, local interest in the project, such as living in or owning property in the project area;
> >
> > have community knowledge or Aboriginal traditional knowledge relevant to the EA; and/or
> >
> > plan to provide expert information relevant to the anticipated environmental effects of the project."

(68) Parties ineligible to apply included for-profit parties, those with a direct commercial interest in the project, and government representatives other than Aboriginal governments. Therefore under federal standards it is possible to receive funding without being directly affected and possible to be excluded from funding despite being directly affected.

(69) Federal involvement in the review of a hydroelectric application increases public participation opportunities. Federal environmental assessments are tiered, with participation increasing as the assessment becomes more in depth. Hydroelectric power generating stations with a production capacity of 200MW or more require a comprehensive study, which requires public consultation. The responsible federal authority may also request a review panel with

[24] Participant Funding Program Review Committee Report, CEAA Registry #04-07-2996, Doc #30 2008-07-17.

public hearings. The Canadian Environmental Assessment Agency states that review panels:[25]

> ". . . involve large numbers of interested groups and members of the public by allowing individuals to present evidence, concerns and recommendations at public hearings."

(70) At the Dunvegan hearings, the same environmental coalition that was denied standing by the AUC/NRCB panel was able to participate fully after the provincial-federal panel was convened. Coalition member Alberta Wilderness Association (AWA) was deemed an interested party and granted federal funding. The Rationale for Allocation found that the AWA "could contribute new and applicable information to the EA process and that it had the capacity to carry out the proposed activities."[26]

C. Reasons for an enhanced approach to standing

(71) The ELC submits that an enhanced and more inclusive approach to standing is justified for two primary reasons. First, the information needs for an appropriate public interest decision are high and should be reflected in an inclusive rather than an exclusive process. Second, a more inclusive approach to standing will minimize legal challenges that are otherwise likely in light of recent Alberta Court of Appeal judgements.

Effective public interest decisions are fully informed

(72) The current approach to determining standing at Alberta's regulatory agencies contradicts directly with their public interest mandates. It is impossible to meet a public interest mandate with the "directly affected" test because the only parties are those with private interests.

(73) Directly affected parties are often not suited to represent public interests. This is true in the case of both local landowners and the

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[25] Canadian Environmental Assessment Agency, *Basics of Environmental Assessment*, available online at: http://www.ceaa.gc.ca/default.asp?lang=En&n=B053F859-1#panel

[26] *Participant Funding Program Review Committee Report*, online: Canadian Environmental Assessment Agency<http://www.ceaa.gc.ca/050/document-eng.cfm?document=28095>.

project proponent. Either party can be in a conflict or interest or suffer credibility issues when addressing public interests.

(74) The interests of private parties may not be aligned with public interests. Broad public interests often cannot be subsumed by narrower private ones.

(75) It is unfair to require private interveners to assume all responsibility for public interests. Landowners can see their personal interests can be met by compensation or accommodation.[27]

(76) Directly affected individuals may also lack the resources and technical knowledge to bring forth information about public interest issues. Further, directly affected individuals with personal concerns may not have the incentive to form groups and address broader issues. Standing decisions against groups can work against individuals who would otherwise succeed. In *Bartlett v. Alberta (EUB*)[28] an individual was denied a hearing on account of the individual having belonged to an internally divided group that had withdrawn its objection to an application.

(77) It is also unreasonable to rely on the proponent for identification of the public interest. The proponent is usually a corporation whose legal duty is to its shareholders and it may contest public interest interventions. At the second Dunvegan proceedings, the proponent contested the standing of the CROSS group even though the two parties were in consultations and members of CROSS had standing at the first hearing.

(78) Many matters of public interest are areas that include both direct and indirect affects. Many health, safety and environmental concerns may be cumulative or less directly related to a single approval; however, their impacts are still quantifiable. Some interests are more difficult to quantify, such as intergenerational interests.

(79) The current interpretation of "directly affected" is especially ill suited for the hydroelectric context. Section 9(3)(b) of *HEEA* provides that there will be no hearing if:

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[27] In the second Dunvegan proceedings, two local residents who had standing formally withdrew from the proceedings before the hearing, stating that their concerns had been addressed.

[28] *Bartlett v. Alberta (Energy and Utilities Board)*, 2005 ABCA 340.

> …the Commission is satisfied that the applicant has met the relevant Commission rules respecting each owner of land that may be directly and adversely affected by the Commission's decision on the application.

(80) One cannot assume that the absence of directly affected landowners ensures that the project is in the public interest. The public interest determination for projects situated away from populated areas or on public lands must not be assumed.

(81) The directly affected test also causes the public interest criteria to be skewed towards the economic over the social and environmental. This occurs because the only participants with party status are the proponent and those with theoretical power to potentially stop the project based on the infringement of property rights. Even economic considerations will be too narrow absent indirectly affected persons like tourism operators or recreational users.

(82) The need to be "adversely" affected, by limiting the nature of information becoming before the AUC, denies an understanding of what is required for a good project or how it could be done better.[29] Ultimately the test gives no consideration to participant capacity, knowledge or contribution and denies the board the knowledge to make the best decision.

Alberta Court of Appeal standing consideration

(83) Decisions and orders from the AUC, NRCB and ERCB may be appealed to the Court of Appeal on a question of jurisdiction or question of law. [30] Decisions and appeals from one agency can be persuasive and even binding on the others.

(84) The AUC's public interest mandate and standing determinations will be considered by the Alberta Court of Appeal three times in only two years of existence. Appeals from the ERCB are even more common.

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[29] This raises the collateral issue of having government agencies fully engaged in the Commission processes. Alberta Transportation and Alberta Environment did not attend the final Dunvegan hearing and the AUC did not exercise summons power. The panel collected questions from interveners with a specific interest in the information held by those agencies and conducted a written interrogatory. Questions for Environment related to the completeness of the EIA. Questions for Transportation related to river crossings. The agencies had information required for the meaningful participation of the public intervener group CROSS, who asked for an adverse inference to be drawn based on non-participation.

[30] *Supra* note 14 at s. 29(1).

Frequent appeals can be attributed to a high volume of applications but they also flow from contentious decisions, including those over standing.

(85) The standing test for being "directly and adversely affected" has two aspects: a legal aspect and a factual aspect. As confirmed by the Alberta Court of Appeal in the case of *Cheyne v. Alberta (Utilities Commission)*.[31]

> The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.

(86) In doing so the AUC is inheriting unsettled questions of law. Conflicting decisions on appeal from different agencies create uncertainty over what cases to follow. The case of *Kelly v. Alberta (ERCB)* took a broad view of the standing test.[32] The court overturned a denial of standing and remitted the matter to the board with explicit directions. The Court suggested that the right to notice and consultation under board directives (Directives 56, 60 and 71) established that the appellants had a "right or interest" known to law and therefore passed the first part of the test. The Court further held that the second part of the standing test does not require a person to show a potential effect on them different or greater than the general public. It was sufficient to show that they could be affected and prejudiced. Residing in an area of health and safety concern was held to be sufficient.

(87) In light of *Kelly*, the determination of how a "right or interest" is known to law becomes increasing difficult as the determination of of right may be created by Board documents (if they are sufficiently prescriptive). Further complexity regarding the nature of the right that will be recognized was created by the Court of Appeal in the case of *Cheyne v. Alberta (Alberta Utilities Commission)*, where the Court directly limited the relevance of specific AUC Rules to the standing determination.[33] Taken together, *Cheyne* and *Kelly* likely establish

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[31] *Cheyne v. Alberta (Utilities Commission)* 2009 ABCA 348 citing *Dene Tha' First Nation v. Alberta (EUB)* 2005 ABCA 68. at para. 10.
[32] *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 3.
[33] *Cheyne v. Alberta (Utilities Commission)* 2009 ABCA 348 at paras 27-29.

that the interests on which standing is to be determined include health and safety.

(88) Whether economic interests should be treated more broadly is an issue on which leave to appeal has been granted in *ATCO Midstream Ltd. v. Alberta (Energy Resources Conservation Board).*[34] This decision may further elaborate on the nature of legal "rights or interests" that may warrant being granted standing.

(89) The need for "adverse" effects is an emerging litigation issue. Since the *Kelly* case, the ERCB has found landowners with health and safety interests were not "adversely" affected by living in an area of potential evacuation measures because evacuation has a "beneficial impact" on the evacuated persons.[35]

(90) Allegations of unfairness and denial of rights to a hearing contributed to the granting of leave to appeal from the Montana Alberta Tie Line hearings.[36] In granting leave the Court considered the enactment of the *AUCA* and its public interest mandate.

(91) Leave to appeal a denial of standing under *HEEA* is currently granted in at least one case.[37]

(92) These cases raise specific issues about how arguments about how a "right or interest" is known to law may result in an increase in case by case appeals.

D. Alberta's standing approach must reflect the public interest

(93) In a comparison of Canadian jurisdictions, law professor David Boyd notes that: [38]

> Only in rare cases is public standing denied. In some provinces, however, such has Alberta, standing is limited by some environmental laws to individuals who are "directly affected" by a project or activity.

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[34] *ATCO Midstream Ltd. v. Alberta (Energy Resources Conservation Board)* 2008 ABCA 231. Both appellants are gas companies who seek economic protection from the authorization of a new upstream gas project.
[35] ERCB disposition letter, Review Application No. 1640831 (Application No. 1623169) unpublished.
[36] *Sincennes v. Alberta (Energy and Utilities Board),* 2008 ABCA 255.
[37] *Maxim Power Corp. v. Alberta (Utilities Commission)* 2010 ABCA 122.
[38] Boyd, David, *Unnatural law* (Vancouver: UBC Press, 2003).

(94) Others note that the restriction of standing to the "directly affected" at Alberta boards came about at the same time that standing was becoming less of a barrier to public participation in other jurisdictions.[39] In many jurisdictions, the main legal barrier to public participation is now costs.[40]

(95) Boyd calls the restriction of public standing in environmental decision making an example of "systemic weakness".[41] He comments that “some legislated participation tools are designed to fail through high thresholds, short time periods, and complex rules”.

Reducing conflicts to increase regulatory efficiency

(96) The AUC has the power to enter joint reviews or cooperative proceedings with other bodies inside or outside Alberta.[42] Similar powers are provided to the NRCB and the federal government. The review of projects under shared provincial and federal jurisdiction is subject to the *Canada-Alberta Bi-Lateral Agreement for Environmental Assessment Cooperation* (2005). The Agreement provides that if both Canada and Alberta determine that public hearing is required, then there will be a Joint Panel Review. There are at least two possible public interest conflicts in a joint panel.

(97) First, the panel members have different mandates and a potential for a conflicted decision. *CEAA* does not prescribe a mandate of environmental considerations rather than a public interest one. Under *CEAA*, a panel's primary task is to consider whether the project is likely to cause any significant adverse environmental effects. A project could be in the public interest but not warrant approval, or it could have no significant adverse environmental effects and still not be in the public interest.

(98) Second, agreements must preserve each government’s own legislative requirements in a shared process. The general rule in a case of shared jurisdiction is to comply with all relevant laws. The Canada-Alberta agreement provides for both "the identification of affected people" and "public involvement". Section 10 provides that:

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[39] J. Sherman, M. Gismondi, and M. Richardson, “Not Directly Affected: Using the Law to Close the Door on Environmentalists” (1996) 31:1 *Journal of Canadian Studies* 102 at 103.
[40] Boyd, *supra* note 27.
[41] *Ibid*., at 212 and 229.
[42] *Supra* note 14 at s. 16.

