In the Matter of

Request for Review of the Lower Athabasca Regional Plan
Pursuant to s. 19.2 of the *Alberta Land Stewardship Act*
Submitted by the **Chipewyan Prairie Dene First Nation**

June 25, 2014

Response Submissions of the Government of Alberta

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INTRODUCTION

1. The Chipewyan Prairie Dene First Nation (the Applicant) has requested a review and amendment of the Lower Athabasca Regional Plan (LARP) in its entirety, with specific provisions outlined in Part 1 of its submissions, under section 19.2 of the *Alberta Land Stewardship Act* (ALSA). The Applicant's submissions, as referred to in this response, are those submitted in March 2014, addressed to Minister Campbell.

2. Pursuant to ALSA, the Stewardship Minister has found the application to be complete in form and has forwarded the application to the Review Panel (the Panel).

3. The Government of Alberta (Alberta or Crown) submits the following in response to the Applicant's review request.

EXECUTIVE SUMMARY

4. Alberta submits that the majority of the concerns expressed by the Applicant are outside the jurisdiction of the Panel as the concerns are not with the content of LARP but relate to:

   - Determinations of questions of constitutional law;
   - Adequacy of consultation leading up to the enactment of LARP or for LARP implementation;
   - Allegations of harms related to pre-existing development activities;
   - Allegations of harms related to potential future development activities;
   - Allegations of harms related to the implementation of LARP; and
   - Items or features alleged to be missing from the content of LARP.

5. Some of the Applicant's concerns are within the jurisdiction of the Panel as they relate to the content of LARP. However, the provisions of LARP pointed to by the Applicant do not cause any harm to the Applicant; instead, the LARP content enhances the existing regulatory regimes and does not take away from any existing rights and uses.

6. The Applicant's dissatisfaction with the overall balancing of the competing interests in LARP is not sufficient to trigger the Panel's role in recommending specific amendments to the Minister.

7. Alberta does not necessarily agree with any or all of the Applicant's characterization of its members' rights, activities and land use. For the purposes of this response, whatever that characterization may be, Alberta submits that the Applicant has not shown that there is any existing or future harm to income, property, health or quiet enjoyment of property caused by a provision of LARP so as to trigger the Panel's power to provide recommendations for amendment to the Minister.

8. Therefore, Alberta requests that the Panel report to the Minister, pursuant to Rules 36-37,[1] that the Applicant is not directly and adversely affected.

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[1] Alberta Land Stewardship Act – Rules of Practice for Conducting Reviews of Regional Plans (March 2014) [Panel Rules], Rule 36-37 – **Authorities Tab 1**

REGULATORY CONTEXT OF LARP

LARP Balances Interests

9. ALSA's purpose is:

> (a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;
>
> (b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;
>
> (c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
>
> (d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.[2]

10. ALSA authorizes the Lieutenant Governor in Council to establish integrated planning regions, such as the Lower Athabasca Region, and a regional plan for the region following public consultation.[3] The regional plan must describe the vision and objectives for the region and may, amongst other things, include policies, set thresholds, specify indicators, describe monitoring, and describe the measures to be taken to achieve the objectives and policies.[4]

11. The Lower Athabasca Regional Plan (LARP) is a regional plan established by the Lieutenant Governor in Council pursuant to ALSA.

12. In keeping with ALSA's overarching purpose and its requirements for regional plans, LARP establishes a framework in which to balance competing interests on the landscape of economic opportunities, social considerations, and environmental considerations within the Lower Athabasca Region.[5] More specifically, LARP:

- Establishes a long-term vision for the region;
- Aligns provincial policies at the regional level to balance Alberta's economic, environmental and social goals;
- Reflects ongoing commitment to engage Albertans, including aboriginal peoples, and land-use planning;
- Uses a cumulative effects management approach to balance economic development opportunities and social and environmental considerations;
- Set desired economic, environmental and social outcomes and objectives for the region;

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[2] *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8, s. 1(2) – **Authorities Tab 2**
[3] ALSA, ss. 3(1), 4(1) and 5
[4] ALSA, ss. 8(1) and 8(2)
[5] Lower Athabasca Regional Plan 2012-2022, OC 268/2012, (2012) Alberta Gazette 2012,Part I, pg. 1049 (ISBN No. 978-1-4601-053705 (Printed version) and ISBN No. 978-1-4601-0538-2 (Online version)) [LARP], pg. 2 – Purpose

- Describes strategies, actions, approaches and tools required to achieve the desired outcomes and objectives;
- Establishes monitoring, evaluation and reporting commitments to assess progress; and
- Provides guidance to provincial and local decision-makers regarding land-use management for the region.[6]

13. LARP does not give priority to any one of economic, environmental or social considerations.

14. LARP itself has four main parts:

- Introduction – which includes the overall purpose of LARP and how LARP is intended to inform land-use decisions;
- Strategic Plan – which sets out the vision for the future of the Lower Athabasca Region and outlines a set of strategic directions which will assist in realizing the vision and desired outcomes;
- Implementation Plan – which includes more specific regional objectives, strategies and actions to support realization of the regional vision, and includes indicators so that progress towards this vision can be measured and evaluated;
- Regulatory Details Plan- which introduces regulatory requirements to enable the achievement of the strategic direction and associated actions.

15. LARP also establishes a number of Management Frameworks for the Lower Athabasca Region for important environmental considerations including air quality and surface water quality. LARP and the Management Frameworks identify indicators and triggers and limits for those indicators.[7]

16. LARP also expressly contemplates the creation of additional frameworks, including those relating to groundwater management, surface water quantity, and biodiversity management. These additional frameworks and other initiatives to fully implement the terms of LARP continue to be developed.

17. LARP is the culmination of years of work by the Government of Alberta as well as specific consultation and engagement with a Regional Advisory Council, First Nations and Metis organizations, municipalities, environmental groups, industry stakeholders and members of the public.[8]

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[6] LARP, pg. 2

[7] LARP, pgs.73-76; Lower Athabasca Region Air Quality Management Framework for Nitrogen Dioxide (NO2) and Sulphur Dioxide (SO2), printed August 2012, ISBN978-1-4601-0532-0 (Online Version), available on the website http://environment.alberta.ca/documents/LARP_Framework_AirQuality_FINAL.pdf [Air Quality Management Framework], pgs. 19 and 26 – **Authorities Tab 3**; and Lower Athabasca Region Surface Water Quality Management Framework for the Lower Athabasca River, August 2012, ISBN No. 978-1-4601-0530-6 (Online Version), available on the website, http://environment.alberta.ca/documents/LARP_Framework_SurfaceWaterQuality_FINAL.pdf [Surface Water Quality Management Framework] pg. 17 – **Authorities Tab 4**

[8] LARP, pg. 2

LARP Does not Take Away From the Existing Regulatory Regimes

18. LARP does not replace or take away from the existing regulatory regimes. For any activity on the landscape within the Lower Athabasca Region, LARP simply adds a layer to the existing regulatory structure.

19. LARP does not authorize any particular development or activity.

20. A proponent for any activity is still required to go through the provincial regulatory process, including receiving the necessary regulatory authorizations under legislation, prior to commencing any activity. This legislation includes, but is not limited to, the *Environmental Protection and Enhancement Act* (EPEA), the *Water Act*, the *Public Lands Act*, the *Historical Resources Act* and the *Forests Act*.

21. As an example, under EPEA, a proponent for a proposed activity may have to conduct an environmental assessment and prepare an environmental impact assessment report if the activity is listed as a mandatory activity in regulation or is otherwise referred to the assessment process.[9] The environmental impact assessment report must contain the information outlined in the terms of reference issued for the particular report and must also include:

    (a) a description of the proposed activity and an analysis of the need for the activity;

    (b) an analysis of the site selection procedure for the proposed activity, including a statement of the reasons why the proposed site was chosen and a consideration of alternative sites;

    (c) an identification of existing baseline environmental conditions and areas of major concern that should be considered;

    (d) a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations;

    (e) an analysis of the significance of the potential impacts identified under clause (d);

    (f) the plans that have been or will be developed to mitigate the potential negative impacts identified under clause (d);

    (g) an identification of issues related to human health that should be considered;

    (h) a consideration of the alternatives to the proposed activity, including the alternative of not proceeding with the proposed activity;

    (i) the plans that have been or will be developed to monitor environmental impacts that are predicted to occur and the plans that have been or will be developed to monitor proposed mitigation measures;

[9] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 [EPEA], ss. 44-45 – **Authorities Tab 5**

(j) the contingency plans that have been or will be developed in order to respond to unpredicted negative impacts;

(k) the plans that have been or will be developed for waste minimization and recycling;

(l) the manner in which the proponent intends to implement a program of public consultation in respect of the undertaking of the proposed activity and to present the results of that program;

(m) the plans that have been or will be developed to minimize the production or the release into the environment of substances that may have an adverse effect;

(n) the final terms of reference; and

(o) any other information that the Director considers necessary to assess the proposed activity.[10]

22. This report must be published and made publicly available.[11]

23. Once the Director determines that the environmental impact assessment report is complete, depending on the activity, the Director advises the Alberta Energy Regulator (AER), the Natural Resources Conservation Board (NRCB), the Alberta Utilities Commission (AUC) or the Minister (Minister of Environment and Sustainable Resource Development)(ESRD) that the report is complete.[12]

24. The proponent will then be in a position to apply for the specific authorizations required for the activity in question from the AER, NRCB, AUC or ESRD (or some combination of these entities) as necessary.

25. Each of these entities has an application process and a review process which requires the proponent to submit additional information specific to the regulatory process and the activity in question which the decision-maker must consider. Each of these processes allows for some form of public participation in the review process. Forms of public participation include statements of concern by affected members of the public, appeal rights, or a public hearing.

26. Once one of these entities issues an authorization under the applicable legislation, the holder of the authorization, such as the holder of an approval issued under EPEA, must continue to comply with the terms and conditions of the authorization. These requirements are not replaced by LARP.

27. LARP then is an additional consideration which must be taken into account by the decision-maker in determining whether to authorize the applied for activity. In other words, after assessing all the other information provided by the public and by the proponent, the decision-maker must also assess whether the activity is consistent with LARP before deciding whether to

[10] EPEA (Tab 5), s. 49
[11] EPEA (Tab 5), s. 50
[12] EPEA (Tab 5), s. 53

allow the activity. LARP also adds the requirement for Alberta to initiate management responses in accordance with the management frameworks should a trigger or limit be exceeded.[13]

LARP Does Not Take Away From the Crown's Duty and Policy Commitments to Consult

28. LARP does not take away the Crown's existing duty and policy commitment to consult with aboriginal peoples when government decisions may adversely affect their exercise of constitutionally protected rights.[14]

29. In addition to the regulatory application process, the Crown continues to meet any applicable duty or policy commitment to consult with aboriginal peoples (such as First Nations), including those arising from section 35 of the *Constitution Act, 1982*.

30. LARP cannot and does not change Canada's Constitution. Treaty rights and their constitutional protection exist regardless of what Alberta legislates.

31. Further, all regulatory decision-makers must ensure that their decision-making complies with Canada's Constitution, which includes recognition of treaty rights. Under LARP, the Applicant's ability to raise concerns with project-specific regulatory decision-makers about the impacts of specific projects on treaty rights remains intact.

ROLE OF REVIEW PANEL

Panel is Limited to Determinations of Direct and Adverse Effect Related to the Content of LARP

32. The Panel is created by statute and therefore is limited in its jurisdiction to the powers granted to it under its enabling legislation.

33. Section 19.2 of ALSA provides:

> (1) A person who is directly and adversely affected by a regional plan or an amendment to a regional plan may, within 12 months from the date the regional plan or amendment affecting the person comes into force, request a review of the regional plan or amendment affecting the person in accordance with the regulations.
>
> (2) On receiving a request under subsection (1), the Stewardship Minister must establish a panel to conduct a review of the regional plan or amendment and report the results of the review and any recommendations to the Stewardship Minister.[15]

34. Section 5(1)(c) of the *Alberta Land Stewardship Regulation* defines "directly and adversely affected" in respect of a person with regard to a regional plan, as meaning "that there is a reasonable probability that a person's health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan".[16]

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[13] LARP, Regulatory Details, ss. 26 and 33
[14] LARP, pgs. 5, 34, 40, 63, 69
[15] ALSA (Tab 2), s. 19.2(1) and (2)
[16] *Alberta Land Stewardship Regulation,* AR 179/2011 [ALS Reg.], s. 5(1)(c) – **Authorities Tab 6**

35. Section 7(1) of the Regulation indicates the required contents of an application for review which includes:

- Identification of specific provisions of the regional plan which the applicant believes is or will directly and adversely affect the applicant;[17]
- An explanation of how each of the above indicated specific provisions is or will directly and adversely affect the applicant;[18]
- An explanation of the adverse effects suffered or expected to be suffered as a result of the above indicated specific provisions;[19] and
- The relief requested which may include an amendment to the above indicated specific provisions that the applicant proposes to diminish or eliminate the adverse effects.[20]

36. Rule 36 of the Rules of Practice for Conducting Reviews of Regional Plans provides that the Panel must provide advice on whether the applicant is directly and adversely affected by "a specific provision or provisions in a regional plan".[21]

37. If the Panel's advice is that the applicant is directly and adversely affected, the Panel must in its report to the Minister:

a) Identify and explain how the specific provision or provisions in the regional plan or in an amendment to a regional plan directly and adversely affects the applicant, and

b) Explain the adverse effects with respect to health, property, income or quiet enjoyment of property, or some combination of them, that the applicant is suffering or expects to suffer as a result of the specific provision(s) identified.[22]

38. The effect of these provisions is that the Panel is limited in its jurisdiction to reporting to the Minister as to existing or future harms to health, property, income or quiet enjoyment of property, caused by the content of specific, identified provisions of LARP. The Panel does not have the jurisdiction to conduct a review of LARP in its entirety. The role of the Panel is not to again balance the competing economic, social and environmental considerations in the entire Lower Athabasca Region.

39. The Panel does not then have the jurisdiction to consider matters such as:

- The creation process of LARP, including concerns related to consultation;
- Allegations of harms related to pre-existing development activities;
- Allegations of harms related to future development activities;
- Concerns related to the implementation of LARP;

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[17] ALS Reg. (Tab 6), s. 7(1)(d)
[18] ALS Reg. (Tab 6), s. 7(1)(e)
[19] ALS Reg. (Tab 6), s. 7(1)(f)
[20] ALS Reg. (Tab 6), s. 7(1)(g)
[21] Panel Rules (Tab 1), Rule 36 a)
[22] Panel Rules (Tab 1), Rule 38

- Items or features alleged to be missing from the content of LARP; and
- Allegations of harms related to legislation other than LARP.

40. The Panel also does not have jurisdiction to consider any questions of constitutional law, which would include alleged infringements of aboriginal or treaty rights, or alleged breaches of section 35 of the *Constitution Act, 1982*.[23]

"Directly and Adversely Affected" – General Causation Principles Apply

41. As set out above, the Panel's role is confined to identifying specific provisions of LARP, if any, that directly and adversely affect the Applicant. There must be a direct causative link between LARP content and the harm alleged.