"if a public hearing is held, an opportunity for members of the public to participate in the hearing."

(99) Joint panels are convened under subsequent agreements to provide for hearing rules, panel obligations, and applicable standards, but must comply with the master agreement. The Dunvegan agreement included the following terms:[43]

- All hearings shall be public and the review will provide opportunities for timely and meaningful public participation.
- The review would be conducted so as to discharge the obligations of each jurisdiction's agencies, including those of the NRCB under the *NRCBA*, those of the AUC under the *AUCA* and *HEEA*, and those set out in *CEEA* and the Terms of Reference for the specific environmental assessment.
- The Panel would conduct its public hearing according to the AUC Rules of Practice.

(100) Following the Agreement, the joint panel issued a new Notice of Hearing. The Notice called for submissions to include statements on intervener rights and cited the "directly and adversely affected" standard. Public interest groups were still able to participate fully following the federal funding determination.

(101) The Dunvegan hearings suggest that non-compliance could result from using AUC rules in a joint process. It might not be possible to meet federal standards on standing, notice, and costs in a hearing that follows AUC rules. Federal parties cannot contract out of their statutory obligations with an agreement for the AUC rules.

Positive steps towards improving public participation

(102) The final Dunvegan hearings in 2008 were ultimately broadly attended and in closing the panel recognized and thanked the diverse participants.[44] At the pre-hearing stage the panel put the proponent on notice to produce further information on issues of concern to

[43] *Agreement to Establish a Joint Panel for the Glacier Power Dunvegan Hydroelectric Project* - CEAA Registry # 04-07-2996.
[44] CEAA registry #04-07-2996, Transcripts – September 26, 2008 – doc #125 - 2008-09-25, remarks of Chairperson at page 188.

participants. At the hearing stage it considered that the project could have far ranging impacts

(103) The AUC has since issued a notice of Enhanced Process on the Heartland Transmission Line. The enhanced process creates a presumption of standing for all who reside or own property within 800 meters of the proposed transmission line. A statement of intent to participate will still be required of each party and standing may be challenged on a case by case basis. Further components of the enhanced process include a range of participation options for those with standing and information sessions on the process.

(104) This approach to hearings sets out processes early on and may promote group formation or the identification of class concerns. If standing disputes follow, these may assist in settling the question of the effect of pre-determinations on standing.

E. Standing determinations need clarity in process

(105) There is a need to provide further guidance and clarity around notices and process for standing determinations before the AUC. The *AUCA* provides no guarantees of a hearing in any circumstances, even on the preliminary question of standing. All participation rights depend on a pre-determination by the AUC made with little legislated guidance. Potential interveners must navigate a layered regime consisting of two statutes, two rules, discretionary determinations and confusing common law tests. It can be unclear what supporting evidence is required of participants and at what point in the proceedings. The critical legal requirements to be granted standing before the AUC may be misunderstood by members of the public.

(106) *Rule 001* provides that those who wish to participate in proceedings must submit a Statement of Intent to Participate. It requires a submission on "the manner in which the intervener's rights may be directly and adversely affected" and a brief description of how an approval of the application would directly and adversely affect them.[45] What amounts to “direct and adverse effects on rights” is not defined in legislation or the Rules and must be made on a case-by-case basis.

(107) Notice of the Dunvegan hearings may have caused confusion over the use of the same test for costs and standing. The Notice clearly

[45] Alberta Utilities Commission, *Rule 001*: Rules of Practice.

invited "directly affected" participants to make submissions on funding but was not clear in a call for submissions on standing.[46] One participant's filed submission cites uncertainty in the case of parties who might not pass the directly affected test for costs, but indicated that they would self fund in order to participate.[47] The Pre-Hearing Conference Report notes that the Panel had "received very little information from the majority of parties and stated concern that numerous attendees at the pre-hearing conference expressed an intention to intervene at the hearing without having asked for a cost determination".[48] The Panel invited participants to obtain further information from staff and make further representations on the funding issue but not on standing.

(108) The Dunvegan records indicate a lack of clarity over the purpose of pre-hearing conferences as a forum to determine standing. The Panel's Memorandum of Decision (2001) indicates parties who would and would not have standing but little information on how those determinations were made. Standing was denied to the environmental organizations but awarded to local residents who would later form CROSS. Likewise in 2008, the panel's report on the pre-hearing conference listed several "preliminary and procedural matters" for the conference to address. These did not include standing. The report lists the parties with standing and "other" participants, and articulates the hearing rights for each of the two classes of participant, but there is little articulation of the factors considered in standing determinations.[49]

(109) The AUC should adopt and codify formal processes around notice, preliminary hearings and reasons around standing determinations.

F. Process recommendations

(110) The AUC requires principles to determine public participation at hearings. These principles must guarantee all necessary participation while ensuring that interventions are optimal. Most importantly,

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[46] See *supra* note 2. CEAA Registry #04-07-2996- Notice of Pre-hearing meeting (pre-hearing report) - exhibit 1 - doc 32.
[47] *Ibid*. CEAA Registry #04-07-2996 - exhibit 7 - doc 38.
[48] *Ibid*. CEAA Registry #04-07-2996 – (Pre-Hearing Meeting Report, January 28, 2010) doc 54.
[49] The report indicates that the status of CROSS was contested and decided at the pre-hearing conference. CROSS was awarded standing on account of members having qualified as directly affected in the prior proceedings.

these principles must reflect diverse impacts on public interests and provide standing to parties able to express those interests.

(111) Legislated criteria in the *AUCA* or *HEEA* would be helpful. Criteria could also come through regional planning or AUC rules. New prescribed criteria may not even be necessary. The public interest mandate as it exists is sufficiently broad that the AUC might be able to take a broader approach to standing without exceeding its jurisdiction. The AUC could establish criteria to consider in determining directly affected within its own rules. However, the currently legislated rights approach to standing determination would continue to be expressly incompatible with the public interest mandate.

(112) We recommend that the "directly and adversely affected" requirement for standing be repealed or replaced. Alternatively, the ELC recommends altering interpretation of the "directly and adversely affected test" to include those parties who are able to display a genuine interest in the outcome formal standing in hydroelectric power generation proceedings.

(113) The ELC recommends that standing and regulatory process regarding the standing be altered as follows:

1. **A "genuine interest" approach to a determination for legal standing should be adopted.** We support the use of this test for costs and notice as well. Genuine interest is the best option because broadens participation while maintaining the screening rigour of a legal test. The screening function would promote optimal interventions. The legal implementation of the genuine interest test could be as straightforward as substituting words within the existing framework.

2. **Those failing to meet the genuine interest test are able to submit information in hydroelectric developments where the information is relevant to the proceeding.** The goal for regulatory processes must be to ensure the best informed decision with the highest level of efficiency. In this regard, all relevant information in a hearing process should be considered by the decision maker. Participants could be sorted or clustered based on concerns or contributions to the process. "Parties" would be those with affected personal interests or private rights grievances based on a causal connection to the project. These parties could be directed to pre-hearing

mediation. "Interveners" would be those who hold a valid interest in the issues or can assist the proceedings.

3. **Joint proceedings should follow the broadest participation standards.** Cooperative proceedings should not reduce rights that would be afforded under one agency's legislation. Applying the broader standards will ensure compliance with all standards. This rule should apply to standing, costs, notice, and all procedural elements. Adopting the broadest applicable approach will provide insurance against legal disputes and ensure that the AUC has before it the information required to make the best decision.
4. **Pre-hearing determination, reasoning and notice for standing determinations should be formalized**.

Part III: Jurisdictional issues in hydroelectricity power generation development in Alberta

A. Introduction

(114) The purpose of this part is to identify regulatory issues that may be encountered when considering projects with inter-jurisdictional considerations. In particular, we present a study that illustrates the legal uncertainties which arise where a hydroelectric project involves environmental impacts across jurisdictional boundaries. Also highlighted are the limitations of the provincial and federal governments' respective roles in hydroelectric power generation development. Respecting constitutional boundaries and responsibilities in regulatory processes is required if conflicts are to be avoided.

(115) Alberta regulators have broad jurisdiction to regulate hydroelectric power in Alberta. These powers are subject to federal jurisdiction to regulate fisheries and navigation, as well as other matters. While some minor extra-provincial impacts are permissible, the provincial powers to regulate hydro developments with inter-provincial impacts are not unlimited. Alberta regulators may only regulate matters in the province.

(116) The constitutional and interjurisdictional issues that may arise further emphasize the importance of regulatory processes to be fully informed about potential impacts of a proposed project, not only within the province but also downstream. In this regard the public

interest determination criteria of the AUC and incorporation of an appropriate standing test will facilitate fully informed decision making, thereby minimizing the chance for constitutional litigation.

B. Constitutional jurisdiction and hydroelectricity: regulatory purpose not projects

(117) The Canadian Constitution allocates what are called "heads of legislative power" between the federal and the provincial governments. If one level of government passes a statute or regulation governing a matter over which the Constitution gives the other level exclusive power to legislate, a court may strike down or read down the law. The Constitution, with a few narrow exceptions, allocates legislative purposes to each level of government, not things or activities. In Canada the scope of federal and legislative powers is governed by sections 91 and 92 of the *Constitution Act, 1867*.[1]

(118) An activity like a hydroelectric power development may have many aspects, some of which are federally regulated and some of which are provincially regulated.[2] The province may have jurisdiction to pass laws relating to property damage from an activity, while the federal government has jurisdiction to pass laws relating to fisheries issues from the same activity. The activity itself is neither federal nor provincial. The salient issue is always whether the purpose of the legislation that regulates hydroelectric development is federal or provincial. The federal government could not enact legislation solely to protect property within the province, and the province could not enact legislation solely to protect fish. However, laws from the two orders of government are valid in their own spheres even if they overlap in an incidental way. In other words, it might be possible that a provincial law with a main objective to protect property also protected fish. Conflicts arise only when a provincial law goes to the core of a federal topic, or it is impossible to comply with both a provincial and a federal law in practice or in purpose at the same time, in which instance the federal law prevails.[3]

C. Provincial jurisdiction over hydroelectricity

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[1] *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.
[2] *Law Society of British Columbia v. Mangat*, 2001 SCC 67 at paras 48-50 and *Hodge v. The Queen* (1883), 9 App. Cas. 117 at 130.
[3] These are referred to as the doctrines of interjurisdictional immunity and paramountcy.

(119) Water and watershed management is not a subject in the constitution. The most important provincial powers relating to water management are the management of natural resources within the province, including Crown land and water, property and civil rights, and matters of a local and private nature. [4] Provincial governments also have jurisdiction over the generation of electricity in the province to rely upon in hydroelectric developments.

(120) Alberta, along with Saskatchewan and Manitoba, obtained jurisdiction over natural resources within their boundaries through the *Natural Resources Transfer Agreement* (*NRTA*) of 1930, as embodied in the *Constitution Act, 1930*. The *NRTA* provided the prairie provinces the rights over Crown land, mines and minerals, and water (although uncertainty around the granting of water rights resulted in a 1938 amendment to the *NRTA*).[5]

(121) The province subsequently enacted the *Public Lands Act* which declares that the Alberta government has the administration and control of the title to the beds and shores of all "permanent and naturally occurring bodies of water, and all natural rivers, streams, watercourses and lakes".[6] The ownership rights of a province are like those of a private owner, and include an exclusive right to fish in those waters and rights to use the water. As an owner, the province has the power to administer rights over water and the beds of waters, such as granting land and water rights. It is possible that the province also has some jurisdiction to pass laws relating to water flows and pollution as part of its management of public lands.