42. The Supreme Court of Canada recently discussed causation of adverse impacts on aboriginal or treaty rights in *Rio Tinto Alcan v. Carrier Sekani Tribal Council* (*Carrier Sekani*).[24] The alleged harm must be caused by the government action complained of. In particular, past harms cannot be said to be caused by the current government action. Furthermore, the harm must be more than speculative to count as an adverse effect. The Court stated:

> **... The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.**
>
> ... Mere speculative impacts, however, will not suffice. ..., there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; ...[25]

43. While *Carrier Sekani* was about the Crown's duty to consult regarding potential adverse impacts on aboriginal rights in the absence of a treaty, the general principles of causation are relevant to the issue of whether the Applicant is or will be harmed by LARP content.

44. The Applicant's dissatisfaction with LARP content, and a desire for revisions and additions, is not a sufficient trigger for the Panel's power to recommend relief. Just because LARP might not include what the Applicant would like LARP to have included does not mean that LARP harms or will harm the Applicant.

45. The Applicant may suggest that the definition of "directly and adversely affected" set out in the *Alberta Land Stewardship Regulation* should be given a special interpretation on the basis that the Applicant's members are an aboriginal people. However, that suggestion is contrary to case law. While there is a principle suggesting that "statutes relating to Indians should be liberally construed", this principle applies only to interpreting Indian-specific federal legislation, and does

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[23] *Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44, Sched. B, Pt. II, s. 35 – **Authorities Tab 7**; *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3 [APJA], ss. 10, 11 and 16 – **Authorities Tab 8**

[24] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Carrier Sekani*] – **Authorities Tab 9**

[25] *Carrier Sekani* (Tab 9) at paras. 45 and 46

not apply to provincial legislation of general application.[26] ALSA and the associated Regulation are provincial legislation of general application. Therefore, an ordinary and factual-based interpretation of "directly and adversely affected" is appropriate.

CONCERNS OF THE APPLICANT

46. Broadly, the concerns expressed by the Applicant are as follows:

- LARP does not include nor protect the Applicant's treaty and aboriginal rights, traditional land uses, or culture;
- LARP does not include consideration of nor does it address how the Applicant's members can continue to access and peacefully use and occupy reserve lands;
- LARP is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of aboriginal and treaty rights and traditional land uses; and
- LARP is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for traditional land use and the exercise of treaty rights.

47. The Applicant requests a review of, and amendment to, LARP in its entirety so as to be consistent with the Applicant's view of the exercise of its members' treaty and aboriginal rights and traditional land use in perpetuity.

ISSUES OUTSIDE THE PANEL'S JURISDICTION

48. Alberta submits that the Panel does not have the jurisdiction to consider the majority of the issues raised by the Applicant because:

- the harms alleged raise questions of constitutional law;
- the harms alleged relate to alleged inadequacy of consultation during LARP creation or LARP implementation;
- the harms alleged relate to pre-existing activities;
- the harms alleged relate to potential future activities;
- the harms alleged relate to implementation of LARP, not its content; and
- the harms alleged relate to purported omissions from LARP, not the content of LARP.

Panel has no Jurisdiction to Determine Questions of Constitutional Law

49. The *Administrative Procedures and Jurisdiction Act* (APJA) indicates that no decision-maker has jurisdiction to determine a question of constitutional law (which includes a determination of any

[26] *Wasauksing First Nation v. Wasausink Lands Inc.*, 2004 CarswellOnt 936 (Ont. C.A.) at paras. 92-94 – **Authorities Tab 10**

right under the Constitution) unless conferred such jurisdiction by regulation.[27] The Panel is a "decision-maker" to which the APJA applies. While the Panel's role pursuant to ALSA is to provide a report and recommendations to the Stewardship Minister, rather than the Panel itself rendering changes to the regional plan,[28] other panels that provide recommendations have been found to be "decision-makers" pursuant to APJA.[29]

50. As a decision-maker, the Panel has not been granted jurisdiction to determine questions of constitutional law. The *Designation of Constitutional Decision Makers Regulation*, which confers jurisdiction in relation to questions of constitutional law to certain decision-makers, does not include a Panel under ALSA.[30]

51. As the Alberta Court of Appeal noted, "the Alberta statute reflects a policy decision that the citizens of Alberta are ultimately entitled to have their constitutional rights determined by a superior court".[31]

52. Therefore, the Panel cannot determine any question of constitutional law.

53. As a finding that LARP somehow infringes the Applicant's members' treaty rights or aboriginal rights would necessarily involve determining rights by applying s. 35 of the *Constitution Act, 1982* to LARP, this would be a "question of constitutional law" and therefore, outside the scope of the Panel's jurisdiction.

54. In any event, Alberta would note treaty and aboriginal rights are protected by s. 35 of the *Constitution Act, 1982,* irrespective of whether it is specifically enshrined within LARP. LARP cannot and does not purport to change Canada's *Constitution*.

Panel has no Jurisdiction to Consider Alleged Inadequacy of Consultation During LARP Creation or During LARP Implementation

55. As noted above under the heading Role of Review Panel, the combined effect of ALSA, the Regulation and the Rules is that the Panel is limited in its jurisdiction to reporting to the Minister as to existing or future harms caused by the content of LARP. Alleged harms related to how LARP was created or harms alleged to be caused by how LARP is being, or may be, applied are not within the Panel's jurisdiction. Therefore, it is outside of the purview of the Panel to consider the adequacy of consultation leading to the enactment of LARP or the adequacy of future consultation as it may occur under LARP.

56. Alberta submits that the following issues raised by the Applicant are related to adequacy of past or future consultation and cannot be considered by the Panel:

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[27] APJA (Tab 8), ss. 10, 11 and 16.

[28] ALSA (Tab 2), s. 19.2

[29] *Siksika First Nation v. Alberta (Director, Southern Region, Environment)*, 2007 ABCA 402, para. 10 – **Authorities Tab 11**

[30] *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006 – **Authorities Tab 12**

[31] *UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)*, 2012 ABCA 130, para. 43 – **Authorities Tab 13**

- Strategic Plan, pages 23 and 69: The peripheral/token role given to Aboriginal peoples in implementing sub plans under a regional plan that does not include what the Applicant considers to be its treaty and aboriginal rights, traditional land use and culture, as noted at Part A, paragraph 13 and Part C, paragraph 15 of the Applicant's submissions.

- Also in relation to Strategic Plan, pages 23 and 69: The opportunity to provide information does not translate into any government commitment to take actions or require decision-makers to exercise their functions in a manner consistent with the Applicant's view of the continued ability of Aboriginal Peoples to exercise treaty and aboriginal rights, engage in traditional land use, practice their culture or to access, peacefully use and occupy their reserve lands, also as noted in Part A, paragraph 13 of the Applicant's submissions.

- In relation to Strategic Plan, pages 34 and 63 (outcome 7): Relegates the Applicant to the role of TEK (traditional ecological knowledge) and information provider. No commitment by Alberta to do anything with this information that is protective of the Applicant's view of its treaty rights, traditional land use and culture, as noted in Part A, paragraph 23 of the Applicant's submissions.

57. In any event, Alberta submits that it did indeed include aboriginal peoples in the LARP land-use planning processes and decisions at the strategic level during LARP creation.[32] The Applicant even notes in its submissions (under Introduction) that it "participated in the LARP process reviewing and providing comment on the draft LARP."

58. Further, LARP includes a number of explicit references to Alberta's continuing commitment to engage with and consult aboriginal peoples including the following:

- Inclusion of aboriginal peoples in land-use planning is identified as a strategic direction that will improve the ability to balance economic, environmental and social outcomes in the region.[33]

- In developing a biodiversity management framework and a landscape management plan, the Government of Alberta will work with First Nations to consider how First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centres.[34]

- Government will engage with First Nations and stakeholders on initiatives to designate motorized access such as identification of trails or areas when developing the regional parks plan and regional trail system plan.[35]

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[32] *Response to Aboriginal Consultation on the Draft Alberta Land-Use Framework 2008,* printed September 2009, ISBN. 978-0-7785-8710-1 (Online Version), available on the Land Use Secretariat website at https://landuse.alberta.ca/Governance/AboriginalPeoples/Pages/default.aspx and also *Response to Aboriginal Consultation on the Lower Athabasca Regional Plan*, printed June 2013, ISBN. 978-1-4601-0456-9 (Online Version), available on the Land Use Secretariat website at https://landuse.alberta.ca/LandUse%20Documents/Response%20to%20Aboriginal%20Consultation%20on%20the%20Lower%20Athabasca%20Regional%20Plan%20-%202013-06.pdf – **Authorities Tab 14**

[33] LARP, pg. 24

[34] LARP, pg. 29

[35] LARP, pg. 30

- The Government of Alberta will work closely with aboriginal peoples...and other stakeholders to develop new-or enhance existing- tourism attractions, amenities, accommodations and access.[36]

- Aboriginal culture, with its connection to the land and environment, provides a unique opportunity for engagement in land planning, conservation, recreation and tourism initiatives...As such, the Alberta government will look for opportunities to engage these communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning in this region.[37]

- The Alberta government will invite First Nations who have expressed an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations - Richardson Backcountry Stewardship Initiative (or Richardson Initiative).[38]

- In accordance with applicable government policy as it may be from time to time, the Government of Alberta will continue to consult with aboriginal peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the input from such consultations continues to be considered prior to the decision.[39]

- Outcome 7: Inclusion of aboriginal peoples in land-use planning, which includes as its objective to encourage aboriginal peoples' participation in land-use planning and input to decision-making in recognition of the cultural and economic importance of land use to those aboriginal communities with constitutionally protected rights. This will provide both aboriginal communities and the Government of Alberta with a basis for better addressing current and potential land-use conflicts, in a manner supportive of aboriginal traditional uses, such as the exercise of treaty rights.[40]

59. In summary, Alberta submits that the Panel does not have the jurisdiction to address the issues raised by the Applicant, as specified above, as this goes to the adequacy of the Crown's consultation with the Applicant either during the creation process of LARP or during the implementation of LARP. These issues do not flow from the content of LARP.

60. Alberta also submits that, in any event, LARP does provide for effective and meaningful engagement and consultation opportunities for the Applicant, including with respect to impacts on rights recognized under section 35 of the *Constitution Act, 1982*.

Panel has no Jurisdiction over Alleged Harms from Activities Which Pre-date LARP

61. As noted above, the Panel has jurisdiction only with respect to harms alleged to be caused by the content of LARP. Harms which are alleged to have occurred due to activities which were carried on or approved prior to LARP cannot be caused by LARP and are therefore outside of the Panel's jurisdiction.

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[36] LARP, pg. 33
[37] LARP, pg. 34
[38] LARP, pg. 34
[39] LARP, pg. 34
[40] LARP, pgs. 63-64 - several specific strategies for achieving Outcome 7 are included.

62. Alberta submits that this includes the following concerns:

- Honouring of existing tenures including permitting access to water resources and disposal infrastructure , as noted in Part A, paragraph 22; and

- Recreational use of the area which the Applicant considers its traditional territory has already interfered with the Applicant's exercise of rights as noted in Part C, paragraph 11.

63. In any event, Alberta submits that LARP takes into account existing development impacts and works towards ameliorating continued effects of such development. Most notably, LARP sets aside approximately 1.5 million more hectares of land as conservation areas.[41] The reduction in land disturbance by the creation of conservation areas is expected to enhance opportunities for the exercise of treaty rights and traditional land uses.

64. With regards to the Applicant's concern that existing tenures will be honoured, with allowance for access to water resources and disposal infrastructure, LARP commits to making integrated land management between all industrial users on public land "a necessary element of doing business."[42] This integrated land management is designed to better coordinate existing industrial activities and any future activities, such as road networks and other infrastructure, to reduce the overall extent and duration of the land disturbance footprint.[43]

65. With respect to existing recreational use of the area that the Applicant considers to be its traditional territory, LARP calls for additional planning for these types of uses to better manage the impact to the land.[44] For example, prior to LARP motorized recreation was generally allowed throughout the area, whereas under LARP, motorized recreation will be managed in the future to occur in designated areas.[45] First Nations, such as the Applicant will be consulted in accordance with applicable policy on these plans as they move forward. [46]

66. In summary, Alberta submits that the above noted harms alleged by the Applicant are said to have occurred due to activities which pre-date LARP and are therefore outside of the Panel's jurisdiction.

67. In any event, Alberta also submits that LARP does consider existing development and works towards reducing continued effects of all development at a regional level.

Panel has no Jurisdiction to Consider Applicant's Allegations of Harms Related to Potential Future Development Activities

68. As noted above in the explanation of LARP's place in the overall regulatory structure, LARP does not authorize any particular activity or development. All future development activities remain subject to the existing regulatory process. Therefore, alleged harms related to potential future activities are not caused by LARP and are outside of the Panel's jurisdiction.

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[41] LARP, pg. 84
[42] LARP, pg. 25
[43] LARP, pg. 25
[44] LARP, pgs. 32, 45, 46, 63 and 64
[45] LARP, pgs. 84 and 86
[46] LARP, pg. 63-64

69. Alberta submits that the following concerns of the Applicant fall within this category:

- The contemplation of future development which is incompatible with the Applicant's view of treaty rights practice in conservation areas, including reference to the mineral tenures in the Richardson Wildland Park as noted in Part A, paragraph 18 of the Applicant's submissions;

- Loss of ability to exercise what the Applicant considers to be its members' treaty and aboriginal rights in preferred places by preferred means, as noted in Part C, paragraph 2 of the Applicant's submissions;

- Loss of ability to engage in traditional land use and other traditional pursuits, as noted in Part C, paragraph 4 of the Applicant's submissions;

- Loss of ability to transmit traditional knowledge and culture to future generations, as noted in Part C, paragraph 5 of the Applicant's submissions;

- Loss of ability to engage in cultural activities and live in a culturally appropriate manner, as noted in Part C, paragraph 6;

- Loss of culture, as noted in Part C, paragraph 7 of the Applicant's submissions;

- Impact to identity as Denesuline people and ability to exercise Dene spiritual practices, as noted in Part C, paragraphs 3 and 24 of the Applicant's submissions;

- Loss of food security, as noted in Part C, paragraph 8 of the Applicant's submissions;

- Increased risks, and perceived risks, associated with consumption of traditional foods, as noted in Part C, paragraph 9 of the Applicant's submissions;

- Health impacts linked to changes in diet from traditional to store-bought foods, as well as contamination of country foods, and change in lifestyle as traditional land use opportunities decrease, as noted in Part C, paragraph 10 of the Applicant's submissions;

- Loss of ability to utilize the Athabasca River as a navigation corridor, as noted in Part C, paragraph 16 of the Applicant's submissions;

- Loss of ability to access fishing , hunting and trapping areas due to water quantity issues, as noted in Part C, paragraph 17 of the Applicant's submissions;

- Contamination of local water, as noted in Part C, paragraph 18;

- Decision makers will allow removal of tracts of land from the land base supporting the exercise of what the Applicant considers its treaty rights and traditional uses, as noted in Part C, paragraph 19 of the Applicant's submissions; and

- Further transformation of land from natural to industrial, as noted in Part C, paragraphs 20-23 and 25.