(122) In Alberta, the provincial government also owns the water itself by virtue of the operation of the *Water Act* declaring provincial ownership of surface and ground water. This provides additional ownership rights that can be relied upon to manage and allocate water. It is significant to understand that provincial ownership rights,

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[4] *Constitution Act, 1867*, *supra* note 1, s.92 (5), (10), (13), (16), 92A and s.109 and the Natural Resources Transfer Agreement, *infra*.

[5] See *Natural Resources Transfer (Amendment) Act*, S.C. 1938, c. 36. Interestingly this Act never resulted in a statute from Britain, as was the case for the original NRTA (the *British North America Act, 1930*). Previously the Supreme Court of Canada, in *Re Provincial Fisheries* ((1895), 26 S.C.R. 444) found that under section 109 of the Constitution, the beds of all publicly owned waters except harbours vest in the provinces by virtue of being related to property within the province.

[6] *Public Lands Act,* R.S.A. 2000, c. P-40 at s.3.

privileges, and powers in water and beds of waters may be severely constrained by aboriginal rights, where they can be made out. [7]

(123) The effect of this is that the Alberta government can pass a wide variety of legislation regulating the use of water and lands under water. However it is significant to note that much of this relies on the powers of ownership to administer property and property rights.

(124) Provincial jurisdiction over "property and civil rights" gives provincial governments wide jurisdiction over matters relating to private law. The province has enough powers under this provision to legislate regarding civil causes of action related to the management of water (nuisance, negligence, riparian rights, and environmental rights) so long as it is within the province.[8] Property and civil rights jurisdiction also enables provincial legislatures to regulate a particular trade.[9] Jurisdiction over property and civil rights should also allow the province to create new property rights, for example in the water itself, and to abolish rights.

(125) For anything further relating directly to water management, the province must rely primarily on its residual powers over matters of a "merely local or private nature".[10] To satisfy this, it must clearly be a matter of a merely local or private nature in the province. Issues having an inherently interprovincial dimension or that are already covered by federal powers will not be captured by this provision. This power is of importance only where an issue cannot be allocated to any other federal or provincial head of power.

(126) With respect to hydroelectric power operations themselves, there are two other important provincial powers. The Constitution provides that each provincial legislature has the power to make laws in relation to the "development, conservation, and management of sites and facilities in the province for the generation and production of

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[7] Provincial ownership and jurisdiction is qualified because these powers are subject to any unextinguished aboriginal title and rights see *Walpole Island First Nation v. Canada* (A.G.), [2004] O.J. 1970 (Sup. Ct. J.) for one such claim. This makes the exercise of provincial jurisdiction *prima facie* subject to a duty of consultation with First Nations where credible claims to such rights are asserted. If a claim were successful the ownership, or some component of it would be under exclusively federal jurisdiction.

[8] *Interprovincial Cooperatives v. Dryden Chemicals*, [1976] 1 S.C.R. 477

[9] This is in contrast to the federal Trade and Commerce power. See *Electric Commissioners v. Snider*, [1925] AC 396 (P.C.)

[10] *Schneider v. The Queen*, [1982] 2 S.C.R. 112 regarding the *Heroin Treatment Act* remains the most clearly reasoned decision regarding the use of this provision.

electrical energy."[11] This provision only came into place in 1982. This also allows provinces to enact laws for electricity export to other provinces. This provision is difficult to interpret as there has been very little consideration of it in the courts. However, it is important to consider that, on its face, it does not provide exclusive jurisdiction over anything other than the "development" and "management" of sites and facilities. It accordingly allows the provinces to enact laws regulating site development and management of sites that are within the province.[12] This power is capable of supporting Alberta legislation such as the *Hydro and Electric Energy Act*[13], and the *Alberta Utilities Commission Act*.[14]

(127) Provinces also have powers over local works and undertakings other than "works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province" not including any works that are declared to be federal in federal legislation. It is widely understood that even before 1982 this should have been sufficient to support the regulation of electrical generation works development and management.

(128) Works have been defined as physical things, while undertakings typically relate to organizations such as companies. However, many federal telecommunications and broadcasting cases have interpreted "work" as the entire activity, since there is only a limited physical project associated with these.[15] Accordingly, whether a hydroelectric project is a "local" work or an "inter-provincial" work will be a question that must be resolved based on the facts of the project itself and the scope of activities that a court determines are included in the "work."

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[11] *Constitution Act*, *1867*, *supra* note 1 s.92A.

[12] see *Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327*, asserting that the intention of 92A was to prevent electrical generation enterprises from "accidentally" becoming interprovincial undertakings by virtue solely that they export electricity or are interconnected, this would appear to be the case. However this interpretation is still questionable if it is interpreted as eliminating federal jurisdiction over interprovincial electricity works, as the court appears to do because 92A very clearly is limited to sites and facilities "in the province." In this case the SCC held that the federal declaratory power to designate nuclear power a federal work, still operated to override provincial management under 92A.

[13] *Hydro and Electric Energy Act*, R.S.A. 2000, c. H-16

[14] *Alberta Utilities Commission Act,* S.A. 2007, c. A-37.2

[15] P. Hogg, *Constitutional Law of Canada* , looseleaf 5th Supp. v.1 (Toronto: Thompson Carswell, 2009) at 22-4

Provincial jurisdiction applied

(129) Under various powers, the province of Alberta regulates hydroelectricity projects. In addition to regulation by the Alberta Utilities Commission (AUC) under the *Hydro and Electric Energy Act* requiring authorization for the facility as both a "hydro development" and a "power plant", the Natural Resources Conservation Board (NRCB) regulates hydroelectricity dam as a "water management project" under the *Natural Resources Conservation Board Act*. [16] In both cases the regulator must determine whether the project is in the public interest.

(130) The Alberta *Environmental Protection and Enhancement Act* (*EPEA*) designates the construction, operation, or reclamation of a plant, structure or thing for the generating of hydro-electric power as an activity under the Act.[17] The *EPEA* requires an environmental assessment for the construction, operation, or reclamation of a hydroelectric power generating plant with a capacity of 100 megawatts or greater.[18]

(131) The Alberta *Water Act* treats a hydroelectric development as a "work" under the *Act*.[19] The *Water Act* requires a licence for the net depletion of water (for example at a headpond) and the operation of the works.[20] A *Water Act* approval is also required prior to carrying out any activities associated with the water body. This may include the construction of the headworks and associated structures as well as bridges and culverts necessary for access. The need for *Water Act* approvals and licenses also means that the hydroelectric project is a regulated activity under the *EPEA.*[21]

(132) Some provincial laws apply primarily to the physical construction of the project (application to physically construct a dam and a reservoir, power plant, etc.) while other Alberta laws apply to the broader environmental or public interest issues in hydro development, such as environmental assessment and AUC and NRCB approvals or water allocation.

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[16] *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3.
[17] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, shed. s.2.
[18] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/1993. Schedule 1 (Mandatory Activities).
[19] *Water Act*, R.S.A. 2000, c. W-3.
[20] *Ibid,* s. 6(1), 49(1).
[21] *Environmental Protection and Enhancement Act, supra,* note 19, Sched. s.9(1).

D. Federal jurisdiction over hydroelectricity development

(133) Despite the extensive range of powers allocated to Alberta, it is important to recognize that in its essence, hydroelectric power is neither federal nor provincial. Some aspects of hydroelectricity are regulated by valid federal legislation such as the *Navigable Waters Protection Act*,[22] *Fisheries Act,*[23] *Canadian Environmental Assessment Act,*[24] and the *Migratory Bird Convention Act, 1994.*[25] In other cases, the actual hydroelectric project may have aspects that are of national concern,[26] affect federal and First Nations lands or are inter-provincial in nature, and these aspects may be under federal jurisdiction.[27] One example would be federal hydropower under the *Dominion Water Power Act*[28] and federal jurisdiction over exports under the *National Energy Board Act*.[29]

(134) Federal constitutional jurisdiction over navigation of waterways and inland fisheries is of central relevance to the discussion of hydroelectric power development. The Canadian Constitution specifically grants the federal government the power to regulate the public right of navigation.[30] This power is exercised through the *Navigable Waters Protection Act*.[31] The federal power over navigation is constitutionally very broad. It includes the ability to legislate with respect to all navigable waters and works of navigation, as well as other areas of maritime law.[32]

(135) In the *Friends of the Oldman River* case, the Supreme Court of Canada held that the public right of navigation was paramount over other provincial powers. The court also found that the provinces are "constitutionally incapable of enacting legislation authorizing an interference with navigation."[33] The court noted that:

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[22] R.S.C. 1985, c. N-22.
[23] R.S.C. 1985, c. F-14.
[24] S.C. 1992, c. 37.
[25] *Migratory Birds Convention Act,* 1994, S.C. 1994, c. 22.
[26] *R. v. Crown Zellerbach Canada Ltd*., [1988] 1 S.C.R. 401.
[27] *Constitution Act, 1867*, *supra* note 1 s.91 (1A), (10), (12), (27) and preamble, known as the Peace Order and Good Government clause (POGG), also see 92(10).
[28] R.S.C. 1985, c. W-4.
[29] *National Energy Board Act*, R.S.C. 1985, c. N-7, The power to review electricity exports allows the Board to consider the environmental effects of the project.
[30] *Supra* note 1 at s.91(10)
[31] *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.
[32] *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.
[33] *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3.

> The Crown in right of Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. It follows that the Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval.
>
> ... Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. ... The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.

(136) The Supreme Court's characterization of navigation as inherently inter-provincial in character and gives some insight into how the constitution regards flow management generally. The perspective of functional integration should be no different for other aspects of inter-provincial flows. In a very significant case, *British Columbia v. Lafarge,*[34] the Supreme Court of Canada further clarified that provincial laws can impact navigation and shipping only where the impact doesn't go to the core of navigation and shipping and where the provincial law would not frustrate the purpose of the federal one.[35] In that case, the federal power over navigation ousted ordinary provincial jurisdiction over land use planning generally, with the court commenting that navigation and shipping powers may bring within federal jurisdiction a matter otherwise subject to provincial jurisdiction if that matter is "closely integrated" with shipping or navigation.[36] In that case, an otherwise valid municipal bylaw was constitutionally inapplicable to the Vancouver port.

(137) What *Lafarge* demonstrates is that where a valid provincial law regulates an activity in such a way that it might frustrate federal objectives over navigation and shipping, it can be "read down" so

[34] 2007 SCC 23
[35] *Ibid.* at paras 83-85.
[36] *Ibid.* at para 66.

that the provincial law does not apply to that activity. This would in principle apply as much to hydroelectric projects as it does to ports.

(138) Federal jurisdiction over fisheries extends to issues of fish habitat and water pollution under the federal *Fisheries Act*. Federal legislation regulates fish habitat alterations and pollution generally, as well as related issues. This jurisdiction is broad in scope.[37] Hydroelectric dams will trigger federal environmental assessments where fish habitat alteration permits are required under the *Fisheries Act*.[38] The federal power over fisheries in the Constitution is very broad, and includes conservation and protection of fish species as well as the regulation of fisheries as a resource, including a common property resource. This includes all aquatic life as well as commercial interests and aboriginal rights, sports, and recreation.[39] The result is that the federal government will need to authorize the harmful alteration, disruption, or destruction of fish habitat from works or undertakings, including hydroelectric dams under the *Fisheries Act.*[40] In doing so the federal government can take into consideration a wide range of issues canvassed under federal environmental assessment legislation and impose a range of conditions reflecting that assessment.[41]

(139) Under sections 20-22 of the *Fisheries Act*, the Minister of Fisheries and Oceans can regulate fish-ways in dams, including provisions for keeping waterways open and unobstructed for fish passage, and provides for a positive obligation on any owner or occupier of any obstruction to provide "sufficient flow of water" for fisheries purposes (safe passage and flooding of spawning grounds), as determined by the Minister.