70. In any event, Alberta submits that LARP either (a) reduces the likelihood of the prospective future harm which the Applicant is concerned with or (b) has no effect on such harms. LARP overall does not increase the possibility of such potential future harms.

71. With respect to the Applicant's concern regarding the potential for future development in conservation areas, Alberta submits that many forms of development, including petroleum and natural gas development and oil sands development, are not permitted in the conservation areas, including the Richardson Wildland Park.[47] LARP protects a large amount of additional land – an additional 1.5 million hectares – from future industrial development.[48]

72. In regards to the concerns outlined by the Applicant in Part C of its submissions, Alberta submits that treaty rights, while constitutionally recognized and affirmed, are not unlimited. Specifically, the treaty right to hunt, trap and fish for food is not site-specific; it is the activity which is protected.[49] Further, the Supreme Court of Canada has found for the exercise of treaty rights that changes in method do not change the essential character of the practice nor diminish the rights.[50] Accordingly, a First Nation's exercise of a treaty right in a manner different from that previously used does not necessarily diminish the exercise of the treaty right. Alberta submits that a changing landscape may change the exercise of treaty rights, without harming such rights.

73. In summary, Alberta submits that the above alleged harms relate to potential future activities and are outside of the Panel's jurisdiction.

74. In any event, Alberta also submits that LARP does not increase the potential for any of these alleged harms, but rather, reduces the likelihood that these harms will occur.

Panel has no Jurisdiction to Consider Allegations of Harms Related to the Implementation of LARP

75. As noted above, the Panel must consider only the harm caused by the content of LARP. Alleged harms caused by how LARP is or may be applied or interpreted by industry or regulatory decision-makers are outside the Panel's jurisdiction and cannot be considered.

76. Alberta submits that the following concerns of the Applicant are therefore outside of the Panel's jurisdiction:

- The concern, as expressed in Part B and Part C, paragraphs 1 and 19, of the Applicant's submissions, that LARP is being applied by decision-makers and relied on by oil sands companies to preclude the protection of what the Applicant considers to be its members' aboriginal rights, treaty rights and traditional land uses.

77. In any event, Alberta notes the general principle that all decision-making must comply with the requirements of legislation, including Canada's Constitution with its express recognition of aboriginal peoples' rights. In *Quebec (Attorney General) v. Canada (National Energy Board)*, the Supreme Court of Canada stated "it is obvious that the Board must exercise its decision-making

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[47] LARP, pg. 84
[48] LARP, pg. 84
[49] *R. v. Lefthand*, 2007 ABCA 206, para. 101 and 178 – **Authorities Tab 22**
[50] *R. v. Morris*, 2006 SCC 59, paras. 30 and 33 – **Authorities Tab 21**

function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982.*"[51]

78. LARP does not take away from the Applicant's ability to raise its concerns with these project-specific decision-makers about the impacts of projects on such constitutionally recognized rights. Concerns regarding the alleged failure of regulatory decision-makers to comply with the constitutional recognition of these rights can still be raised in the appropriate forum, which may be through the appeal or judicial review mechanism for that specific decision-maker. LARP leaves this ability intact.

Panel has no Jurisdiction in Relation to Alleged Omissions from LARP

79. As noted above, the Panel has jurisdiction only with respect to harms alleged to be caused by specific provisions of LARP. The Panel then has no ability to consider measures alleged to be missing from LARP.

80. Where LARP is silent on a particular topic, no taking away from existing rights occurs; rather, the current regulatory regime remains unchanged.[52] The Alberta Court of Appeal has indicated that maintenance of the status quo with respect to a First Nation's concerns is not an adverse impact.[53] In other words, LARP causes no harm by omitting to add a layer to the present regulatory regime with respect to certain matters.

81. Alberta submits that the Panel has no jurisdiction to consider the following concerns raised by the Applicant:

- LARP does not include a specific regulatory details plan for traditional land use and treaty rights nor does it contain other measures that are protective of what the Applicant considers to be its members' treaty and aboriginal rights, traditional land uses and culture, as noted in Part A, paragraphs 1-3, 10, 12, 16, and 26-30 of the Applicant's submissions;

- The conservation areas have not been selected nor designed nor their objectives set in a manner consistent with the Applicant's view of its members' treaty rights and traditional uses or with the Applicant's ability to access and peacefully use and occupy reserve lands, as noted in Part A, paragraphs 4, 5 and 17 of the Applicant's submissions;

- The Air Quality Management Framework triggers and limits do not include reference to the health of the Applicant's members, as noted in Part A, paragraph 6;

- Reclamation is only required to an equivalent land capability (rather than to a state consistent with the Applicant's view of aboriginal traditional land use and the exercise of treaty rights), as noted in Part A, paragraph 15 of the Applicant's submissions; and

- Conservation areas will be managed to provide low-impact backcountry recreation opportunities and nature-based tourism products and services without any mechanism for

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[51] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at para. 44 – **Authorities Tab 15**

[52] LARP, pg. 27

[53] *Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137, at para. 89 – **Authorities Tab 16**

consideration of the impacts such activities will have upon the Applicant, including restrictions on motorized vehicles as noted in Part A, paragraph 20 of the Applicant's submissions; and

- A large portion of the lands recommended by the Applicant for preservation in the Dillon Wildland Area were not accepted, as noted in Part A, paragraph 19 of the Applicant's submissions.

82. In any event, in relation to the concern that LARP does not explicitly include mechanisms for managing traditional land use or access for the exercise of treaty rights, Alberta submits that it must also respect its jurisdictional limits as included in the federal-provincial division of powers within sections 91 and 92 of the *Constitution Act, 1867*. Under this division of powers, Canada has exclusive legislative power over "Indians" and "Lands reserved for the Indians".[54] While provincial enactments of general application (such as LARP) apply of their own force to "Indians" and on reserves, this is subject to exceptions arising from the division of powers. The key exceptions are that LARP and other provincial enactments cannot legislate about Indian rights, the status or capacities of Indians as Indians or the Indian interest in land. Nor can such provincial enactments single out "Indians" for special treatment.[55] Therefore, in legislating access to provincial Crown land, Alberta could not expressly define somebody as being or not being an "Indian" or lands as those to which "Indians" have a right of access to exercise treaty rights. To the extent that the Applicant suggests that LARP should be amended to do such things, such amendments may be unconstitutional.

83. With respect to the designation of conservation areas, Alberta submits that one of the key criteria for establishment of conservation areas were that the area support aboriginal traditional uses.[56] These uses were considered, along with the other criteria, such as little to no industrial activity and areas that are representative of the biological diversity, in establishing the location of conservation areas.

84. More generally, LARP states that the biodiversity management framework and landscape management plan are to have several measures that will support systematic, regional management of wildlife habitat and populations and should, in turn, support the exercise of treaty rights and traditional land use.[57] LARP also expressly indicates that Alberta will work with First Nations in developing the biodiversity management framework, the landscape management plan, and the Lower Athabasca Regional Trail System Plan.[58]

85. Further, as noted above, LARP does not take away from the Crown's duty to consult or other policy commitments to consult with aboriginal peoples (such as First Nations) when government decisions may adversely affect the exercise of constitutionally protected rights.

86. With respect to the Air Quality Management Framework, Alberta notes that the triggers and limits within the framework are based on the Alberta Ambient Air Quality Objectives (AAAQO). The AAAQO were developed and implemented under the *Environmental Protection and*

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[54] *Constitution Act, 1867*, R.S.C. 1985, App. II, No. 5, ss.91 and 92 – **Authorities Tab 17**
[55] *R. v. Sutherland*, [1980] 2 S.C.R. 451, para. 5 – **Authorities Tab 18**
[56] LARP, pg. 30
[57] LARP, pgs. 45-46
[58] LARP, pgs. 63-65

Enhancement Act (EPEA) to protect the environment and human health, while recognizing principles of sustainability that include environmental as well as technical, social and economic considerations. [59] An AAAQO is "a numerical compensation, value or narrative statement which is intended to provide protection of the environment and human health to the extent that is technically and economically feasible, and the socially and politically acceptable".[60] Therefore, human health, although not specific to the health of the Applicant's members, is one of the important bases on which these triggers and limits were set.

87. For the specific AAAQOs used in the LARP Air Quality Management Framework[61]:

- The 1-hour average Alberta Ambient Air Quality Objective for nitrogen dioxide is 300 µg m-3 (159 ppb) based on respiratory effects.
- The annual average Alberta Ambient Air Quality Objective for nitrogen dioxide is 45 µg m-3 (24 ppb) based on vegetation.
- The 1-hour average Alberta Ambient Air Quality Objective for sulphur dioxide is 450 µg m-3 (172 ppb) based on pulmonary effects.
- The annual average Alberta Ambient Air Quality Objective for sulphur dioxide is 20 µg m-3 (8.0 ppb) adopted from the European Union, which based its objective on the protection of ecosystems.

88. Further, LARP enhances the use of AAAQOs by establishing triggers that are below the limit for each indicator (the LARP air quality limits are the AAAQO). This allows sufficient time to plan and react to manage air quality so as to avoid reaching that limit. LARP also addresses cumulative effects by ensuring releases from various sources and at various scales are managed so that they do not collectively result in unacceptable air quality. It also contemplates the use of both regulatory and non-regulatory tools in addressing air quality concerns. [62]

89. In relation to the Applicant's concern that there is "no mechanism" for consideration of the potential impacts on the Applicant of future development of backcountry recreation and nature based tourism, Alberta submits, as noted above, that LARP does not take away from the existing Crown duty or other policy commitments to consult with the Applicant. Also, as noted above, LARP expresses Alberta's ongoing commitment to continue to engage aboriginal peoples and includes specific indication of engagement in relation to restrictions on motorized access.[63]

90. Further, pending plans formally designating areas or routes, LARP specifies that "[o]ff-highway vehicle use is permitted on existing access".[64] The rationale for restricting motorized access to designated areas is "to mitigate potential biodiversity impacts associated with random

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[59] LARP, pg. 73; Air Quality Management Framework (Tab 3) pg. 12
[60] Air Quality Management Framework pg 12
[61] Air Quality Management Framework pg 12
[62] Air Quality Management Framework
[63] LARP, pg. 30
[64] LARP, pg. 30

motorized access".[65] This in turn will support the exercise of traditional activities on the landscape.

91. With respect to the Applicant's concern regarding suitable reclamation criteria, the current objective of reclamation under the *Environmental Protection and Enhancement Act* and the *Public Lands Act* is "equivalent land capability".[66] LARP does not require reclamation to any particular standard – LARP merely outlines the existing requirement.[67] Omissions from LARP are outside the Panel's jurisdiction, as is recommending amendments to legislation other than LARP.

92. In any event, such specific criteria are not appropriately dealt with at a regional level. Also, LARP does assist more generally in reclamation by contemplating the implementation of a progressive reclamation strategy which will provide mechanisms to define, measure and report on the return of lands to equivalent capability.[68]

93. With respect to the Applicant's concerns (Part A, paragraph 19) regarding the Dillon Conservation area, Alberta would note that the Dillon Conservation Area is 191,544 hectares (or 2% of the total land base within the LARP planning area).[69] It is also contiguous with the Gipsy-Gordon conservation area designated under LARP, which is 158,542 hectares.[70] Contrary to the Applicant's assertion, new forestry harvesting and mineral exploration activities are not contemplated within conservation areas.[71]

94. In summary, Alberta submits that items or measures alleged to be missing from LARP cannot be harm caused by LARP and are outside of the Panel's jurisdiction.

95. In any event, the existing regulatory structure will continue to apply where LARP is silent with respect to a particular topic, maintaining the status quo. Alberta submits that maintenance of the status quo is not an adverse effect caused by LARP.

ISSUES WITHIN THE PANEL'S JURISDICTION

96. The following concerns raised by the Applicant relate to the content of LARP:

- LARP prioritizes development, as noted in Part A, paragraphs 11 and 12 of the Applicant's submissions;

- LARP's designations of provincial recreation areas and public land areas for recreation and tourism (PLARTs) may result in increased recreation use of the areas, and therefore increased competition for resources, thereby impacting use of the areas by the Applicant's members, as noted in Part C, paras 11-14 of the Applicant's submissions.

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[65] LARP, pg. 30
[66] *Conservation and Reclamation Regulation*, Alta. Reg. 115/1993, ss. 1(2),(2) – **Authorities Tab 19**; *Public Lands Administration Regulation*, Alta. Reg. 187/2011 [PLAR], s. 23 – **Authorities Tab 20**
[67] LARP, pg. 26
[68] LARP, pg. 46
[69] LARP, pg. 84
[70] LARP, pg. 84 and 93
[71] LARP, pg. 84

97. However, Alberta submits that the content of LARP does not, in fact, cause the harm alleged by the Applicant.

LARP does not Authorize or Prioritize Development

98. The Applicant suggests that LARP prioritizes development (Part A, paragraphs 11-12).

99. This assertion is not accurate.

100. LARP does not prioritize development. LARP "aligns provincial policies at the regional level to balance Alberta's economic, environmental and social goals".[72] LARP's vision describes "a desired future state for the Lower Athabasca in which the region's diverse economic opportunities are balanced with social and environmental considerations using a cumulative effects management approach".[73]

101. LARP identifies seven regional outcomes.[74] The outcome of optimizing the economic potential of the oil sands must be weighed against the outcomes of managing landscapes to maintain ecosystem function and biodiversity, managing air and water to support human and ecosystem needs, and inclusion of aboriginal peoples in land use planning. LARP does not rank the regional outcomes.

102. In summary, LARP does not prioritize development for the Lower Athabasca Region. Rather, it strives to strike a balance between social, environmental and economic outcomes, taking into account the current state of the region.

Any Effect from LARP's Designation of Recreation Areas is not Adverse

103. The Applicant argues, at Part C, paragraphs 11-14, that LARP's designations of provincial recreation areas and public land areas for recreation and tourism (PLARTs) may impact the Applicant's exercise of treaty rights. In particular, the Applicant alleges that designation of the provincial recreation areas and PLARTs may encourage further sport and commercial hunters and fishers as well as increasing numbers of recreational users. The Applicant cites concerns of increased competition for resources and impacts to the Applicant's ability to hunt due to safety concerns. The Applicant is also concerned that the proposed road and trail networks will increase the amount of access by recreational users to the PLARTs.

104. Alberta submits that the Applicant will not be adversely affected.

105. The majority of the lands that will be established as provincial recreation areas or PLARTs are currently vacant public lands administered under the *Public Lands Act* and the *Public Lands Administration Regulation* (PLAR). On these vacant public lands, motorized access is not limited to designated routes and any person can enter onto and occupy this land for a recreational purpose (as defined) for up to 14 days, subject to certain exceptions.[75]

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[72] LARP, pg. 2
[73] LARP, pg. 23
[74] LARP, pg. 37
[75] PLAR (Tab 20), s. 32

106. Once established as either provincial recreation areas under the *Provincial Parks Act* or as public land use zones under the *Public Lands Act*, these areas will be subject to additional regulation. For example, motorized recreation will be limited to designated routes. This regulation is intended to mitigate impacts to the lands and potential biodiversity impacts associated with random motorized access. Regulation of motorized access will increase, not detract from, safety. Hunting, with its attending safety concerns, will continue to be regulated by existing legislation.

107. Alberta submits that the increased regulation of the provincial recreation areas and PLARTs will support the exercise of traditional activities on the landscape[76] and will reduce the potential for conflict between users, including the Applicant's members, rather than increase such conflict.

108. Alberta would also note that provincial recreation areas and new PLARTS will make up only a small portion (approximately 0.55% and 0.91%) of the land base in the Lower Athabasca region.

CONCLUSION

109. Alberta submits that the majority of the concerns raised by the Applicant are not related to the content of LARP and are therefore outside of the Panel's jurisdiction and must not be considered.

110. For the concerns noted above which are within the Panel's jurisdiction, as they relate to the current content of LARP, Alberta submits that no harm to the Applicant, as alleged, or at all, arises from the content of LARP complained of.

111. Alberta submits that the Applicant has not shown that there is any existing or future harm caused by a provision of LARP so as to trigger the Panel's power to provide recommendations for amendment to the Minister.

112. Consequently, Alberta requests that the Panel report to the Minister, pursuant to Rule 37, that the Applicant is not directly and adversely affected in accordance with Rule 36.

All of which is respectfully submitted June 25, 2014.

ALBERTA JUSTICE AND SOLICITOR GENERAL



Per: Lisa Semenchuk, Wendy Thiessen, and Witek Gierulski
Counsel for the Government of Alberta

[76] LARP, pg. 30

Table of Authorities

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1.	Alberta Land Stewardship Act – Rules of Practice for Conducting Reviews of Regional Plans (March 2014)
2.	*Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8
3.	Lower Athabasca Region Air Quality Management Framework for Nitrogen Dioxide (NO2) and Sulphur Dioxide (SO2)
4.	Lower Athabasca Region Surface Water Quality Management Framework for the Lower Athabasca River
5.	*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12
6.	*Alberta Land Stewardship Regulation*, AR 179/2011
7.	*Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44, Sched. B, Pt. II
8.	*Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3
9.	*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43
10.	*Wasauksing First Nation v. Wasausink Lands Inc.*, 2004 CarswellOnt 936 (Ont. C.A.)
11.	*Siksika First Nation v. Alberta (Director, Southern Region, Environment)*, 2007 ABCA 402
12.	*Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006
13.	*UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)*, 2012 ABCA 130
14.	A. *Response to Aboriginal Consultation on the Draft Alberta Land-Use Framework 2008* B. *Response to Aboriginal Consultation on the Lower Athabasca Regional Plan*
15.	*Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159
16.	*Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137
17.	*Constitution Act, 1867*, R.S.C. 1985, App. II, No. 5
18.	*R. v. Sutherland*, [1980] 2 S.C.R. 451
19.	*Conservation and Reclamation Regulation*, Alta. Reg. 115/1993
20.	*Public Lands Administration Regulation*, Alta. Reg. 187/2011

21.	*R. v. Morris*, 2006 SCC 59
22.	*R. v. Lefthand*, 2007 ABCA 206

Alberta Land Stewardship Act
Rules of Practice for Conducting Reviews of Regional Plans

March 2014

Section 19.2 of the *Alberta Land Stewardship Act*, SA 2009, A-26.8, as amended, and sections 5-11 of the *Alberta Land Stewardship Regulation*, AR 179/2011, establish the statutory requirements for requesting and conducting a review of a regional plan. The review of a regional plan must be conducted by a Panel. Section 10(1) of the *Alberta Land Stewardship Regulation* permits the Stewardship Minister to establish rules respecting the conduct of a review by a Panel.

Definitions

1. In these Rules,

   a) "Act" means the *Alberta Land Stewardship Act*, SA 2009, A-26.8, as amended;

   b) "administrative body" means the Secretariat or another body that provides administrative support to the Panel;

   c) "applicant" has the same meaning as in section 5(1)(a) of the Regulation;

   d) "application" has the same meaning as in section 5(1)(b) of the Regulation;

   e) "application form" means the application form for a request for review as posted on the Secretariat's website;

   f) "Chair" means the Panel member who is designated as the Chair in accordance with section 16 of the Rules;

   g) "Code of Conduct" means a code of conduct for members of a Panel;

   h) "Crown" means the Crown in right of Alberta;

   i) "directly and adversely affected" has the same meaning as in section 5(1)(c) of the Regulation;

j) "electronic" has the same meaning as in the *Electronic Transactions Act*, SA 2001, c E-5.5, as amended;

k) "electronic agent" has the same meaning as in the *Electronic Transactions Act*, SA 2001, c E-5.5, as amended;

l) "information request" has the same meaning as those questions set out in section 29 of the Rules;

m) "Minister" means Stewardship Minister as defined in section 2(1)(cc) of the Act;

n) "party" means the applicant or the Crown;

o) "Panel" has the same meaning as in section 5(1)(d) of the Regulation;

p) "recorded mail" means a form of document delivery by mail or courier in which receipt of the document must be acknowledged in writing;

q) "Regulation" means *Alberta Land Stewardship Regulation,* AR 179/2011, as amended;

r) "review" means a review pursuant to section 19.2 of the Act;

s) "Rules" means these rules respecting the conduct of a review by a Panel;

t) "Secretariat" has the same meaning as in section 2(1)(x) of the Act; and

u) "written submissions" means those documents referred to in section 24 of the Rules.

Dispensing with or varying the Rules

2. At any time where considerations of fairness so require, the Minister may supplement, dispense with or vary these Rules or any part thereof. Where the Minister supplements, dispenses with or varies the Rules, the Minister must issue directions in respect of the appropriate procedure or new timelines.

Computation of Time

3. Unless otherwise specified, where reference is made to a number of days, it means calendar days.

4. Where a time fixed for taking action expires or falls on a day that is not a business day, the action may be taken on the next business day.

5. When counting to or from an event or activity in days, the date on which the event or activity occurs is not counted.

Service of Documents

6. A document may be served by electronic method on the administrative body or on a party who has specifically provided an address to which information or data in respect of a review may be transmitted, if the document is sent to the administrative body or party at the specified address, and

   a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and

   b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the administrative body or the party to be served was successfully completed.

7. Service is effected under section 6 when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.

8. A document may be served on the administrative body or on a party by being sent by recorded mail, addressed to the administrative body or the party at the address for service provided to the administrative body for the purposes of a review.

9. Service is effected under section 8 on the earlier of

   a) the date acknowledgment of receipt is signed, or

   b) 7 days after the date on which the recorded mail is sent.

Complete applications

10. An application is not deemed complete until all the applicable information required under section 7(1) of the Regulation and the application form has been provided to the satisfaction of the Minister.

11. Subject to section 22, the Minister must serve notice to each party once an application is deemed complete, and must forward the application to the Panel once the Panel has been established.

12. The Minister may require an applicant to submit any additional information he considers necessary for the application to be deemed complete within a specified time period.

13. If an applicant fails to submit the information required under section 12 within the specified time period, the Minister may deem the application to be incomplete and must not forward the incomplete application to the Panel. The Minister must serve notice to the applicant that the application has been deemed incomplete and will not be forwarded to the Panel.

Establishing a Panel

14. The Minister must establish a Panel to conduct a review after determining that the application is complete in accordance with section 7(1) of the Regulation.

15. In establishing a Panel in accordance with section 6(1) of the Regulation, the Minister must

    a) with respect to section 6(1)(a), appoint Panel members from a roster of individuals selected through a competition conducted by the Secretariat,

    b) with respect to section 6(1)(b), appoint Panel members from members of the board or other body to which the Minister referred the request for review,

    c) appoint one or three Panel members, and

    d) set the remuneration of the Panel members which will be paid by the Secretariat.

16. If three Panel members are appointed, the Minister must designate one of the Panel members as the Chair of the Panel.

17. The Chair's duties may include

    a) calling or arranging meetings of the Panel members,

    b) requesting administrative or legal support for the Panel in conducting the review,

c) permitting a party to correct typographical errors or similar clerical errors in a written submission,

d) issuing information requests and receiving responses to information requests,

e) ensuring the review is conducted in a timely manner, and

f) submitting the Panel's report and any recommendations to the Minister.

18. If one Panel member is appointed, that Panel member must perform the duties of the Chair in sections 17(b), (c), (d), (e) and (f) of the Rules.

Code of Conduct

19. Each Panel member must review and adhere to the Code of Conduct when conducting a review.

20. The Minister may repeal the appointment of any Panel member who does not comply with the Code of Conduct or any of these Rules. The Minister must appoint a new Panel member to replace a removed Panel member.

Combining applications

21. In accordance with section 9(2) of the Regulation, the Minister may appoint one Panel to conduct a review of more than one application.

22. If the Minister combines applications in accordance with section 21, the Minister may serve notice to all applicants once all the applications to be heard by one Panel are deemed complete, and may forward all completed applications being combined to the Panel together.

23. If a Panel conducts a review of more than one application, the Panel must prepare and submit a separate report and any recommendations for each application.

Written submissions

24. Subject to section 28, the Panel must conduct the review based only on the written submissions of each party, specifically

a) the applicant's application,

b) a written response by the Crown, and

c) a written reply by the applicant, if submitted.

25. The Crown must serve its written response on the administrative body and the applicant within 90 days of receiving notice from the Minister that the application has been deemed complete under section 11 of these Rules.

26. If the applicant decides to provide a written reply, the applicant must serve its written reply on the administrative body and the Crown within 60 days of being served with the Crown's written response. If the applicant submits a written reply, the reply must be limited to addressing only matters raised by the Crown in its written response.

27. Once the timelines in sections 25 and 26 have lapsed or if a party serves notice on the administrative body that it will not be providing a written submission, the Panel must, subject to section 28, proceed with the review based on the written submissions before it.

Information Request

28. After the Panel has received and reviewed the written submissions, the Panel may request that a party provide further information necessary to permit a full and satisfactory understanding of the matters in the review.

29. An information request by a Panel under section 28 must

a) be in writing,

b) be directed to the party from whom a response is sought,

c) contain specific questions for clarification about the party's evidence, documents or other material that may be in the possession of the party and relevant to the proceeding, and

d) set out the date on which a response is required.

30. The administrative body must serve the information request on the party from whom a response is sought, and provide a copy of the information request to the other party.

31. The party receiving the information request must respond in writing with a full and adequate written response to each information request, or provide reasons why the information cannot be provided. The response must be limited only to the issues in the information request and must not raise new issues. The response must be served on the administrative body and the other party.

32. The other party may respond to the information request submitted under section 31 within the period of time set by the Panel.

Conducting the review

33. The Panel must conduct the review based only on the written submissions and responses to information requests, if applicable, of each party.

34. For additional clarity, the Panel must not consider any submissions from any person or entity other than a party in conducting a review.

35. The Panel has no authority to retain its own experts or to seek additional information from any party except in accordance with sections 17(b), (c) and (d), 18, 28 and 29 of the Rules.

36. In conducting a review, the Panel must provide advice on whether the applicant is directly and adversely affected by either

    a) a specific provision or provisions in a regional plan, or

    b) a specific provision or provisions in an amendment to a regional plan.

37. If the Panel's advice is that the applicant is not directly and adversely affected in accordance with either sections 36(a) or (b) of the Rules, the Panel must issue its report to the Minister with its advice on this issue alone.

38. If the Panel's advice is that the applicant is directly and adversely affected in accordance with either sections 36(a) or (b) of the Rules, the Panel must, in its report to the Minister

    a) identify and explain how the specific provision or provisions in the regional plan or in an amendment to a regional plan directly and adversely affects the applicant, and

b) explain the adverse effects with respect to health, property, income or quiet enjoyment of property, or some combination of them, that the applicant is suffering or expects to suffer as a result of the specific provision(s) identified.

39. The Panel may, in its report to the Minister, include recommendations specific to the provision(s) identified in section 38(a) of the Rules that may mitigate the adverse effects identified in section 38(b) of the Rules. Any recommendations made by the Panel must have regard to the purposes of the Act.

40. The Panel must submit its report and any recommendations to the Minister within one year less one day from being appointed or on a shorter timeline as directed by the Minister.

41. The Panel's report and any recommendations must reflect a consensus of the Panel members.

Communicating with the Panel

42. No party must contact the Panel or any Panel members directly. All communications to the Panel must be through the administrative body.

Costs

43. The Panel has no authority to consider or award costs in relation to a review.

Term of Panel Appointment

44. The appointment of a Panel member expires

a) one year less one day from the date of initial appointment, or

b) upon the Panel submitting its report to the Minister,

whichever date occurs first.

Public Record

45. Subject to section 46, the Secretariat must post the following documents on its website

a) all written submissions,

b) information requests and responses to information requests, and

c) the Panel's report and any recommendations.

46. A party may request in writing that the Panel keep a document or a portion of a document confidential. The Panel may grant such a request if, in the opinion of the Panel, the document or portion of document contains information contains sensitive business or personal information.

47. The other party may view a document kept confidential under section 46 by filing an undertaking with the administrative body that the opposing party will hold in confidence any evidence disclosed in a confidential document.

Records

48. Notwithstanding the involvement of an administrative body, the Secretariat must retain a copy of all written submissions, correspondence involving a party and the administrative body related to a review, and any Panel reports and recommendations.

General

49. In the event of any conflict or ambiguity between these Rules and the Act or Regulations, the Act or Regulations prevail over these Rules. For additional clarity, the Act prevails over the Regulations.

50. Words importing male persons including female persons, words importing female persons include male persons.

51. The headings preceding each section of these Rules are included for convenience only and do not form part of the Rules.

ALBERTA LAND STEWARDSHIP ACT

Chapter A-26.8

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Purposes of Act

1(1) In carrying out the purposes of this Act as specified in subsection (2), the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest.

(2) The purposes of this Act are

(a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

(b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;

(c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;

(d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

2009 cA-26.8 s1;2011 c9 s2

Definitions

2(1) In this Act,

(a) "activity" means

(i) anything that requires a statutory consent, and

(ii) anything that, under an enactment, must comply with a rule, code of practice, guideline, directive or instrument;

(9) Nothing in this section gives a person a right to compensation

(a) for anything done by a decision-maker under Part 17 of the *Municipal Government Act*, or

(b) as a result of the operation or application of any provisions of that Part.

(10) The Lieutenant Governor in Council may make regulations

(a) respecting the form and manner of making applications to the Crown, the Compensation Board or the Court of Queen's Bench under this section;

(b) respecting the application or modification of Part 3, Division 3, and the regulations made under that Division, in respect of applications to the Compensation Board or the Court of Queen's Bench under this section.

2011 c9 s14

Request for review of regional plan

19.2(1) A person who is directly and adversely affected by a regional plan or an amendment to a regional plan may, within 12 months from the date the regional plan or amendment affecting the person comes into force, request a review of the regional plan or amendment affecting the person in accordance with the regulations.