(140) The federal government also has powers over the conservation of migratory birds by virtue of the federal power over treaties, in particular powers to conserve migratory birds under the *Migratory Birds Convention* of 1916, and because migratory birds are a matter

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[37] *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569.
[38] *Fisheries Act*, R.S.C. 1985, c. F-14.
[39] *Ward, supra* note 37 at para 40-41.
[40] *Fisheries Act*, *supra* note 38, s.35(1). For application to hydroelectric development see *Lavoie v. Canada (Minister of The Environment),* 1999 CanLII 8164 (F.C.) denying motion to strike a fish habitat judicial review of federal process for the Twin Falls hydroelectric development proposed by the Kagiano Power Corporation.
[41] See *Imperial Oil Resources Ventures Limited v. Canada (Fisheries and Oceans)* 2008 FC 598, online: Federal Court of Canada <http://decisions.fct-cf.gc.ca/en/2008/2008fc598/2008fc598.html>.

of national concern.[42] This power extends to all the purposes and objectives of the 1916 treaty. The federal government exercises these powers over migratory birds through the *Migratory Birds Convention Act*.[43] This Act prohibits the destruction of eggs and nests and pollution of bird habitat. This legislation is engaged primarily where there is a need to alter bird habitat such as woodland habitat, or where a dam could potentially pollute or disrupt wetlands and riparian areas downstream. Federal migratory birds issues will trigger a comprehensive federal environmental assessment where there is a proposed construction, decommissioning or abandonment in a wildlife area or migratory bird sanctuary of a dam, dyke, reservoir or other structure for the diversion of water.[44] There are designated wildlife areas at Blue Quills, Meanook, Spiers Lake, and Suffield in Alberta and there are four migratory bird sanctuaries at Saskatoon Lake, Richardson Lake, Red Deer and Inglewood.[45]

(141) The federal government also has the power to protect species at risk under the *Species At Risk Act* (*SARA*).[46] The Act mandates recovery planning and habitat protection for species at risk. It prohibits killing, harming, harassing or taking animals that are listed under *SARA*. It also prohibits the destruction of residences of those animals. *SARA* also requires any other federal person or body that may authorize potential destruction of critical habitat can proceed only if all reasonable alternatives to the activity have been considered, and all feasible measures have been taken to minimize impacts. Like migratory birds legislation, *SARA* relies on a variety of federal powers such as over fisheries, federal lands, aboriginal issues, national concern and criminal law, among others.[47]

(142) Screening level basic assessments are triggered by a range of federal approvals under the *Canadian Environmental Assessment Act*.[48] Comprehensive federal environmental assessments are also triggered where a federal regulator approves the construction,

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[42] *Constitution Act, 1867, supra* note 1, s.137 and see *R v. J.D. Irving Ltd.* [2008] 37 C.E.L.R. (3d) 200 (N.B. Prov. Ct.) holding that the MBCA was valid federal legislation.
[43] *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22.
[44] *Comprehensive Study List Regulations*, SOR/94-638.
[45] *Wildlife Area Regulations*, C.R.C., c. 1609 (Canada Wildlife Act).
[46] *Species at Risk Act*, S.C. 2002, c. 29, see particularly sections 41, 49, 74-79, 137.
[47] Prof. Dale Gibson, *Endangered Species and the Parliament of Canada: A Constitutional Question* (Sierra Legal Defence Fund, 1994); Richard Lindgren, *Species At Risk Act, an Overview* (Canadian Environmental Law Association: 2001).
[48] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s.5, s.7 and s.11.

decommissioning or abandonment of a 200 MW or greater hydroelectric generating station, or where a hydroelectric generating station is expanded and would increase in capacity by 200 MW or 50% or more.[49] Comprehensive federal studies are also required for the construction, decommissioning or abandonment of a dam or dyke that would exceed the annual mean surface area of a natural water body by 1500 ha or more, or the expansion of a dam or a dyke that would result in an increase in the surface area by more than 35%. Likewise for diversions of 10,000,000 cubic metres per year or 35% expansions in diversion.[50] Such projects are deemed likely to cause significant environmental effects by the *Comprehensive Study List Regulations*.[51]

(143) The federal government also has important jurisdiction over hydroelectric development and dams on federal lands.[52] Any physical work built in or on a national park, reserve or historic site or canal that is contrary to the management plan of the area will be subject to a comprehensive study under the *Canadian Environmental Assessment Act*. There are also important federal powers over Indian reserves and aboriginal title lands. The *Dominion Water Power Act* regulates hydro developments on federal public lands. It is administered by Canadian Heritage (Parks Canada) in the southern provinces. The Act requires notices and objection periods for applications for large water-power projects. The Minister responsible can deny applications that are not necessary or in the public interest.[53]

(144) The application of the *Dominion Water Power Act* within Alberta is limited by the 1930 *Natural Resources Transfer Agreement*, however a variety of dams in Alberta continue to be authorized under that legislation.[54] The Parks Canada *Operational Policy* indicates that

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[49] *Comprehensive Study List Regulations, SOR/94-638, (Canadian Environmental Assessment Act)* s.4, s.5.
[50] *Ibid*, s.8-9.
[51] *Ibid*.
[52] *Constitution Act, 1867, supra* note 1, s.91(1A).
[53] *Dominion Water Power Regulations*, SOR/76-40.
[54] *Constitution Act*, *1930*, 20-21 George V, c. 26 (U.K.) s.8 reads: Canada agrees that the provision contained in section four of the Dominion Water Power Act, ... that every undertaking under the said Act is declared to be a work for the general advantage of Canada, shall stand repealed as from the date of the coming into force of this agreement in so far as the same applies to undertakings within the Province; nothing in this paragraph shall be deemed to affect the legislative competence of the Parliament of Canada to make hereafter any declaration under the tenth head of section ninetytwo of the *Constitution Act, 1867*.

hydro-electric development proposals on lands administered by Parks Canada may be considered when they are consistent with the protection of cultural and natural resources.[55] Such proposals will be subject to the federal environmental assessment and review process and the *Dominion Water Power Regulations*, as well as to public consultation.[56] The *Kananaskis Falls and Horseshoe Falls Water Power Regulations* [57] and the *Astoria River Water Power Regulations*[58] deal specifically with historic hydroelectric projects in Alberta national parks.

(145) Finally, the federal government has a few other areas of jurisdiction that can affect hydroelectric development, the most important of which is jurisdiction over issues of national concern.[59] National concern is a challenging area of federal jurisdiction that can encompass a variety of issues that go beyond the ability of a single province to effectively regulate. The federal government has powers to regulate water issues of national concern through the *Canada Water Act*.[60] The *Canada Water Act* allows the federal Cabinet to designate water quality management areas where the management of inter-jurisdictional waters has become a matter of urgent national concern. However, this legislation does not cover quantity issues other than in the definition of "inter-jurisdictional waters" and "water resource management".[61] Interestingly, some existing hydroelectric facilities in Alberta's national parks may have been approved under more obscure national and defence schemes.[62] This demonstrates that where there is a sufficient national interest in water quantity flow management, or hydroelectricity, the federal government does have the ability to intervene.

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[55] Parks Canada. *Guiding Principles and Operational Policies*, Part II – Activity Policies: Historic Canals Policy s.3.6, online: Parks Canada <http://www.pc.gc.ca/docs/pc/poli/princip/sec2/part2e/part2e5.aspx>.
[56] *Ibid.*
[57] SOR/97-473.
[58] SOR 76-40.
[59] *R. v. Crown Zellerbach Canada Ltd.*, *supra* note 27, speaking to national concern over environmental matters, and *R.. v. Hydro-Quebec*, [1997] 3 S.C.R. 213, where the Supreme Court of Canada held that environmental protection was a public purpose that could be properly addressed by the federal government through the criminal law power.
[60] *Canada Water Act*, R.S.C. 1985, c. C-11.
[61] *Ibid.*, s.13 & s. 1 "inter-jurisdictional waters" means any waters, whether international, boundary or otherwise, that, whether wholly situated in a province or not, significantly affect the quantity or quality of waters outside the province;
[62] The Lake Minnewanka Hydro Dam in Banff National Park was evidently authorized in part under an order pursuant to the *War Measures Act* in around 1940.

Federal jurisdiction applied

(146) Can the federal government regulate a hydroelectric development within the province? This question was largely resolved in the Supreme Court of Canada ruling in *Friends of the Oldman River.*[63] The answer to this question must be yes. In that case the Supreme Court of Canada held, respecting an irrigation dam in Alberta, that "the provinces are constitutionally incapable of enacting legislation authorizing interference with navigation". The court also noted that "although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here." In that case, the SCC further held that the province of Alberta was bound by federal navigation legislation and noted the inter-provincial character of the power over navigation:

> Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. ... The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.

(147) The courts have widely agreed that constitutional jurisdiction over navigation is broad in scope, and that provincial legislation that could interfere with navigation is constrained whenever it affects an issue integral to navigation or creates difficulties in complying with or applying both federal and provincial legislation.

(148) It is clear from the case law on hydroelectricity, taken as a whole, that some aspects of hydroelectric developments, in particular navigation, can be treated as exclusively federal matters, notwithstanding that they are entirely within the province and notwithstanding that they are for the generation of electrical energy.[64] For example in *Quebec v. Algonquin Developments* the

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[63] *Friends of the Oldman River Society v. Canada (Minister of Transport*), *supra* note 58 (SCC).

[64] Also see *Hewson v. Ontario Power Co.*, (1905), 36 S.C.R. 596 in which a canal expropriation by the federal Canada Power Company entirely within Ontario was

Quebec Superior Court found that although the Constitution gave the province the exclusive power to impose indirect tax on the generation of electrical energy in the province, the Côte Ste-Catherine hydropower station was an exception.[65] The station was on federal lands and the court accepted the argument that the electrical energy provision did not apply to federal property. It held that the federal government may exert control over hydroelectric power to ensure it does not hamper navigation in a waterway using the federal power over navigation. In particular the court noted that this corresponds to Canada's needs for inter-provincial navigation in Canada.[66] This decision is currently under appeal. However, it conforms broadly to other cases on navigation which have tended to find that the navigation, power forms at least some limitation on provincial water and infrastructure, including electricity management in a range of contexts. The case of *Algonquin Developments* confirms a general jurisdiction for hydroelectric projects that are on federal lands.

(149) Notably, no argument was made with respect to provincial jurisdiction over electric power in the case of the Oldman River dam, which was initially an irrigation dam. Under the *Hydro and Electric Energy Act* the dam was not considered a hydro development even though it was designed to accommodate turbines.[67] The case of *Friends of the Oldman River* before the Supreme Court primarily dealt with the extent to which the federal government could conduct an environmental assessment of the dam.

(150) So it can be seen that while hydroelectricity might be considered to be an essentially provincial matter, the federal government has significant powers it may utilize to either promote, manage, or obstruct hydroelectric developments in Alberta. In particular, the ability to grant or refuse permits for navigable waters and fisheries issues grants the federal government wide powers to intervene in hydroelectricity projects, whether or not they are entirely within the province or in provincial waterways.