(2) On receiving a request under subsection (1), the Stewardship Minister must establish a panel to conduct a review of the regional plan or amendment and report the results of the review and any recommendations to the Stewardship Minister.

(3) On receiving a report and any recommendations under subsection (2), the Stewardship Minister must present the report and recommendations to the Executive Council.

(4) Any request for a review and any report and recommendations under this section must be made publicly available in their entirety by the secretariat in accordance with the regulations.

(5) The Lieutenant Governor in Council may make regulations

(a) respecting requests for a review under subsection (1);

(b) respecting the establishment of panels under subsection (2), including, without limitation, regulations respecting the appointment, powers, duties and remuneration of panel members;

(c) respecting the form and manner in which reports and recommendations of a panel must be provided to the Stewardship Minister;

(d) respecting the manner in which requests for a review and reports and recommendations under this section are to be made publicly available.

2011 c9 s14

Division 3
Compliance Declarations

Local government bodies

20(1) When a regional plan is made, every local government body affected by the regional plan must

(a) review its regulatory instruments, and

(b) decide what, if any, new regulatory instruments or changes to regulatory instruments are required for compliance with the regional plan.

(2) Every local government body affected by the regional plan must, within the time set in or under, or in accordance with, the regional plan,

(a) make any necessary changes or implement new initiatives to comply with the regional plan, and

(b) file a statutory declaration with the secretariat that the review required by this section is complete and that the local government body is in compliance with the regional plan.

Decision-making bodies

21(1) When a regional plan is made, every decision-making body affected by the regional plan must

(a) review its regulatory instruments, and

(b) decide what, if any, new regulatory instruments or changes to regulatory instruments are required for compliance with the regional plan.

(2) Every decision-making body affected by the regional plan must, within the time set in or under, or in accordance with, the regional plan,

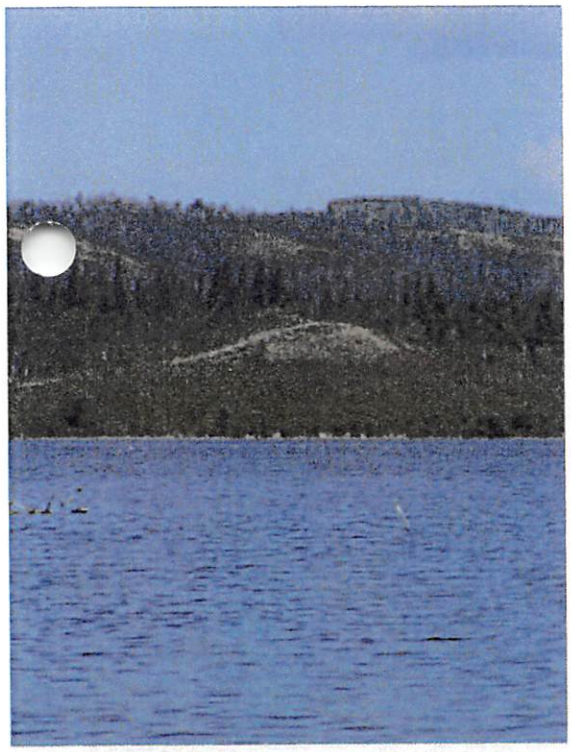
(a) make any necessary changes or implement new initiatives to comply with the regional plan, and

Lower Athabasca Region
Air Quality Management Framework

For Nitrogen Dioxide (NO_2) and Sulphur Dioxide (SO_2)

environmental • social • economic

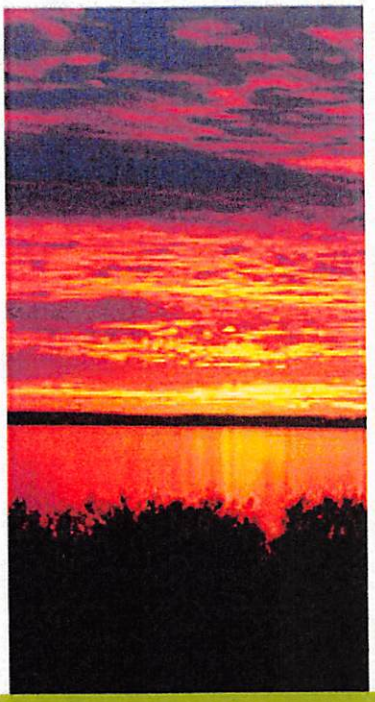
Land-use Framework

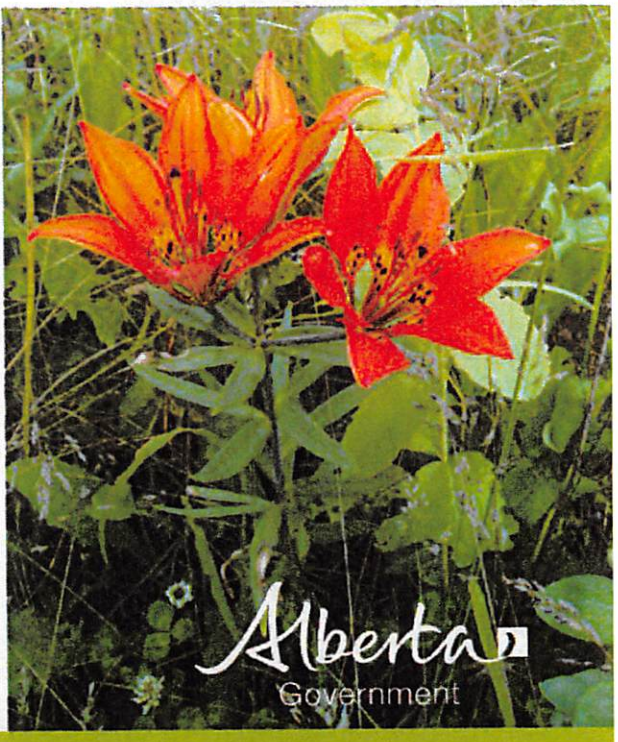












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1.0 Introduction

Alberta Environment and Sustainable Resource Development's three Lower Athabasca Region management frameworks were developed using input from different stakeholders within the Lower Athabasca Region including industry, First Nations and Métis peoples, and non-governmental organizations. As part of a series developed by the department for the Government of Alberta's *Lower Athabasca Regional Plan*, these frameworks are designed to maintain flexibility and to proactively manage cumulative effects to air quality, surface water quality and groundwater quality and quantity within the Lower Athabasca Region. The frameworks provide context for development and related regulatory processes and facilitate sustainable resource management. They are intended to add to and complement, not replace, existing policies, legislation, regulations and management tools.

The frameworks are policy documents that will be implemented and given legal authority as specified in the regional plan, and through Alberta Environment and Sustainable Resource Development's and potentially other departments' mandates and legislation.

The **Air Quality Management Framework** provides an additional component for the region in the overall air quality management system. This includes setting ambient air quality triggers and limits for nitrogen dioxide (NO_2) and sulphur dioxide (SO_2) with guidance for long-term decision making and management.

The **Surface Water Quality Management Framework** focuses on the Lower Athabasca River downstream of the Grand Rapids to the Athabasca River Delta. It sets surface water quality triggers and limits for 39 indicators measured at the Old Fort monitoring station.

The goal of the **Groundwater Management Framework** is to enhance the existing system to manage non-saline groundwater resources across the Lower Athabasca Region including management of potential cumulative effects on these resources. It establishes indicators of groundwater quality and quantity and the method for developing triggers and limits. This document forms the basis for more technical, detailed documents that have been prepared for each of the groundwater management areas in the region. These are *Groundwater Management Framework* supporting documents for the:

- North Athabasca Oil Sands (NAOS) Area
- South Athabasca Oil Sands (SAOS) Area
- Cold Lake - Beaver River (CLBR) Area

Please note that in May 2012, the Government of Alberta brought together the ministries of Environment and Water and Sustainable Resource Development to create one ministry called Alberta Environment and Sustainable Resource Development.

2.0 Purpose

The framework described in this document is part of the shift to cumulative effects management. It seeks to balance anticipated development with environmental protection. The use of indicators of air quality with triggers and limits helps to clearly define the management of cumulative effects of development and contributes to the achievement of desired regional objectives for air quality.

This *Air Quality Management Framework* was prepared by Alberta Environment and Sustainable Resource Development for the *Lower Athabasca Regional Plan*, one of seven regional plans being advanced under the *Alberta Land Stewardship Act* and the *Land-use Framework*.

The Lower Athabasca Region is the focus of major industrial development that is driving Alberta's and Canada's economy. Increasing population and industrial expansion is expected to continue in the coming years making management frameworks important components of the regional plan.

The *Terms of Reference for the Lower Athabasca Regional Plan* state that the proposed regional air management approach is to set regional industrial emissions caps for oxides of nitrogen (NO_x) and sulphur dioxide (SO_2). This management framework addresses this requirement by confirming that the province will continue to require industrial sources of these substances to employ pollution prevention and emission minimization principles as outlined in provincial policy. In addition, the framework sets ambient air quality triggers and limits for the indicators nitrogen dioxide (NO_2) and SO_2. It includes guidance on the management response if air quality triggers or limits are exceeded.

NO_x which includes nitrogen oxide (NO) and NO_2 are released as a product of combustion from industrial, transportation or home heating sources. The most stable and abundant oxide of nitrogen is nitrogen dioxide or NO_2. Alberta Ambient Air Quality Objectives (AAAQOs) are established for NO_2 and it is reported from most air monitoring stations in the region. This framework focuses on monitoring and responding to ambient concentrations of NO_2 as a way of managing releases of NO_x. Emissions management includes not only industrial emissions, but also other sources such as transportation and municipalities.

The main sources of SO_2 releases in the Lower Athabasca Region are from point sources at industrial facilities such as upgrading and other oil sands processing facilities. To a lesser extent, SO_2 is released through the combustion of fossil fuels.

Goals of the Framework

- Adopt cumulative effects management at the regional level to proactively maintain ambient air quality below the limits for NO_2 and SO_2.
- Develop triggers and limits for NO_2 and SO_2 and use monitoring data to determine ambient air quality in relation to those triggers and limits.

- Evaluate current management approaches for opportunities and solutions to improve air quality management, including broadening the understanding of contributing sources and seeking better technological solutions.
- Support and supplement the current pollution prevention and emission minimization principles as part of air quality and substance release management.
- Provide effective and efficient management that support the flexibility needed to address local ambient air quality within the region. Reduce prescriptive approaches in general, while assuring escalation to more prescriptive or regulatory approaches if the ambient concentrations increase.

The framework's proactive approach to managing ambient air quality will help to inform regulatory needs to ensure that development can continue while still maintaining air quality that supports a healthy human population and environment.

2.1 The Lower Athabasca Region

The Lower Athabasca Region covers a large area (93,216 square kilometres) of northeastern Alberta and encompasses agricultural lands, boreal forest and wetlands, including the Peace-Athabasca Delta, one of the largest freshwater deltas in the world. The region contains three municipal areas: the Regional Municipality of Wood Buffalo, including the city of Fort McMurray; the Municipal District of Bonnyville, including the city of Cold Lake; and Lac La Biche County. The Lower Athabasca Region is also home to a number of First Nations reserves, and Métis Settlements and communities. Please see the map on the following page for the locations of the municipal areas within the region.

The region has extensive natural resource development potential in the oil sands, natural gas and forestry sectors. Industrial development in the Lower Athabasca Region is an economic driver for Alberta and Canada and is expected to continue to increase in the coming years. As more people move to the region to develop the resources, the cumulative effects of human activity on the environment may also increase. Residents have expressed concerns about the impacts of industrial air emissions on health, the environment and overall quality of life.

Releases in the region come from oil, gas and oil sands operations; agriculture; forestry; and non-point sources such as vehicles and urban areas (e.g., home heating). Various substances in the air are associated with oil sands industrial processes and upstream oil and gas developments. These substances include oxides of nitrogen (such as NO_2), SO_2, hydrogen sulphide (H_2S) and other sulphur-containing compounds, ammonia (NH_3), hydrocarbons, fine particulate matter and ozone.

Ambient air concentrations of most substances are not uniform throughout the Lower Athabasca Region; rather they are influenced by the location, density and nature of developments in the area. The nature of certain developments, such as surface oil sands mining operations, means that the area influenced by cumulative emissions can also be large.

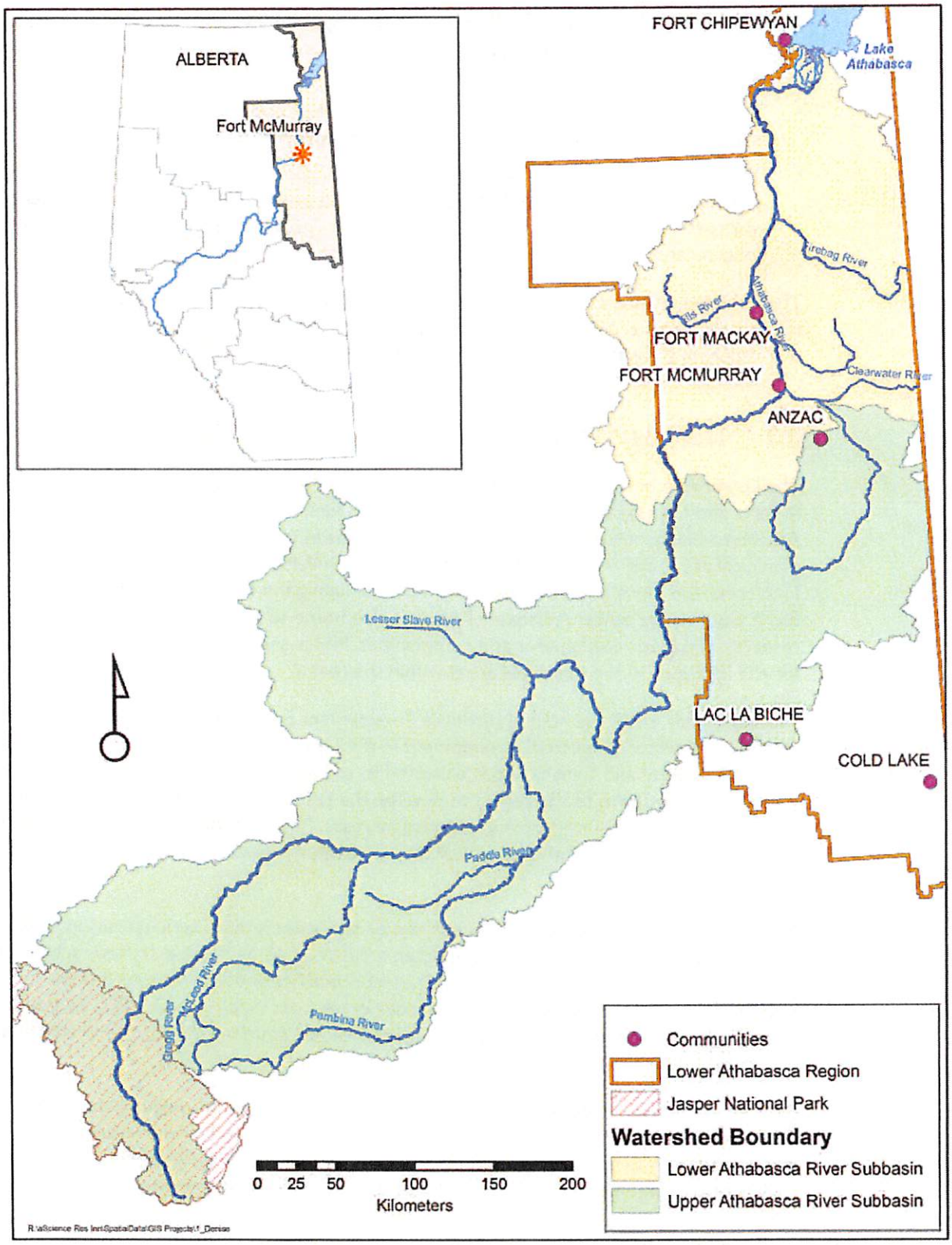


Figure 1
Map of the Athabasca River Basin and Boundary of the Lower Athabasca Region

2.2 Framework Development

The initial drafting and detailed revision of this framework relied on technical and editorial input from federal regulators, industry, multi-stakeholder organizations, non-governmental groups and First Nations and Métis peoples. An engagement process led by Alberta Environment and Sustainable Resource Development involved targeted stakeholders as well as acceptance of written feedback about the framework. At the same time, the Land Use Secretariat led a consultation process about the *Lower Athabasca Regional Plan* that involved gathering feedback on key aspects of advice provided by the Regional Advisory Council, feedback on the draft *Lower Athabasca Regional Plan* and an opportunity to provide input on the management frameworks.

All input was considered as the framework was developed. Overall, the comments supported the framework as a beneficial tool for environmental management within the Lower Athabasca Region.

Managing air emissions through ambient air quality outcomes aligns with recommendations from the Clean Air Strategic Alliance (CASA, 2009a), with Alberta's renewed Clean Air Strategy now being developed (Government of Alberta) and with the initiatives described in the draft Comprehensive Air Management System or CAMS (CAMS Steering Committee, 2010) which has been renamed the national Air Quality Management System (AQMS currently under development).

- CASA recommended defining ambient air quality triggers based on ambient concentrations with associated management actions.
- The renewed Clean Air Strategy outlines that air quality continue to support human populations, ecosystems, as well as continued economic prosperity.
- The national AQMS (currently under development) air quality management approach calls for place-based air quality management using a similar trigger-based system, with management activities that address all contributing emissions sources.
- Adopting these approaches for the framework supports the concept of environmentally responsible clean energy production in Alberta.

3.0 Key Concepts and Principles

There are two drivers that have guided this framework. The first is the need to build on provincial environmental protection and management policies and emission minimization practices. The second is the need to adopt a cumulative effects management system in the region.

3.1 Provincial Policy Direction

One of the purposes of regional plans is to translate provincial policy to the regional scale. The *Air Quality Management Framework for the Lower Athabasca Region* facilitates this by affirming the provincial environmental principles of:

- pollution prevention through employment of best available technology economically achievable
- emission minimization through best management and control practices, and
- continuous improvement and keeping clean areas clean.

Air quality is most frequently described in relation to objectives against which the ambient concentration of the substance can be compared. This framework outlines how to address air quality with respect to the current practice of established Alberta Ambient Air Quality Objectives (AAAQOs) for NO_2 and SO_2.

3.2 Cumulative Effects Management and Management Frameworks

The Government of Alberta has made a commitment to cumulative effects management, which focuses on the achievement of outcomes, understanding the effects of multiple development pressures (existing and new), assessing risk, collaborative work with shared responsibility for action, and improved integration of economic, environmental and social considerations. It follows an adaptive management model where decision-makers learn from experience and new information and adapt to changing social expectations and demands. Performance management, along with pollution prevention principles, is essential to providing information on environmental conditions and identifying the need for any adjustments and changes on an ongoing basis. The development of management frameworks is an important addition to accomplish this shift to a cumulative effects management system. They will play an important role in long-term planning and decision making in accordance with the outcomes defined in the regional plan.

The management framework approach is depicted in Figure 2.

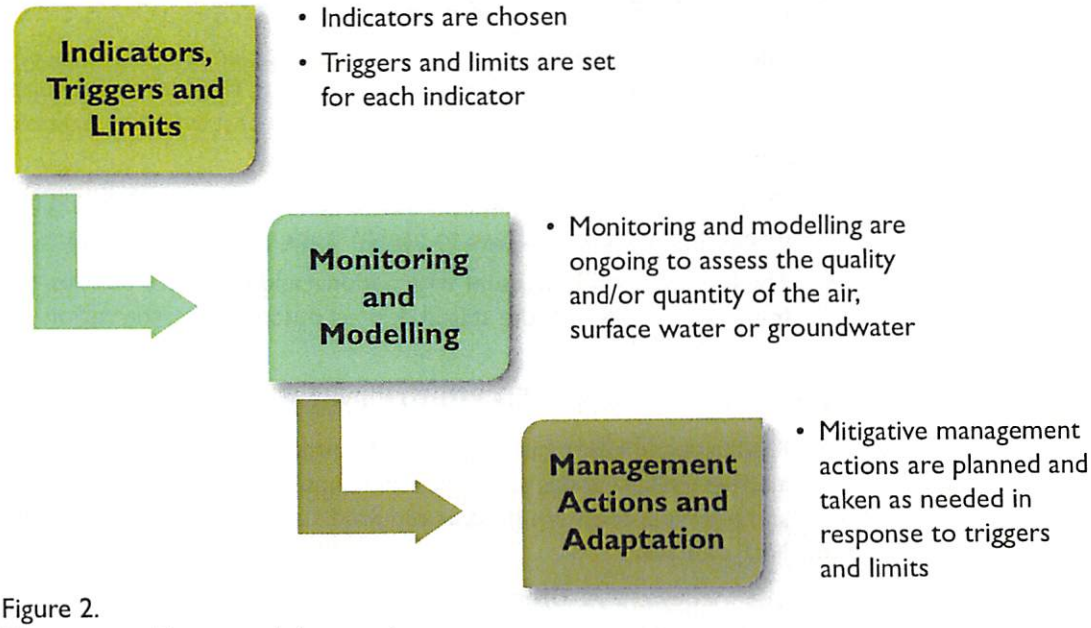


Figure 2.
Management Framework Approach

3.3 Key Principles

The following are key concepts and principles that form a foundation for the management framework.

3.3.1 Maintains Acceptable Air Quality

- The framework contributes to management of local air quality in the region by considering that:
  - ambient air concentrations of substances are influenced by the location, density and nature of developments in the area, and;
  - the nature of certain developments, such as surface oil sands mining operations, means that an area influenced by cumulative releases can be large.

3.3.2 Applies a Regional Perspective

- The framework contributes to proactively managing air quality within the region with consideration of human population and ecosystem health.
- The framework assigns and applies ambient air quality triggers and limits to NO_2 and SO_2 consistently across the region.
- As development proceeds and releases grow over time, the use of ambient air quality triggers will ensure that releases from various sources and at various scales are managed so they do not, collectively, result in unacceptable air quality.
- The framework addresses potential adverse impacts on ambient air quality from air emissions in the Lower Athabasca Region that could arise, despite the requirement for continuous improvement, from cumulative regional emissions and/or local emissions.

3.3.3 Builds on Existing Legislation, Regulations and Policies

- The framework is intended to add to and complement, not replace, existing management frameworks, policies, legislation and regulations. This includes requirements related to pollution prevention and incorporation of the best available technology economically achievable.
- Opportunities for continuous improvement will be considered in planning required management actions relative to capital stock turnover timelines.
- The framework is consistent with national and provincial policies, strategies and frameworks, and with the stated desired outcomes for the region.

3.3.4 Incorporates Flexibility and Adaptability

- Flexibility and adaptability result when place-based management actions are tailored to address specific issues associated with ambient air quality triggers. A range of actions and potential tools are used, as required, to manage ambient air quality with respect to NO_2 and SO_2.
- The framework recognizes that development plans, emission control technology and scientific understanding may change over time, and flexibility is needed to ensure that the desired environmental outcomes continue to be achieved.
- Alberta Environment and Sustainable Resource Development will review and update the framework to ensure alignment with other policies that are developed or revised at a regional, provincial or national level, or at a minimum 10-year interval to align with regional planning.

3.3.5 Clearly Communicates

- The framework supports long-term certainty in Alberta's policy and regulatory process. It provides clarity for industry, early in their design cycle, about operating requirements for emissions management that may be necessary due to cumulative impacts.
- The system described in this framework and the expectations for emissions management are clearly defined and transparent.
- Public access to ambient air quality monitoring data from continuous air monitoring stations is available through the CASA Data Warehouse at www.casadata.org. This data is used to determine air quality levels within the Lower Athabasca Region.

3.3.6 Involves Partnerships

- Alberta Environment and Sustainable Resource Development involves stakeholders, First Nations and Métis peoples, and working groups who live and work in the area as the framework is implemented.
- Ambient air monitoring and data collection are conducted by environmental and community associations comprised of citizens, Aboriginal groups, and industry and government representatives who gather data at existing continuous air monitoring stations and store it on the CASA Data Warehouse.

4.0 The Current Management System

4.1 Regulatory Context

Under the existing regulatory system, proponents of new activities assess the effects of cumulative emissions from natural, transboundary, non-point and industrial sources as part of Environmental Impact Assessments and applications for operating approvals or their renewal. Regulators use the mechanisms such as those listed in Table 1 along with applicable performance standards and modelling guidelines to identify appropriate mitigation and define allowable releases of NO_2 and SO_2 from each facility. These mechanisms along with the regulatory system will continue to be instrumental for the successful implementation of the additional components included within the *Air Quality Management Framework*.

Table 1. Regulatory and Non-regulatory Management of Air Emissions and Effects in the Lower Athabasca Region

Governance	Jurisdiction
Provincial Acts	
Environmental Protection and Enhancement Act (EPEA)	Provincial
Alberta Land Stewardship Act (ALSA)	Provincial / Regional
Regulations	
Approvals, monitoring and reporting requirements	Alberta (EPEA)
Compliance and enforcement	Alberta (EPEA)
Air Quality Management System (AQMS) in development	National
Guidelines	
Alberta Ambient Air Quality Objectives (Alberta Environment, 2009)	Alberta
Policies and Frameworks	
Land-use Framework (LUF)	Provincial / Regional
Acid Deposition Management Framework (Alberta Environment, 2008)	Alberta
Industrial Release Limits Policy (Alberta Environment, 2000)	Alberta
CEMA Acid Deposition Management Framework (CEMA, 2004)	Non-regulatory
CEMA Ozone Management Framework (CEMA, 2006)	Non-regulatory
Particulate Matter and Ozone Management Framework (CASA, 2003)	Alberta
CEMA Interim Nitrogen (Eutrophication) Management Recommendations and Work Plan (CEMA, 2008)	Non-regulatory

Governance	Jurisdiction
Strategies	
Alberta's Clean Air Strategy (in development)	Alberta
Responsible Actions: A Plan for Alberta's Oil Sands (Government of Alberta, 2009b)	Alberta
Federal Acts	
Canadian Environmental Protection Act	Canada

4.2 Current Alberta Ambient Air Quality Objectives for NO_2 and SO_2

Current AAAQOs are developed and implemented under the Alberta *Environmental Protection and Enhancement Act* to protect the environment and human health while recognizing principles of sustainability that include environmental as well as technical, social and economic considerations.

AAAQOs are reviewed by Alberta Environment and Sustainable Resource Development's multi-stakeholder process, which involves consultation within government and among the scientific community, environmental organizations, industry and the general public. The multi-stakeholder group may recommend new AAAQOs or revisions to existing AAAQOs for Alberta Environment and Sustainable Resource Development to consider and implement.

Ambient concentrations of NO_2 and SO_2 can affect both human and ecosystem health. Because short-term elevated concentrations of NO_2 or SO_2 may affect health, Alberta Environment and Sustainable Resource Development sets hourly and 24-hour AAAQOs for both substances. To address longer-term concerns, annual AAAQOs were established.

Table 2 shows the current annual and hourly AAAQOs for NO_2 and SO_2. For a complete list of current AAAQO values, Alberta Environment and Sustainable Resource Development's website should be referenced at www.environment.alberta.ca/01005.html.

Table 2. AAAQOs for NO_2 and SO_2

Substance	Averaging Time	Current Alberta Ambient AAAQO	Basis for Objective Value
NO_2	1 hour	300 µg/m³ 159 ppb	odour perception
	annual	45 µg/m³ 24 ppb	based on vegetation effects
SO_2	1 hour	450 µg/m³ 172 ppb	pulmonary function
	annual	20 µg/m³ 8 ppb	natural forests, lichen, protection of ecosystems adopted from European Union

4.3 Understanding Ambient Air Quality within the Region

Measuring and managing ambient air quality at a local level recognizes the variability and diversity of air quality within the region's 93,216 square kilometres. Defining air quality locally within the region helps to focus efforts to manage air quality where the problems may be occurring. Responding to local measurements is necessary to prevent ambient air quality concerns from spreading.

Ambient air quality monitoring is foundational to the implementation of this framework. Continuous air monitoring data are used to assess air quality with respect to the ambient air quality triggers and limits for NO_2 and SO_2 as specified in this framework. To effectively manage air quality, the locations of the continuous air monitoring stations are taken into consideration when assessing ambient conditions, undertaking a management response and considering the need for management actions.

This framework uses air quality data from airshed monitoring to define the ambient air quality level. The flexibility of this approach allows Alberta Environment and Sustainable Resource Development to adapt the framework when air monitoring station types or locations are changed or added within an airshed.

Existing air monitoring was designed to monitor air quality for industrial compliance as well as to monitor air quality in communities within the region. Individual stations measure local air quality as influenced by nearby emission sources. To understand air quality within the region, air monitoring must be described with respect to what the stations were designed to monitor. For example:

- Some air monitoring stations are clustered near industrial facilities primarily to monitor compliance with respect to ambient concentrations; consequently data collected from these stations represents the air quality near those industrial facilities and not the air quality for the region as a whole. Stations located close to industrial sources provide valuable information into how the releases are dispersed locally from point sources. They supply data essential to effective management of industrial sources; therefore, they play an important role in successful implementation of this framework.
- Similarly, continuous air monitoring stations that are located in specific communities represent air quality only in those communities.
- Air monitoring stations located in more remote areas provide information about how both industrial and non-point sources (e.g. transportation) releases disperse within the region. They also provide data for understanding longer term effects of emissions within the region.

The air quality in the region cannot be described adequately by a single number. Monitoring and managing local ambient air quality as described in this framework ensures that the most effective tools are being used where they are needed. Comprehensive air quality monitoring in the region needs to monitor air quality around industrial sources as well as in communities to ensure that all sources are managed appropriately.