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held to be a work and undertaking for navigation and for the general advantage of Canada. In that case the undertaking involved electric power generation near Niagara Falls. In that case Davies J. commented that in his view the supply of electric power "over large areas" is necessarily not a local work or undertaking, in this he relied on the possibility of extension beyond the limits of the province.

[65] 2009 QCCS 1198.

[66] *Ibid.* at paras 71-73.

[67] See *Friends of the Old Man River Society v. Energy Resources Conservation Board* (1988), 58 Alta. L.R. (2d) 286 (C.A.)

(151) Also of central relevance to regulatory processes is how an activity and its authorization may impact aboriginal treaty rights and reserve lands, being exclusively federal jurisdiction. Exclusion of aboriginal groups from the process may impact the constitutionality of the regulatory proceeding from a federal-provincial perspective, not just on the basis of the adequacy of consultation. Aboriginal ownership rights may put square limitations on the regulatory jurisdiction of some provincial regulators (where the legislation of that regulator relies constitutionally on provincial ownership for example). Unless these issues are fully canvassed in the regulatory process, the regulator cannot know if it is acting within its constitutional jurisdiction because it will not know who the owner of the affected resources is, and therefore will not know if the affected properties are federal or provincial.

E. Difficulties arising from inter-provincial waterways

(152) A fundamental issue in hydroelectric generation is whether the Alberta Utilities Commission or another provincial regulator such as Alberta Environment can provide an authorization for a hydro development that will have the effect of altering the flow or quality of water to another province or territory. The answer to this question would depend largely on the scope of the project, the scope of the authorization, and the purpose of the law relied on for the authorization.[68] The basic principle in every case is that provinces may only regulate matters "in the province".[69]

(153) If the entirety of the work constituting the hydro development is within the province of Alberta, then it could rightly be the case that the Alberta Utilities Commission can authorize that physical work as a local work or undertaking and as an electrical generation site within

[68] *Reference re Waters and Water-Powers*, supra note 57 at 210-219 per Duff J. (Water Powers);.– whether the federal government can authorize hydro electricity would depend on the purpose for which they did so. The federal government cannot assume control over water-powers not connected with a federal purpose. Federal jurisdiction will depend on the purpose, the character of the power relied on, and the character of the means employed in a particular case. The court did not seem interested in the nature of the river itself (whether provincial or inter-provincial) however they found that if the work extended beyond the boundary of the province, there would be federal jurisdiction.

[69] In English the wording is "in the province" and in French it is "of the province" or "de la province" see *Québec (Procureur général) c. Algonquin Développements Côte Ste-Catherine inc. (Développements Hydroméga inc.)*, 2009 QCCS 1198 (CanLII)

the province.[70] This would of course be subject to various areas of federal jurisdiction.

(154) In such a case it is essential to recall that the provision of the Constitution that deals with works and undertakings is not necessarily confined to the physical aspects of construction of projects. A difficult question for hydroelectric development is what physically and legally constitutes the work or undertaking for constitutional purposes. It might simply be the dam and reservoir, or it could be a wider range of direct and indirect physical aspects of the project. Accordingly, while the site of a dam or reservoir might be "in the province" the entire activity may not always be. Interestingly, the federal *Dominion Water Power Act* defines a water power undertaking as including all diversion of water and flows, the generation of energy, transmission and distribution, surveying land management, and other incidental activities.[71] This suggests that a hydroelectric power project may include flow alterations both upstream and downstream in the scope of the "work" or "undertaking". If this is the case, then any hydroelectric project could potentially be an inter-provincial, rather than a local work if it has material inter-provincial flow impacts.[72]

(155) If a hydroelectric project in a province were to be found by a court to be a work or undertaking that crossed provincial boundaries, provincial legislation might be limited in application by the courts. This is particularly the case where the provincial laws interfere with an integral part of the inter-provincial work, or if it is impossible for the proponent of the project to comply with all relevant regulations and still further the federal purpose of the legislation.[73] Moreover,

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[70] s.92(10), see *Fulton et. al. v. Energy Resources Conservation Board,* [1981] 1 S.C.R. 153. In that case Calgary Power Ltd. applied to the Alberta Board to build transmission to a point near the BC boarder, landowners argued that this was federal jurisdiction. The Supreme Court of Canada held that the interconnection fell within the provincial authorization in relation to local works and undertakings. The court considered that the nature of the line was such that it was substantially within the province and that the purpose of Alberta legislation was not to regulate the inter-provincial relationship and there was said to be no relevant federal regulation scheme. The power for the province to authorize inter-provincial transmission was added to the Constitution the following year. Also see *Ref Re Water and Water Powers* [1929] S.C.R. 200.

[71] *Dominion Water Power Act*, R.S.C. 1985, c. W-4, s.2.

[72] See note 12.

[73] On this issue see *British Columbia v. Lafarge Canada*, [2007] 2 S.C.R. 86 in which the Supreme Court of Canada held unanimously that a municipal bylaw didn't apply to a project on lands zoned under the *Canada Marine Act,* the majority holding that the *Canada Marine Act* was paramount even though the project was

the inter-provincial aspects of the work might be so substantial as to supplant some parts of provincial jurisdiction. In such instances an otherwise valid provincial law can be read down for having substantial impacts on federal jurisdiction.[74]

Provincial legislation with extraprovincial impacts

(156) Aside from intruding on federal jurisdiction areas like navigation and fisheries, or inter-provincial works, Alberta legislation authorizing a hydro project can have an effect on property and private rights (for example, contractual rights, water rights, or riparian rights) or public lands (beds of waterbodies) outside the province. If so, the statute may be either invalid or inapplicable due to breaching the territorial limitation that all province's legislation must apply only "in the province." In essence the issue is that Alberta cannot unilaterally authorize activities that create impacts regulated by other provinces, in particular private property and contractual rights.

(157) Case law involving hydroelectricity and territorial jurisdiction have focused on extraprovincial impacts of legislation on contractual rights rather than property rights. For example, in *Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission*[75] the Ontario Court of Appeal struck down an Ontario statute cancelling a contract between an Ontario company and a Quebec power company because it affected rights of the Quebec company outside of Ontario. Likewise, in *Re Upper Churchill Water Rights*[76] the Supreme Court of Canada struck out the Newfoundland *Water Rights Reversion Act* which was aimed at expropriating a hydroelectric facility in Labrador. The expropriation affected a contract between the hydroelectric company and Hydro Quebec, outside of Newfoundland. The law was struck out for being directed towards contractual rights in the province of Quebec. This was so although it involved activities fundamental to Newfoundland's ability to regulate electrical projects and rivers within its boundaries.

(158) While both of these cases deal with contractual rights outside the province, they make it very clear that private rights outside the province that are affected by a hydroelectricity development regulation, insofar as they purport to alter contracts involving

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not integral to navigation and shipping jurisdiction, the court found an operational conflict between the city bylaw and the federal zoning policy.

[74] *Ibid*.

[75] [1937] O.R. 796 (C.A.).

[76] [1984] 1 S.C.R. 297.

extraprovincial parties, are squarely outside the jurisdiction of the regulating province. This will be the case even when the legislation is important for managing electric power or public property in the originating province. In other words, Alberta cannot pass legislation that fundamentally alters, affects, impacts, or impinges on private rights or public property outside Alberta.

(159) This limitation on provincial legislative powers should, in principle, extend to flooding or water level reductions on public lands in other provinces and territories. In each case the courts will ask whether the provincial electricity, environmental, and water legislation engaged in a hydro approval is predominantly directed towards the regulation of electricity, property and private rights or environmental quality in the province. If the legislation is so directed, then it should be constitutionally valid.

(160) However, as seen in the above cases, a court may find that a statute has an extra-provincial or federal purpose if it has, as a matter of course, a dramatic impact on a matter of federal or extra-provincial jurisdiction. A court may also strike it down if it has a "colourable" effect on another province or an issue of federal jurisdiction.[77]

(161) In the western provinces, it should be noted that most fresh water management has a significant factual inter-provincial aspect due to the geography of western rivers. Where the actual administration of provincial water management or electricity generation is such that it deals significantly with water quality and quantity in other provinces, it may be highly susceptible to judicial review on constitutional grounds. This may be so, despite the legislation itself dealing on its face with the allocation or regulation of flows within the province. Indeed, water rights in other provinces and territories are governed by that jurisdiction's own water allocation legislation and are clearly "situate" within other provinces.[78]

(162) For example, the Saskatchewan *Water Power Act*[79] appropriates the right to waterpower in Saskatchewan to the Saskatchewan

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[77] For example see *Campbell-Bennett v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207, where the Supreme Court of Canada held that a federally incorporated inter-provincial and international oils pipeline was not subject to the provincial *Mechanics Lien Act* because it was an inter-provincial work or undertaking.

[78] *Reference re Churchill, supra* note 70. In this regard, the *Master Agreement on Apportionment*, discussed further *infra*, may limit the number of circumstances in which an extraprovincial impact will occur.

[79] R.S.S. 1978, c.W-6.

government. Alteration of water flows in Alberta may not only infringe upon Saskatchewan's jurisdiction to govern waterpower but it may impair private rights of the Saskatchewan government and its licencees. Likewise alterations in flows could impact public lands and riparian owners in Saskatchewan. All of these issues are within Saskatchewan's exclusive jurisdiction. Any Alberta law that attempted to authorize these impacts outside the province of Alberta might be struck out or read down. Moreover, Alberta has no control over private law claims made in Saskatchewan against the hydroelectric operator.

(163) While no firm answer can be given indicating that Alberta regulators can never authorize projects with extra-provincial impacts, prudent regulators and legislators will turn their minds to the potential extra-provincial impacts of how they interpret and apply their legislation. In this, they would consider whether they are overreaching with their approvals rather than approve projects with extra-provincial or federal impacts as a matter of course. In such cases it is helpful for provincial regulators to have clear inter-jurisdictional agreements upon which to rely.

(164) The provincial *Water Act* in Alberta doesn't speak to inter-provincial effects in any great detail. However sections 6(2)(b) and (e) allow intergovernmental agreements on waterpower and trans-boundary water. Inherently, the exercise of the diversion and allocation provisions of that Act will have extraterritorial impacts of some kind. In this regard, it is the provincial *Water Act* that is likely to be the most vulnerable, in particular the provisions of the Act that allocate water diversion rights to hydroelectric developments. To the extent that provinces do not agree with their neighbours on water allocation issues, the courts may well examine such provisions carefully.

(165) Likewise, section 4 of the *Natural Resources Conservation Board Act* dealing with water management projects is vulnerable – in both cases the issue will relate to whether the purpose is to regulate flows that ultimately impact other provinces. Likewise, the *Alberta Utilities Commission Act* empowers the Alberta Utilities Commission (AUC) to decide whether hydro developments are in the public interest. One salient issue for the Constitution in both of these cases is whether the public includes those outside the province of Alberta and their interests. Specific to regulatory process, this may require

incorporation of extraprovincial perspectives through public participation.[80]

(166) The broad public interest discretion of the AUC and the NRCB may engage environmental regulation of water and air emissions that have significant transboundary effects. Where those provisions raise the prospect of significant impacts on other provinces, there is the potential that it encroaches on federal jurisdiction or the jurisdiction of other provinces. Regulators can address these issues by including consideration of the extent of impacts of projects outside the province, seeking to mitigate those impacts and including stakeholders from other provinces in the process. While such activities may not authorize the remaining impacts, they can strive to ensure that they do not reach a level of significance that renders the project authorization unconstitutional.