4.4 Current Airshed Monitoring in the Region

The Lower Athabasca Region is Alberta's most heavily monitored region for air quality. Two airshed management zones operate in, and cover most of, the region. These are the Wood Buffalo Environmental Association (WBEA) and the Lakeland Industry and Community Association (LICA), the latter of which has an airshed boundary that extends south of the Lower Athabasca Region.

WBEA's airshed zone monitors close to 70,000 square kilometres in the northern part of the region and is currently using 15 continuous and 39 passive stations. The airshed includes Fort McMurray, Fort Chipewyan, Fort McKay and Anzac as well as a number of oil sands developments. LICA's 25 passive and 3 continuous stations monitor approximately 18,000 square kilometres in the east central part of the region. Together the stations in these two associations comprise the ambient air quality monitoring stations for the Lower Athabasca Region.

WBEA and LICA's airshed zone monitoring contributes to regional air quality management by providing reliable data, identifying concerns and monitoring substances within the airsheds. The WBEA and LICA regional monitoring has evolved to meet compliance and other stakeholder needs. WBEA and LICA will continue to adapt monitoring activities and initiatives based on changing land uses and changing stakeholder interests, although Alberta Environment and Sustainable Resource Development maintains the responsibility for approving monitoring station changes.

More information on WBEA and LICA as well as the ambient air concentrations they monitor is publicly available on their websites at www.wbea.org and www.lica.ca, respectively. These two associations report annually on their monitoring results and summarize their activities and initiatives within the region. Alberta Environment and Sustainable Resource Development analyzes ambient data collected by the associations and reports on air quality through the State of the Environment reporting process, described online at www.environment.alberta.ca/02488.html.

The southeast corner of the Lower Athabasca Region is not covered by either airshed. This area is currently not regarded as being under pressure from an air quality perspective and will continue to be modeled as part of the assessment process for proposed development.

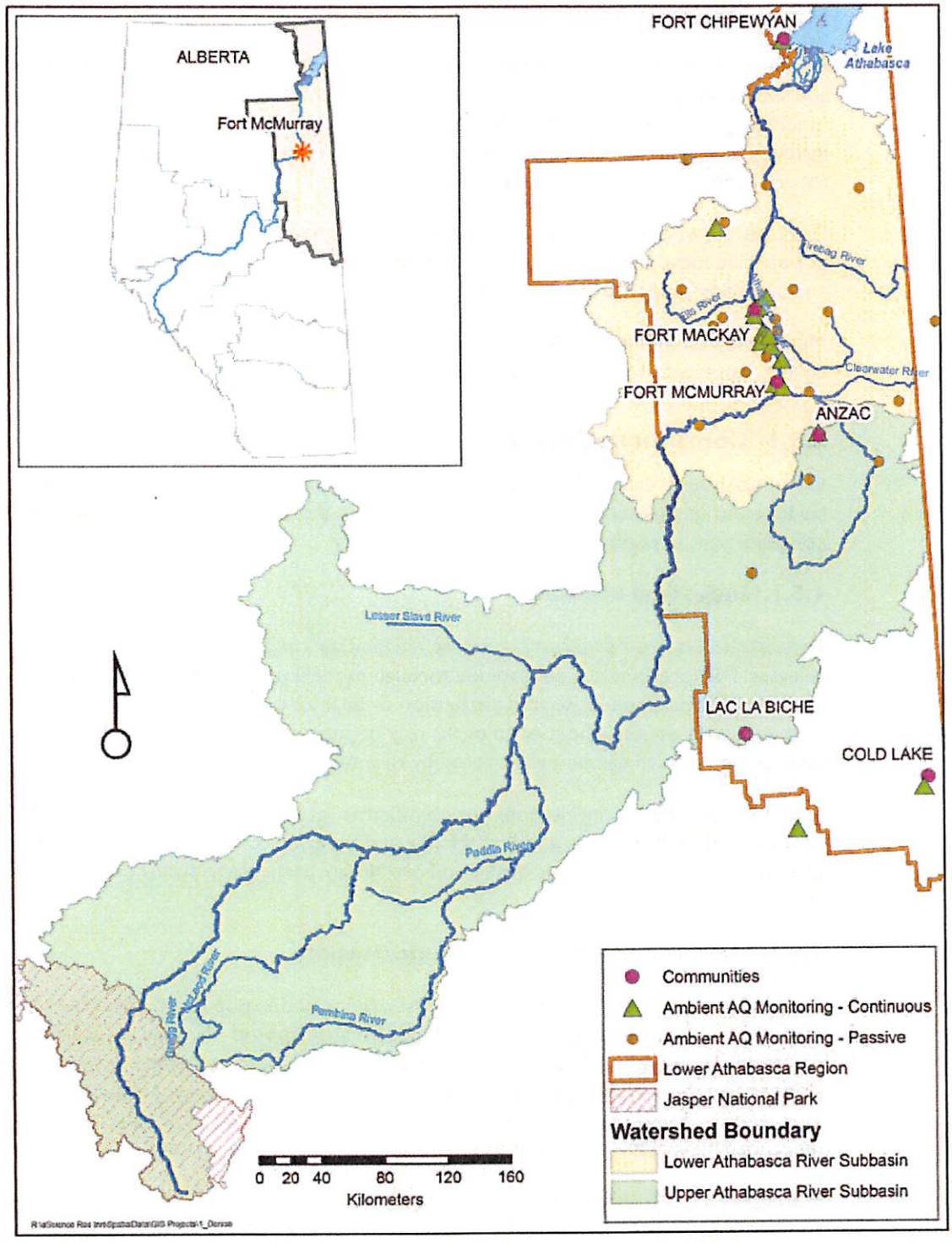


Figure 3:
Map of the Athabasca River Basin and Boundary of the Lower Athabasca Region Showing Ambient Air Quality Monitoring – Continuous and Passive

4.5 Types of Stations in the Region

Air monitoring stations operated by WBEA and LICA are situated to monitor some point sources, some populated areas and some background (undeveloped) areas. Additional monitoring to meet the needs of long-term ecological monitoring programs has also been included as required. Data collected for NO_2 and SO_2 monitoring includes continuous (hourly) and passive (monthly) measurements.

Each station, whether continuous or passive, is designed to sample and represent air quality at a specific location and for a specific purpose. Types of air monitoring stations, their intent and averaging times are shown in Table 3.

Meteorological monitoring is also important and the airsheds have a number of stations that collect representative sub-regional meteorological data.

4.5.1 Continuous Stations

Currently, hourly data collected for NO_2 and SO_2 come from industrial, community, background or meteorological monitoring stations. Continuous air monitoring stations comprise part of regional monitoring for air quality.

4.5.1.1 Industrial Stations

Industrial source stations measure ambient air concentrations as a result of industrial releases. The locations are determined through modelling that is done to measure direct off-location impacts, conduct source attribution or analyze characteristics of air quality near a large industrial source. Short-term peaks may be more prevalent due to point source plume impingement, which can be exacerbated by rare meteorological events.

In WBEA, two monitoring stations are classified as "attribution" stations. These are located between industrial sources and Fort McKay and are used to help determine which industrial sources may be influencing air quality in Fort McKay, particularly during poor air quality events.

4.5.1.2 Community and Background Stations

Community air monitoring stations are located in populated areas and are sited to measure the ambient air quality to which people are exposed. Air quality measured at most community stations is influenced by transportation emissions and emissions from local urban sources (e.g., home heating). Community stations may also be influenced by nearby industrial sources. Fort McKay is an example of a regional community where air quality is largely influenced by industrial as opposed to in-community emission sources.

Background air monitoring stations are sited to measure remote ambient air concentrations and/or to complement the monitoring of ecological effects. Their purpose is to measure the concentrations of pollutants in areas far removed from direct anthropogenic influences or to detect concentrations due to transboundary influences. As a result, short-term exceedances are less likely to be found in these areas.

4.5.2 Passive Stations

With passive monitoring, a reactive surface on the sampler is exposed to the air, and substances are transferred from the air to the sampler surface by diffusion. Samplers are typically exposed for one month and are useful for looking at long-term trends of air pollutants at specific locations. Since passive sampling is conducted over a longer period, short-term events (such as those occurring over an hour) may be "averaged out." An advantage of a passive sampling system is that networks of samplers can be used over a large area to determine the spatial variation of ambient air concentrations. Samplers are located to enable the analysis of ecological effects and to assist with analysis of acid deposition, not to assess hourly trends in ambient concentrations or measure short-term exceedances.

Table 3. Air Monitoring Station Summary

Type	Location Design and Intention	Sampling / Averaging Time
Continuous	Industry stations: • ensure release sources comply with AAAQOs • confirm proper operation of equipment (e.g., combustion, pollution abatement) • monitor for substances being released • are located between sources and local communities so that the specific operation responsible for an air quality event can be identified (attribution).	• Continuous sampling • Hourly, annual averaging
	Community stations: • are located to measure potential exposure to humans • support human health risk assessment • provide comprehensive monitoring of substances and other air quality parameters.	• Continuous sampling • Hourly, annual averaging
	Background stations: • provide information on transboundary effects or information about air quality without anthropogenic influences • provide comprehensive monitoring of substances and other air quality parameters.	• Continuous sampling • Hourly, annual averaging
Passive	Passive applications include: • pattern recognition (spatially distributed across region) • ecological monitoring (as required to support program objectives) • background (remote from emission sources) • co-location with continuous monitors (for statistical comparisons).	• Monthly cumulative sampling • Annual averaging only

4.6 Managing Local Exceedances

Alberta Environment and Sustainable Resource Development will continue to respond to local exceedances of AAAQOs after they have occurred. This includes determining the cause of the exceedance, notifying the responsible sources and affected stakeholders as well as any affected First Nations and Métis communities, and determining any requirements to prevent a re-occurrence. Hourly or daily AAAQO exceedances at compliance air monitoring stations are most likely due to upset or abnormal operating conditions at point sources. If an AAAQO (hourly, daily or annual) is exceeded, the identified source or sources are required to submit details of management actions aimed at preventing the event from happening again. In some situations, remedial and preventative actions may be needed to reduce releases from anthropogenic sources.

5.0 Regional Objectives

In support of desired regional outcomes, this management framework establishes the following regional objective for air:

>> Releases from various sources are managed so that they do not collectively result in unacceptable air quality.

In order to better describe what this objective means, indicators have been chosen as well as triggers and limits established for those indicators.

5.1 Indicators, Triggers and Limits

5.1.1 Identifying Key Indicators

Indicators provide information about whether or not a regional objective is being met.

At this time, the framework focuses on managing ambient air quality with respect to ambient air concentrations of NO_2 and SO_2 because these substances:

- are two of the major substances being released in the region
- are actively monitored throughout the Lower Athabasca Region
- are predicted to increase with expanding development
- are being detected at increasing and/or elevated levels in some areas of the region
- are regulated under the *Environmental Protection and Enhancement Act*
- have established AAAQOs
- have monitoring data in areas of concern from an air quality perspective to allow assessment of local ambient air quality against the ambient air quality triggers and limits
- can be controlled through a range of options applied to the various sources.

NO_2 and SO_2 are also precursors to particulate matter and ozone. Acid and nitrogen deposition and their long-term acidification and eutrophication impacts are other potential environmental issues associated with NO_2 and SO_2 emissions. Ecosystem and environmental effects are monitored through regional programs, and effects are managed through regional and provincial management frameworks. Management actions may be initiated by other regional or provincial management frameworks. Such management actions will be considered when undertaking the management response included in this *Air Quality Management Framework*.

Setting Triggers and Limits

Setting ambient air quality triggers and limits for key indicators is a proactive approach to managing air quality.

Provincially, ambient air is defined as outside air; any portion of the atmosphere not confined by walls and a roof, and to which the general public has access. For this management framework, ambient air quality **limits** are determined by the annual AAAQOs.

As defined by CASA, an AAAQO is a **numerical concentration, value or narrative statement which is intended to provide protection of the environment and human health to the extent that is technically and economically feasible, and is socially and politically acceptable** (CASA, 2009a)

An ambient air quality **limit** signals the need to undertake a management response to:

- assess the ambient air quality
- determine the spatial extent of the ambient air quality
- identify and ensure management actions are implemented.

Table 2 shows the current AAAQOs for NO_2 and SO_2 and information about the AAAQO is always available on Alberta Environment and Sustainable Resource Development's website.

Annual average ambient air quality **triggers** are ambient concentration values set lower than the ambient air quality **limit**. Ambient air quality values based on the 99th percentile of hourly data are all established as triggers in the management framework. **Triggers** signal the need to undertake a management response to:

- assess the ambient air quality
- determine if there is an issue
- identify and implement management actions if needed.

By setting the annual average ambient air quality triggers below the air quality limit, the framework allows sufficient time to plan and react to manage air quality so as to avoid reaching that limit.

If an ambient air quality limit or trigger is exceeded, a management response as described in this framework will be initiated. This may lead to identifying the need for management actions such as collecting more data to understand the ambient air quality, or reducing emissions to prevent ambient concentrations from reaching unacceptable concentrations. This framework focuses on ambient air quality and management approaches to maintain acceptable air quality. Other regional or provincial frameworks consider the longer-term effects on the environment (these regulatory and non-regulatory tools are described in Table 1).

6.0
The Management System

What this framework brings to the existing system are the following:

- establishment of a regional objective for air quality
- identification of key indicators for that objective
- setting of triggers and limits for those indicators
- identification of a management response that will be initiated if triggers and limits are exceeded
- alignment with the proposed national Air Quality Management System's four levels
- description of roles and responsibilities for government, monitoring associations and emitters.

Elements from the framework will be included in the *Lower Athabasca Regional Plan* and will be implemented as part of that plan with legal force as provided by the *Alberta Land Stewardship Act*.

In the management framework the annual ambient air quality limits and triggers, and the 99th percentile triggers are expressed in terms of levels of air quality conditions. These ambient air quality levels are described in Table 4 using the annual triggers and limit as an example.

Table 4. Annual Ambient Air Quality Level Descriptions

Level	Description	Management Intent
Level 4	Ambient air quality exceeding air quality limits	Improve ambient air quality to below limits
	Limit	
Level 3	Ambient air quality below but approaching air quality limits	Proactively maintain air quality below limits
	Trigger	
Level 2	Ambient air quality below air quality limits	Improve knowledge and understanding, and plan
	Trigger	
Level 1	Ambient air quality well below air quality limits	Apply standard regulatory and non-regulatory approaches

Note: The ambient air quality values based on the 99th Percentile of hourly data are all established as triggers in the management framework (see Section 6.4).

Implementation of the management framework requires annual assessment and evaluation of the ambient air quality conditions. Alberta Environment and Sustainable Resource Development will use data from air monitoring stations reporting to the CASA Data Warehouse within the region to calculate ambient concentrations of NO_2 and SO_2 in relation to the ambient air quality levels. Because changes could occur within the region, the framework is sufficiently adaptable to respond to, and accommodate the need for, modifications that may arise through such initiatives as the *Ambient Air Monitoring Strategy* (CASA, 2009).