(167) Ultimately, Alberta cannot authorize matters outside its jurisdiction, including those arising from a hydroelectric proposal. However, it can regulate a project within its boundaries such that it minimizes the risk of infringing on matters outside its regulatory authority. It can also refuse projects in the public interest where the project inherently requires the cooperation of other jurisdictions to avoid operational conflicts of different levels of legislation but there is no effective agreement in place to allow such cooperation to take place.

F. Remedies for extraprovincial harm

(168) Generally speaking each province may only deal with property and private matters within the province, electricity generation within the province, and local and private works and undertakings within the province. Where the harm, such as environmental and property damage, occurs within the province, the principle is that the harmed or impacted province has jurisdiction over its own civil harms and damages.

(169) The pertinent question should be if the statute's purpose is to protect property or the environment within the province and it has an incidental effect only on matters outside the province. Where a work or activity occurs in Alberta and it causes impacts to property and water rights in Saskatchewan, in theory so long as the harm occurs in Saskatchewan it is within Saskatchewan's jurisdiction to regulate that

[80] Although the Commission must also be cognisant of the fact that significant reliance on extraprovincial reliance may also give rise to challenges.

harm. So for example, in theory Saskatchewan could regulate liability for damage. This type of analysis should also apply to Alberta's jurisdiction over damage from the Bennett Dam, for example. In at least one case, the Court has suggested that damage occurring in Alberta from the Bennett Dam in BC can be addressed with Alberta nuisance law.[81] It is therefore fundamental to note that Alberta cannot legalize private harm outside its boundaries by virtue of its authorizations.

(170) Matters in this area are greatly complicated by the case of *Inter-provincial Cooperatives v. The Queen* (*Ipco*) in which a split decision of the Supreme Court of Canada found that Manitoba could not enact legislation dealing with liability for pollution coming from Ontario and Saskatchewan and causing harm in Manitoba because this was federal jurisdiction.[82] In that case, Manitoba legislation specifically allowed Manitoba to recover against a polluter of Manitoba waters that was licensed to discharge a contaminant by the Saskatchewan or Ontario government. Although this provision appears crafted to deal with damage occurring in the province of Manitoba, it was struck out by some members of the court as interfering with federal jurisdiction. Other members of the court held that the Manitoba legislation was merely inapplicable to activities licensed out of province because it fell under federal fisheries powers. Some of this analysis appeared to turn on the fact that the legislation affected licences issued by other provinces, and therefore touched on private rights outside the province.

(171) Although the decision has been criticized, the SCC revisited this approach again in *Crown Zellerbach* and it was not seriously questioned.[83] The result is that it is left largely to the federal

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[81] See *Athabasca Chipewyan First Nation v. British Columbia*, 2001 ABCA 112 in which the court considered jurisdiction to hear a case concerning liability of British Columbia for harm to an Alberta First Nation caused by the Bennett Dam in BC. The action was filed in Alberta and the FN applied for *ex juris* service in BC. The Alberta Court of Appeal held that BC liability legislation required claims against the BC Crown to be brought in BC. However it found that it could order service against BC Hydro, a Crown corporation. The Court held that by creating a nuisance, damage etc. outside of BC the Hydro company could not seek immunity from litigation alleging those acts as a Crown agent. Also see decision below in Athabasca Chipewyan First Nation v. Canada, 1999 ABQB 662. BC Hydro ultimately settled these claims out of court with substantial sums of money.

[82] *Interprovincial Cooperatives v. the Queen*, [1976] 1 S.C.R 477.

[83] See Hogg, *supra* note 16 at 13-11. Hogg notes that the part of the majority decisions' reliance on licensing provisions in Ontario and Saskatchewan is tantamount to giving "extraterritorial effect to the licensing statutes" and effectively

government to address any interprovincial matters arising from hydroelectric projects. However, no federal water legislation has been brought in to regulate either quality or flow of inter-provincial waterways specifically.

(172) While federal fisheries legislation deals with pollution of all inland fisheries, quantity issues are only dealt with in a limited sense. Flows between provinces are not addressed, and the *Fisheries Act* doesn't give any special consideration to inter-provincial pollution. Other federal legislation deals largely with water quality outside of inland or fresh waters. For example, in *Crown Zellerbach* the Supreme Court of Canada held in a 4:3 decision from 1988 that pollution discharged within a province that entered marine waters could be prohibited by federal legislation as a matter of national concern. Relying to some extent on the treatment of inter-provincial pollution in *Ipco,* the majority found that "Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole".[84] It would seem that, other subject matter with a largely extra-provincial character could also be federal jurisdiction under the national concern doctrine in that case.[85]

(173) It can be concluded from this line of cases that the Supreme Court appears to accept that activities which have an effect on inter-provincial waterways may not only have a federal dimension, but also be exclusively so, at least in some circumstances. This means that provincial legislation that regulates significant inter-provincial impacts may be struck out or read down by the courts not only if it deals with issues in another province's jurisdiction, but also because it deals with issues within federal jurisdiction. From a practical perspective, these decisions have created a void, since no truly broad inter-provincial federal water law exists. As the Federal Inquiry on Water Policy commented in 1985:

> The *Inter-provincial Cooperatives* case has left a void in authority over inter-provincial rivers. All judges agreed that

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immunizes the licensing provinces from liability for damages caused outside their boarder. See *Crown Zellerbach, supra* note 27 at para 36.

[84] *Ibid*. at para 37.

[85] *Ibid*. at para 56. In contrast the dissent found against this noting that there was no evidence that the substance prohibited by federal legislation was "deleterious in any way or has any impact beyond the limits of the province." The dissent also cites *Ipco* for the proposition that "Parliament had exclusive jurisdiction to deal with a problem that resulted from the deposition of a pollutant in a river in one province that had injurious effects in another province."

> the pollution of inter-provincial rivers was to some extent a federal responsibility. ...it is difficult to predict how the courts would deal with such problems.

(174) The Federal Inquiry on Water Policy did not recommend extensive federal water legislation to deal with these issues except where "jurisdictions involved cannot reach an agreement".[86] Interestingly, this approach does not address whether an inter-provincial agreement is enforceable, implemented, or successful, particularly with regard to issues within federal jurisdiction. This approach also does not consider whether inter-provincial agreements are themselves constitutionally valid.

(175) The *Canada Water Act* provides the federal government with some powers with respect to inter-provincial waterways. The *Canada Water Act* is a historical curiosity that is underutilized. It provides powers for the federal government to create water resource management plans and to undertake programs for inter-jurisdictional waters. However, these powers are limited to "where there is a significant national interest in the water resource management thereof" and it has not been very involved in inter-jurisdictional water management between provinces.

(176) It is certainly a possibility that there might be a significant national interest in an inter-provincial waterway that is subject to a hydroelectric application that might materially impact flows and quality between provinces. However, involvement of federal authorities is open to political considerations. The result is highly unsatisfactory for citizens in all provinces on the receiving end of an inter provincial waterway.

(177) Alberta regulators must be mindful of these issues because Alberta is potentially impacted by decisions on water management in BC, and also because it impacts the Northwest Territories and Saskatchewan with its activities. Accordingly, the promotion of hydroelectric projects in Alberta should only be pursued once an agreement is reached with downstream jurisdictions that is sufficient to handle downstream impacts. Without federal involvement, the absence of such agreements may result in significant inter-provincial regulatory and civil liability issues that are extremely costly to everyone involved. Further, the absence of an agreement may well trigger

[86] Pearse, Peter.H. *et. al. Currents of Change: Final Report, Inquiry on Federal Water Policy* (Ottawa: September 1985) at 74.

federal involvement that could cause significant regulatory uncertainty for the project.

(178) The foregoing illustrates the absolute necessity of bilateral agreements on flow and water quality with all neighbouring jurisdictions. It is essential that hydroelectric developments not proceed where they have any material impacts outside the province without such agreements being fully in place.

G. Existing intergovernmental agreements

(179) The *Mackenzie River Basin Transboundary Waters Master Agreement* was signed in 1997. The agreement commits all six governments to various guiding principles for water management in the whole Mackenzie River Basin. The Mackenzie River Basin Board is not a regulatory or a licensing board, and has no legal or policy basis to regulate resource use in any of the jurisdictions. Signatories include Canada, British Columbia, Alberta, Saskatchewan, the Northwest Territories, and Yukon (the governments with jurisdiction to manage water and the environment in the Mackenzie River Basin).

(180) The agreement makes provision for neighbouring jurisdictions to negotiate bilateral water management agreements to address water issues at jurisdictional boundaries on transboundary streams, and to provide parameters on the quality, quantity, and flow of water. However, the Agreement gives the Board no mechanism to enforce aquatic ecosystem integrity, instream flow needs, or the other principles in the agreement.

(181) In the early 1980s, inter-juridictional cooperation was handled by the Mackenzie River Basin Intergovernmental Liaison Committee (Mackenzie River Basin Committee) which was established by the provincial ministers through a memorandum of understanding in 1977. The MRBC conducted a study, released in 1982, that recommended among other things that the jurisdictions, at an early date:

> conclude an agreement through which transboundary water management issues such as minimum flows, flow regulation and water quality can be addressed at jurisdictional boundary-crossing points in the Mackenzie River Basin, and which establishes a permanent board to implement the provisions of the agreement.

(182) Work has continued on this initiative through the 1990s, including a Ministerial Mackenzie River Basin General Agreement in 1991 that included the NWT and the Yukon. The work arising from the Agreement has largely focused on preparation of studies and draft agreements. The Ministers completed signing The Mackenzie River Basin Transboundary Waters Master Agreement in 1997. Alberta and the Northwest Territories have been negotiating a bilateral agreement on transboundary water management since 1982.[87] These negotiations are evidently still ongoing and are not apparently making substantial progress.[88]

(183) The result is that currently there are no inter-provincial instruments that are capable of dealing with any issues between the provinces and territories responsible for co-managing the Mackenzie basin.

(184) On the Alberta-Saskatchwan interface, the Prairie Provinces Water Board was formed on July 28, 1948 and invovles Canada Alberta, Saskatchewan, and Manitoba. The Board was established to recommend the best use of interprovincial waters, and to recommend allocations between provinces. The Prairie Provinces Water Board (PPWB) is also not situated to adequately deal with hydroelectric projects on interprovincial waterways. The PPWB is constituted under the *Master Agreement on Apportionment*. The 1969 Master Agreement includes an Alberta-Saskatchewan agreement on flows. Under this agreement, Alberta agrees to permit a quantity of water equal to one-half the natural flow of each watercourse to flow into the Province of Saskatchewan... but this shall not restrict or prohibit Alberta from diverting or consuming any quantity of water from any watercourse provided that Alberta diverts water from other watercourses to meet its commitments, as well as special provisions for the South Saskatchewan River.[89] Any disputes under that agreement must be resolved by the Federal Court. The PPWB can only make recommendations regarding inter-jurisdictional flow issues, and generally has a research and monitoring role that is not

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[87] P. Holroyd et al., *The Waters That Bind Us,* (Pembina Institute: February 2009) online: Pembina Institute <http://pubs.pembina.org/reports/watersthatbindus-report.pdf>. at 37.

[88] *Northwest Territories, Additional considerations: Resolving Transboundary Water Issues,* (Rosenberg Regional Forum on Water Policy*:* California, 2009) online: Northwest Territories Department of Environment and Natural Resources <http://www.enr.gov.nt.ca/_live/documents/documentManagerUpload/Rosenberg_Forum_Report.pdf> at 23.

[89] Master Agreement on Apportionment, online: Alberta Environment <http://environment.alberta.ca/01706.html>.

ideal for prediction or regulation of the effects of future hydroelectric projects.

(185) Thus, although there are valuable communication tools and research tools in place for interprovincial waterways that might be impacted by hydro dams, there is no formal shared understanding of how to manage interprovincial waterways or how to manage impacts or resolve disputes that cross provincial and territorial boundaries. Accordingly, there is little upon which a regulator can rely to establish whether an approval is in the public interest. This highlights the need to include downstream jurisdictions and citizens from downstream jurisdictions in approval processes for water management projects.

H. Case studies

Oldman River Dam

(186) The Oldman River Dam was originally proposed in May 1958 as a storage reservoir, and the project was led by the Alberta Department of Environment. The ultimate proposal was the result of various provincial committees in the 1970s and 1980s. In the late 1970s, the Environment Council of Alberta held public hearings on management of water resources in the Oldman basin. Two sites were identified: one on the Peigan Indian Reserve and one at Three Rivers. A provincial impact assessment was conducted in the late 1980s. The project was granted a provincial *Water Resources Act*[90] diversion licence. In that instance all notice and publication requirements were "inexplicably" waived under that Act and the original permit was quashed.[91] Although the facility was built to accommodate turbines, the facility was determined not to be a "hydro development" for the purpose of the *Hydro and Electric Energy Act.*[92]

(187) Federal involvement was initially limited to review for impacts on the Peigan Reserve in the 1980s. The federal government provided the Peigan band with funds to conduct a study of various issues, including fisheries and cultural issues. The federal government ultimately granted an approval under the *Navigable Waters Protection Act* but

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[90] R.S.A 1980, c.W-5

[91] *Friends of the Oldman River Society v. Alberta (Minister of the Environment)*, (1987), 85 A.R. 321. Another interim licence was issued on February 5, 1988 and an application to quash this licence failed: *Friends of Oldman River Society v. Alberta (Minister of the Environment)*, (1988), 89 A.R. 339 (Q.B).

[92] R.S.A. 1980, c.H-13, *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)*, (1988), 89 A.R. 280.

failed to conduct the required environmental assessment federally. Federal fisheries officials declined to participate in the process. Finally, Martha Kostuch, a public intervenor, swore an information before a justice of the peace alleging that an offence had been committed under s. 35 of the *Fisheries Act*. After summonses were issued, the Attorney General for Alberta intervened and stayed the proceedings on August 19, 1988.

(188) In *Oldman River*, it was held by the Supreme Court of Canada that a federal environmental assessment under the *Department of Environment Act* was required before navigable waters permits could be provided. The court in that case upheld the order directing the Minister of Transport to comply with the federal assessment process, even though the dam was by then substantially completed.

(189) In the late 1990s, disputes also arose regarding whether maintenance and upgrades were "works" under provincial legislation (*Irrigation Act, Water Resources Act*). The Alberta Court of Queen's Bench ultimately held that *Irrigation Act* provisions prevailed over *Water Resources Act* requirements for licensing of works.

(190) The Oldman case highlights several difficulties in dam regulation in Alberta, in particular the federal role in managing environmental impacts through the use of its navigation and fish habitat powers. When the federal government does not meaningfully exercise its jurisdiction, this can cause delay and procedural confusion. Moreover, when the applicable regulators do not take adequate steps to ensure that the provincial and federal environmental issues are properly addressed in the appropriate manner, litigation may ensue from those affected. Many of these issues can arise from efforts to fast-track a process rather than allowing the appropriate steps to be followed in due course.

Bennett Dam

(191) In 1957 the British Columbia government initiated plans to develop a hydroelectric project on the Peace River in British Columbia. In 1959, a meeting took place between the Alberta government and the Peace River Development Corporation Ltd to discuss concerns related to the effect of the proposed dam on water levels at the town of Peace River. To alleviate the downstream effects of reducing the water flow, media reported later that the company and the Alberta government entered into a preliminary agreement stipulating that a minimum of 6000 cfs of water would be allowed to flow across the

BC-Alberta border during construction of the dam and while the water reservoir at Williston Lake was being filled.[93] Construction of the dam went ahead as a BC Hydro project in 1962. At the time, Indian Affairs participated in BC Water Rights hearings in BC but did not evidently speak to issues for bands outside of BC.[94] Alberta evidently did not attend. The BC Comptroller of Water Rights authorized the project under a license allowing different flows than those agreed to between Alberta and the original proponent, who was no longer involved in any case. [95] There was also a study of the Bennett Dam and the decision of the BC Utilities Board, but these did not consider downstream impacts beyond the construction region, much less those outside of BC.

(192) Dam construction was completed in 1967, and the reservoir was filled in 1971. The federal government was aware of navigation issues related to the dam from at least 1959 and had a study regarding navigation impacts that was completed in 1962 citing unpredictable changes to navigation in the Peace-Athabasca Delta; however, the flow estimates the federal government relied upon appeared to be flawed.[96] In 1970, Canadian Wildlife Service officials as well as fisheries officials began to identify important waterfowl, fisheries and other wildlife impacts.[97] A federal-provincial task force formed to address the issue appears to have been short lived and unsuccessful. Finally, a group of concerned scientists presented a report entitled *Death of a Delta* to Prime Minister Trudeau in mid 1970 outlining expected impacts from the dam.

(193) It was apparently only in 1970 that Alberta began to make serious appeals to the federal government to become involved in the issue. It was only then that a concerted analysis of federal interests in the project took place. Although the federal government claimed to have asserted a right to control the dam using the *Navigable Waters Protection Act* in 1962, it is in 1970 that we have the first records that they required approval by the Minister of Public Works. A dispute then arose between BC and the federal government over whether the site of the dam was navigable.

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[93] Indian Claims Commission (ICC), *Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998)10 ICCP 117 at 28

[94] *Ibid.*

[95] Saskatchwan Department of Environment, *The proposed Peace-Athabasca Control Structure* (Saskatoon: September 1973).

[96] ICC, *supra* note 92 at 30.

[97] *Ibid.* at 34.

(194) The Bennett Dam alters the flow regime in the Peace River. The flow of water is dictated by the electricity requirements for B.C. Hydro, which significantly reduced the annual flooding of water into the distant Peace-Athabasca Delta in Alberta and consequently altered the water level and seasonal flows to counteract natural patterns. Since the Peace-Athabasca Delta is one of the most important natural freshwater Deltas in North America, the environmental impacts were dramatic. Among the most impacted communities was the Athabasca Chipewyan First Nation (ACFN) who depended on muskrats for food and income. The AFCN never had notice of the dam or the proceedings in BC. Although many of the impacts from the Bennett Dam also impacted Wood Buffalo National Park, the federal government played a minor role in the Dam.

(195) ACFN first launched legal proceedings in 1970 against BC Hydro in relation to damage from the dam that was discontinued for lack of funding.[98] Although the navigation issues with the project were obvious, no *Navigable Waters Protection Act* permits were applied for by BC Hydro in relation to the project.

(196) In 1998, the Indian Claims Commission determined that the federal government breached its legal obligations to protect the Athabasca Chipewyan reserve from harm from the Bennett Dam by taking "reasonable steps to prevent, to mitigate, or to seek compensation for damages" to the ACFN reserve.[99] The Indian Claims Commission also concluded that:[100]

> A thorough consideration of the facts, the provisions of the *NWPA*, and the relevant case law on this subject leads us to conclude that the *NWPA* applied to the Bennett Dam, and a licence was required by BC Hydro for the construction and operation of the dam. Indeed, the federal Crown was also of the opinion that the *NWPA* applied at all material times.

(197) In April 2001, the Canadian government rejected the ICC's recommendations, claiming that Canada did not have a duty to protect first nation lands against damage caused by construction and the operation of the Bennett Dam. Canada also asserted that it did

[98] *Ibid.* at 92.
[99] *Ibid.* at 79.
[100] *Ibid.* at 84.

not have the duty to invoke the provisions of the *Navigable Waters Protection Act*.

(198) In the late 1990s, the Athabasca Chipewyan First Nation launched claims in Alberta courts for compensation from BC and BC Hydro, and were successful in serving BC Hydro, a claim that was later settled.[101] In 2004 BC Hydro awarded the Athabasca Chipewyan First Nation $4 million as compensation for the construction of the Dam, and awarded the Tsay Keh Dene First Nation damages in excess of $20 million.[102] This demonstrates that even where the federal government fails to act, civil liability issues may plague a project as well as the federal government for damages that happen out of province for many decades. The Athabasca Chipewyan First Nation was also successful in quashing export permits granted to BC Hydro by the National Energy Board in Federal Court.[103]

(199) It is fair to describe the Bennett Dam as a devastating experiment in unilateralism by BC. The Saskatchewan government later commented that "BC should have recognized an obligation to those outside parties and acted accordingly".[104] Alberta and Saskatchewan participated in the issue belatedly and federal interests in the Peace-Athabasca delta were not effectively addressed under federal legislation.

(200) What can be concluded from the case of the Bennett Dam? First, many parties (Alberta, the federal government) failed to fully evaluate the impacts of the project on their jurisdictions early in the process. Both Alberta and the federal government relied on incomplete or inconclusive evaluations to avoid involvement. Second, Alberta relied on a private, ultimately unenforceable agreement rather than getting the federal government involved in the project. Third, the federal government failed to exercise the powers it had to resolve the issue when BC would not cooperate. This example shows that the building jurisdiction may work unilaterally in the absence of intergovernmental agreements and that federal oversight of inter-provincial disputes can be uncertain and unpredictable. This example

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[101] *Athabasca Chipewyan First Nation v. British Columbia*, 2001 ABCA 112 allowing service outside Alberta against BC Hydro.
[102] Passelac-Ross et. al. *Aboriginal Peoples and the Future of Water Management in Alberta*, *Conference Handbook* (Edmonton: Canadian Institute of Resources Law, June 10-11 2010) at 17.
[103] *Athabasca Chipewyan First Nation v. British Columbia Hydro and Power Authority*, 2001 FCA 62.
[104] Saskatchewan Environment, *supra* note 94.

also shows that the failure of the federal government to be involved in a meaningful way can be costly from an environmental perspective, as well as resulting in litigation from unaddressed extra-provincial liabilities. Once again it highlights the need for good interjurisdictional cooperation that is governed by enforceable agreements between governments and federal oversight of inter-provincial issues.

Slave River Hydro Dam

(201) The Slave River Hydro Dam was considered in the early 1980s. The dam promised impacts straddling the NWT and Alberta Boarder in the MacKenzie River Valley.

(202) In the early 1980s, when the Slave River Hydro project was proposed, the federal environmental assessment process was under the *Department of Environment Act*. [105] Parks Canada referred the project to the federal Minister of the Environment in 1980.[106] The scope of the review included a variety of navigation, aboriginal, waterfowl and fisheries issues. The project proceeded as a joint federal-provincial review to help avoid duplication. There were also hearings held in the NWT because the sites included locations in Alberta and the NWT.

(203) The environmental impact assessment documents and information were prepared to be used both by federal and provincial authorities. However, the documents for the provincial portion of the assessment did not require a needs assessment. A history of that project demonstrates that federal authorities deferred to the then Alberta Energy Resources Conservation Board (ERCB) on the issue of need and alternatives to the project, issues that should have been covered in both assessments.[107] Alberta officials stood firm under pressure to consider alternatives such as power purchase from Manitoba or a Dunvegan hydroelectric project.[108] The dam was characterized as a "run of river" design; however, it would still form a reservoir.

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[105] R.S.C., 1985, c. E-10, s.6 empowered the Minister to establish guidelines by order for federal departments to use in carrying out their duties, functions and powers. The Environmental Assessment and Review Process Guidelines Order was established in June 1984, SOR/84-467.
[106] P.S Elder, *Environmental Impact Assessment in Canada: The Slave River Project,* [1986] Alta. Law Rev. 205.
[107] Environmental Law Centre, *Interjurisdictional Environmental Aspects of the Slave River Hydro Dam* (Edmonton: Environmental Law Centre, 1984) at 22.
[108] Lyn Hancock, *River of No Return* (July 1982).

(204) Territorial issues were handled partly by the Slave River Development Zone Group (DIZ) which was disbanded in 1985 due to communications issues about project information and status. Other territorial officials participated, such as the NWT water board and the GNWT Department of Renewable Resources.[109] The DIZ group submitted a brief that indicated that "a strong interjurisdictional commission be established" to provide comprehensive and integrated planning of projects in the Mackenzie River Basin.[110] A similar recommendation was made in the Mackenzie River Basin Study report in 1981. The Slave River Hydro feasibility study ultimately concluded that the project presented the potential for significant adverse impacts on fisheries[111] and waterfowl, both important areas of federal jurisdiction.[112]

(205) The controversies surrounding the project largely dealt with waterfowl and fisheries concerns, as well as the lack of intergovernmental agreements in the basin to determine liability and other transboundary mitigation issues.

(206) Participants expressed frustration over a lack of federal jurisdiction assertion in the case of important locations for white pelicans in the vicinity of Slave River. Environment Canada refused to act under provisions in the *Canada Wildlife Act* regarding white pelicans without provincial agreement on joint action.[113] The delta region was also a recognized wetland under the Ramasar Convention, in part because it was whooping crane habitat – and Canadian Wildlife Service biologists believed that it would flood the only existing Whooping

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[109] Slave River Journal "Policy needed on water projects" Oct 18, 1984.

[110] Slave River Development Impact Zone Society, *A Brief Presented to The Inquiry on Federal Water Policy Community Perspectives on Transboundary Management Issues*, October 1984 at 10.

[111] Slave River Hydro Feasibility Study Synopsis (June 1982) p.19 "A dam constructed at the Rapids of the Drowned would be particularly disruptive to spawning".

[112] DA Westworth & Associates Ltd. *Evaluation of Potential Effects of Algernative Slave R. Hydro Developments on the Peace Athabasca Delta* (Edmonton: January 1982). "major impacts" were predicted on wetland communities (S-2) with the "impacts of all three hydrogeneration scenarios are substantial" while "Bison and muskrat are predicted to be most heavily impacted... a great deal of uncertainty surrounds assumptions on waterfowl impacts" and "minor alterations in the water level regime of Lake Athabaska have the potential to cause major disruption s in the existing balance of wetlands in the Delta." (S-11).

[113] Michael Ford, *Discussion Paper Pertaining to A proposed Hydro-Electrical Dam on the Slave River* (Environmental Law Centre: December 1984) at 39 Notably, Pelicans were not a listed migratory bird under the *Migratory Birds Convention Act*.

Crane nesting site.[114] Other issues included transmission through Wood Buffalo National Park, aboriginal land claims issues, roads, and bison migration routes. Despite generally timid federal involvement in the review process, allegations were made that Ottawa was obstructing the project.[115] The project application stalled by late 1984, partly due to the absence of export markets.[116]

(207) A history of the Slave River project demonstrates that the federal-provincial coordination was handled poorly. In 1983, the ELC commented that there was no consultation with the public or other governments before the proposal was formally announced, in violation of Alberta Environment Department's policy.[117]

(208) Attempts to circumvent vital aspects of the environmental review process at both levels of jurisdiction, such as need, alternatives, social impact assessment, and proper handling of waterfowl and parks issues resulted in a confused mandate, controversy over various roles, and other factors that made the application and approval process frustrating for all involved.

(209) Most importantly, this confusion related at its heart to the absence of a comprehensive framework for basin management in the Mackenzie, a vital precursor to making major management decisions. Finally, the absence of a serious commitment to address need issues early in the process cost the governments, proponents, and participants when the anticipated demand did not materialize.

The Dunvegan Hydroelectric Project

(210) The Dunvegan project of Glacier Power,[118] most recently handled by the AUC, NRCB, and a panel appointed under the *Canadian Environmental Assessment Act*, was in some ways a good example of federal-provincial coordination. The *Canadian Environmental Assessment Act* was triggered on May 12, 2004 as a result of the federal regulatory responsibilities under the *Fisheries Act* and the *Navigable Waters Protection Act*. Transport Canada identified a comprehensive study list trigger under the Comprehensive Study List

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[114] Lyn Hancock, *supra,* note 107 at 8.
[115] Link Byfield, "Trouble Looms on the Slave" (Alberta Report, August 8, 1983 p.6)
[116] Mark Lowey, "Odds against Slave dam as power forecasts dim" (Edmonton Journal, Sept 24, 1984) and see "Hydro Project on Hold" (Slave River Journal: June 6, 1985).
[117] Ed Struzik, "Nightmare Seen in Slave Dam" (Edmonton Journal: March 6 1983).
[118] *Dunvegan Hydro Development Act*, S.A. 2009, c. D-18.

Regulations. The *Canada-Alberta Agreement on Environmental Assessment Cooperation* (2005) was utilized and a joint panel agreement was reached. Other jurisdictions were allowed to participate in the assessment, and the panel ultimately made recommendations to both the federal and provincial governments.

(211) However, various aspects of the Dunvegan Hydro Project continue to raise concerns about whether a joint process can fully address issues relevant to both jurisdictions. For example, the concerns of ACFN and Parks Canada regarding flow regulation impacts in the Peace Athabasca Delta were not seriously addressed in the Joint Panel Decision.[119] Moreover, the spatial boundaries of some assessments included BC, but did not include the Peace-Athabasca Delta.[120] Accordingly, while the coordination efforts to deal with transboundary impacts have improved, there continues to be a lack of consideration of impacts that are geographically distant from the project or on the cumulative effects of the entire project in the context of both federal and provincial issues.

I. Opportunities for improvement

(212) The AUC Inquiry has asked participants to address processes whereby the federal authorities could recognize the provincial process, or *vice versa*, to avoid duplication.

(213) While avoiding duplication may be a valuable goal, the primary goal must be excellent environmental protection and oversight from all levels of government. As this overview of federal and provincial jurisdiction demonstrates, a unified approach is only viable if federal interests in fisheries, species at risk, migratory birds, aboriginal issues, inter-provincial waterways and navigation are adequately addressed in the single process. In a context where nearly all projects will have inter-provincial as well as federal impacts of some kind, federal oversight of any harmonized approach is the only oversight that can be fully constitutional in regard to federal subject matters.

(214) To date, although there are some provisions available for environmental assessment coordination, the ultimate standards,

[119] Report of the Joint Review Panel, *Glacier Power Ltd. Dunvegan Hydroelectric Project*, (NR 2008-03) see comments at 85 and 106 citing a lack of assessment of potential cumulative effects in the Peace-Athabasca delta requested by ACFN.
[120] Jacques Whitford, *Environmental Impact Statement,* Fish Communities Technical Report, (October 2006) Figure 4.8-1.

requirements, procedures and legal issues in federal, provincial, and territorial legislation are not easily melded.

(215) It is therefore not legally possible for one level of government to simply "recognize" the process of another. The process of a single level of government is not capable of covering off issues that are outside the lawful jurisdiction of the regulator. Efforts at harmonization, whether procedural or substantive, require the active involvement of all applicable jurisdictions and the completely effective application of the law at each level.

(216) For example, a provincial environmental assessment for a hydroelectric development will not be useful as a "one window" document if it does not conform to the procedure or content requirements provided in the *Canadian Environmental Assessment Act*. This includes the timelines, standing, and substantive evaluation of environmental effects required by that legislation. Likewise, if it is not overseen adequately by federal agencies tasked with authorizing the project, it will neither reflect adequate protection for fisheries, species at risk, in-stream flows, and migratory birds nor protect aboriginal rights or parties outside of Alberta. It is important as well to recognize the different federal and provincial thresholds for triggering an assessment. Any project requiring navigable waters or fisheries permits will trigger a federal screening level assessment, while provincially an assessment is not mandatory until the project reaches the 100 MW threshold. Finally, a federal assessment must be bumped up when the various comprehensive study thresholds are reached. The timelines for notice, comment and criteria for participation in Alberta and federal legislation continue to be divergent in numerous ways.

(217) Regulators must remain mindful that the courts are willing to read down attempts at "delegation" of legislative authority over the environment from the federal government to the province. In *Morton* for example, the BC Supreme Court discussed at length the inability of the federal government to delegate its responsibility for fisheries to the BC government in the regulation of fish farms.[121]

(218) The Supreme Court of Canada also commented recently on the necessity of using valid harmonization mechanisms in the area of environmental assessment, this includes the use of joint federal-

[121] *Morton v. British Columbia (Agriculture and Lands)* 2009 BCSC 136 at paras 182-193. Appeal dismissed 2009 BCCA 481.

provincial assessments instead of attempting to replace federal assessments with provincial ones or attempting to scope approvals along jurisdictional lines.[122]

(219) Although the *Environmental Protection and Enhancement Act* provides authority for joint reviews,[123] this power is constrained by constitutional considerations. Alberta must review its environmental legislation if it is to create an assessment process for hydroelectric projects that can meet federal requirements.

J. Process recommendations

(220) Steps to improve coordination and cooperation include:

1. Broadening standing and timelines under provincial legislation to conform with the public participation requirements under federal legislation.

2. Ensuring that need and alternatives are considered for all projects that that are subject to federal comprehensive study requirements, as well as the capacity of renewable resources that are affected.

3. Including processes that require studies related to fish habitat, species at risk, waterfowl and navigation issues.

4. Engaging other provinces and territories under clear agreements governing approvals of hydroelectric projects on transboundary waterways.

5. Engaging federal authorities early to help ensure that interprovincial matters not covered by those agreements are identified and resolved as early as possible.

Conclusion

Regulatory processes for hydroelectric power generation projects in the province must facilitate reaching decisions in the public interest. There is a need to build criteria around the nature of environmental considerations that will feed into the public interest determination. Also, there is a need to clearly articulate that the evidentiary onus is

[122] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.
[123] *Supra* note 17 s.57.

on proponents to provide sufficient information to allow the Commission to make this determination. Where information is lacking, a public interest determination becomes elusive and reliance on conditional approvals for projects should be avoided.

The public interest determination also requires that information provided by proponents is weighed against other parties who have a genuine interest in the outcome of hydroelectric projects. This requires that the Commission approach the issue of standing in hydroelectric developments in a more inclusive manner than is currently adopted by other administrative processes in the province. This inclusive approach will minimize conflicts and potential litigation around the standing issue and provide decision makers with the information required to make the public interest determination.

Finally, increased efficiency in regulatory processes cannot be pursued in a constitutional vacuum. The inherent nature of hydroelectricity development requires recognition and consideration of both jurisdictional impacts and constitutional realities. While there are efficiencies to be gained, there must also be a recognition that there exist valid roles for both the provincial and federal government in hydroelectric development. Again this requires regulatory processes which are inclusive and fully informed to ensure that the constitutional concerns of all levels of government are addressed.