6.1 Assignment of Ambient Air Quality Levels

The purpose of assigning ambient air quality levels to monitoring stations under the framework is to identify where NO_2 and SO_2 ambient concentrations are in relation to the defined ambient air quality triggers and limit. The idea is to prevent ambient air concentrations from approaching or reaching Level 4 by proactively managing the sources or influences. Once ambient air quality levels are assigned, the main influences can be identified, and any required mitigative management actions can be chosen.

Ambient air quality levels are assigned to individual stations based on the NO_2 and SO_2 metrics. It is possible for an air monitoring station to be assigned an air quality level and need management actions one year, then fall below an ambient air quality trigger, and thus into a lower level, the next year. In this case, the management actions will still be carried out; however the actions may be modified accordingly, as determined by Alberta Environment and Sustainable Resource Development. Management actions are meant to be flexible, taking into consideration the concentration trends, the air monitoring station in question and the magnitude above the ambient air quality trigger.

6.2 What the Current Data Shows

NO_2 and SO_2 trends vary in the Lower Athabasca Region, depending on the location of the air monitoring station.

Annual average and 99th percentile of hourly data NO_2 concentrations have increased at some air monitoring stations in the Lower Athabasca Region, based on historical data going back to 1999.

Annual average SO_2 concentrations have remained quite consistent in the Lower Athabasca Region at industrial, community and background stations. Concentrations remain well below the annual AAAQO.

The upper range (represented by 99th percentile of the annual hourly data) of the ambient concentrations of NO_2 and SO_2 are indicative of the magnitude and frequency of peak concentrations. Increasing trends in peak SO_2 at some monitoring stations will require proactive management to maintain ambient air quality below level four as described by the 99th percentile trigger values.

6.3 Management Response

The terms management response and management action have distinct meanings in the context of this management framework. The management response is a set of steps that will be undertaken (all or in part) if an ambient air quality trigger or limit is believed to have been exceeded. Part of the management response is determining the need for management actions. Management actions become more stringent at higher air quality levels.

The management response begins with assessing whether an ambient air quality trigger or limit has been exceeded. Depending on the findings of assessment and investigation, decisions are made about contributing parties and the need for management actions. At triggers, the emphasis is on reversing trends or avoiding reaching limits. If a limit is exceeded, there is a commitment that steps will be taken to return to conditions below the limit. To confirm that desired outcomes are met, Alberta Environment and Sustainable Resource Development provides oversight of management actions, evaluates the effects of implementation, and communicates progress toward meeting regional outcomes.

The system described below includes the Government of Alberta management response and describes the management tools from which regulators, in collaboration with stakeholders, First Nations and Métis peoples where applicable, can select appropriate place-based management actions to address specific circumstances.

It should be noted that this management response does not replace other responses that are taken as part of ensuring compliance under the environmental regulatory system.

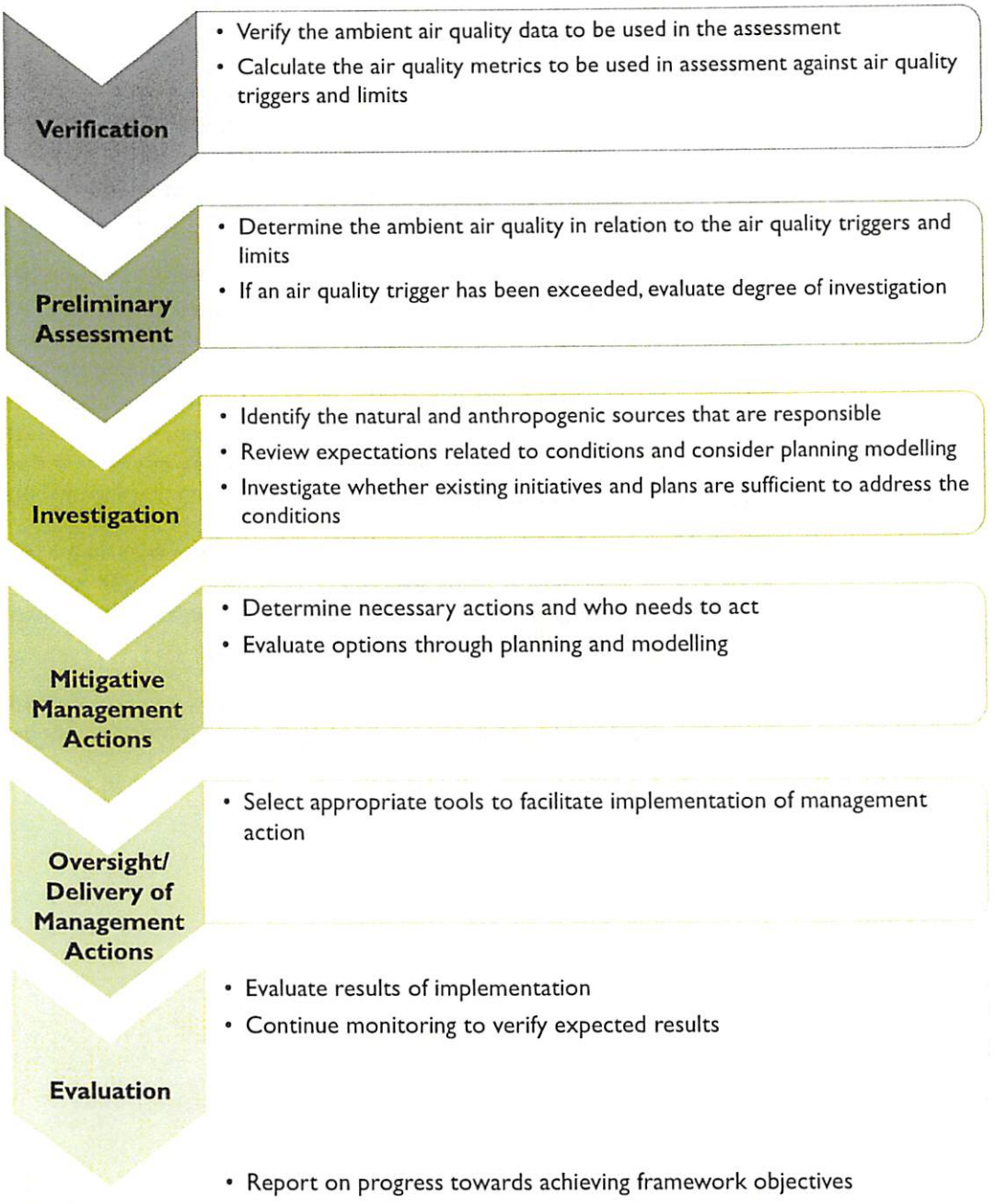


Figure 4
Management Response

6.3.1 Verification

The framework is flexible and recognizes there is no "one size fits all" management action that can effectively deal with the potential range of air quality issues. To accommodate this approach, an annual assessment of ambient air quality data gathered from ambient air monitoring stations throughout the region is conducted. The ambient air quality is described in terms of the ambient air quality levels for NO_2 and SO_2 as well as details regarding the purpose of the air monitoring station and what it is measuring.

Alberta Environment and Sustainable Resource Development analyzes the ambient NO_2 and SO_2 data collected from the airshed monitoring stations, calculates the annual average and 99th percentile of the hourly data metrics to determine how stations fall into the ambient air quality levels outlined in the framework. The quality controlled monitoring data is used to determine whether the corresponding ambient air quality triggers or limits were exceeded. Ambient air quality levels are assigned to individual monitoring stations following the annual assessment. This assessment is based on data retrieved from the CASA Data Warehouse (www.casadata.org).

Hourly NO_2 or SO_2 episodes that contribute to ambient air quality concentrations reaching an ambient air quality trigger or limit are analyzed individually to interpret the primary influence. A particular episode, or several episodes occurring over a certain period or area, may require modelling and emissions inventory data to demonstrate what the primary influence is (or influences are) to ambient air quality levels.

6.3.1.1 Analyzing the Data

The ambient air quality data are analyzed with respect to the annual average. The data are also analyzed by assessing the peak values or the upper range of the hourly data. The upper range of the data is represented by the annual 99th percentile of the hourly data. By using the two types of data, management actions can be tailored to prevent reaching either the annual average or hourly air quality AAAQO's.

The ambient air quality triggers and limits are consistent across the region, but management actions and tools are place-based to deal with specific circumstances.

Annual Average

Analysis of the annual average ambient concentrations occurs after the yearly data have been gathered. To provide time to plan and implement management actions to prevent the ambient concentrations from reaching the limits, the ambient air quality triggers for Levels 2 and 3 are set at 1/3 and 2/3 of the annual ambient air quality limit, respectively. If AAAQOs are revised, the annual ambient air quality limit will become the revised AAAQO for the substances covered by the framework. The associated annual ambient air quality triggers will then be assessed to ensure they are appropriate and that there is sufficient time to respond with management actions.

The annual ambient air quality triggers and limits are shown in Table 5. The annual ambient air quality limits are based on the current AAAQOs for NO_2 and SO_2.

Table 5. Annual Ambient Air Quality Triggers and Limits for NO_2 and SO_2

Description	NO_2	SO_2
Limit[1]	45 µg/m³ (24 ppb)[1]	20 µg/m³ (8 ppb)[1]
Trigger for Level 3	30 µg/m³ (16 ppb)	13 µg/m³ (5 ppb)
Trigger for Level 2	15 µg/m³ (8 ppb)	8 µg/m³ (3 ppb)

Triggers and limits apply at continuous air monitoring stations as reported through the Clean Air Strategic Alliance Data Warehouse.

[1]Annual air quality limits are based upon Alberta Ambient Air Quality Objectives

99th Percentile of the Hourly Data

Exceedances found based on monitoring data are currently, and will continue to be, addressed through the regulatory compliance system. Whenever the hourly AAAQO is exceeded, Alberta Environment and Sustainable Resource Development assesses the source and cause of the exceedance. Under the current regulatory system, if corrective action is required, Alberta Environment and Sustainable Resource Development ensures this compliance function takes place. This regulatory tool will continue to be used when the framework is in effect.

What the framework adds to the evaluation of hourly data is the use of the 99th percentile as a statistical measure that indicates the upper range or peak of the data. The framework analyzes the upper range of the hourly data to identify actions that can be taken to reduce the likelihood of reaching the hourly AAAQO.

The 99th percentile of hourly data is compared against the 99th percentile ambient air quality triggers for NO_2 and SO_2. This analysis indicates the trend in the upper range of the hourly data as well as the frequency of peaks in the data, as opposed to the analysis of the annual average which "smoothes out" the data. The metric allows some of the peak values to be removed to account for rare operating and meteorological circumstances.

Increases in the annual 99th percentile of the hourly data beyond the 99th percentile ambient air quality triggers can provide early warning that exceedances of the hourly AAAQO are more likely to occur. This trend analysis can help in selecting management actions to prevent reaching the hourly AAAQOs.

If the hourly AAAQO is exceeded, the existing regulatory compliance mechanism will come into play as described above, but one hourly exceedance will not put an air monitoring station into Level 4.

The 99th percentile ambient air quality triggers were calculated in relation to the hourly AAAQO for NO_2 and SO_2 and the values are presented in Table 6 below. (See Appendix A for calculation details.) A relationship was determined between the maximum and 99th percentile of the hourly data for both NO_2 and SO_2 and this relationship was then used to calculate the 99th percentile ambient air quality trigger values.

Table 6. Ambient Air Quality Triggers Based on 99th Percentile of the Hourly Data Over a Year

Trigger	NO_2	SO_2
Trigger for Level 4	176 µg/m³ (92 ppb)	94 µg/m³ (36 ppb)
Trigger for Level 3	118 µg/m³ (62 ppb)	63 µg/m³ (24 ppb)
Trigger for Level 2	57 µg/m³ (30 ppb)	31 µg/m³ (12 ppb)

Triggers apply at continuous air monitoring stations as reported through the Clean Air Strategic Alliance Data Warehouse.

6.3.2 Preliminary Assessment

Once the ambient air monitoring data are verified, the annual average and 99th percentiles are assessed against the ambient air quality triggers and limits. This includes ensuring that rare events or natural circumstances that cannot be controlled through emissions management (e.g., forest fires) are understood as part of the annual assessment.

The assessment of NO_2 and SO_2 data in the Lower Athabasca Region will be performed by Alberta Environment and Sustainable Resource Development on an annual basis. Data are normally available from the CASA Data Warehouse in March of each year, for data from the previous year. The assessment is completed each year by the end of the calendar year.

The assessment procedure is based on the one described in the CASA *Particulate Matter and Ozone Management Framework*, which has been performed and refined by Alberta Environment and Sustainable Resource Development since 2004. Data completeness criteria and rounding conventions from the *Canada-Wide Standards for Particulate Matter and Ozone* and the CASA *Particulate Matter and Ozone Management Framework* have been adopted here.

Alberta Environment and Sustainable Resource Development determines and assigns the ambient air quality levels at ambient air monitoring stations. The ambient air quality levels are described in terms of the type of air monitoring station, and whether the level is based on the annual average triggers and limits or the 99th percentile of hourly data triggers. This is an important factor in selecting the appropriate management action, should it be required.

The framework specifies that if any station in the planning region exceeds an ambient air quality trigger or limit a management response will be initiated. The degree of investigation, analysis and action associated with the management response is tailored to:

- the type and location of air monitoring station
- the averaging time (hourly or annual)
- the ambient air quality trigger or limit
- trend analysis (rate of increase or variability of the parameter)
- the substance being detected.

6.3.3 Investigation

The first part of the investigation is to review the ambient air quality levels with respect to expectations for the region. Development occurring within the region will contribute to ambient concentrations of NO_2 and SO_2. The concentrations should be compared to predictions from modelling to understand whether the ambient concentrations are trending as predicted. This assessment helps to determine the extent of the investigation and whether plans and initiatives are having their anticipated effects on ambient concentrations. If ambient concentrations are increasing faster than expected, or in areas where increases were not predicted, these factors will assist in determining management actions.

Investigations of industry stations that exceed ambient air quality triggers (annual average or 99th percentile of hourly data) could involve the identified facilities and might involve forecasting trends and understanding future operational and development plans. Where such stations are on First Nations or Métis traditional lands, the appropriate communities would also be notified.

When community monitoring stations are influenced by industrial sources or if industrial stations are influenced by municipal or transboundary sources, attributing the contributions to ambient concentrations becomes more challenging. Some stations may be influenced by urban, transportation and industrial emissions. In such cases, all relevant stakeholders, and First Nations and Métis peoples would be involved. Siting of transboundary stations provides an indication of the ambient air quality entering and exiting (depending on wind direction) an airshed or, on a larger scale, entering and/or exiting the province.

Ambient air quality characterization and source attribution are more challenging at background stations, as these may be more influenced by transboundary concentrations or natural sources. Background stations reflect the ambient air quality in the area where the wind originates. In the Lower Athabasca Region, due to the extensive nature of development, some background stations may detect the cumulative impact of regional emissions. If longer-term trends lead to ambient air quality triggers being exceeded, a wide range of stakeholders, and First Nations and Métis peoples would likely be involved and regional initiatives would be needed to address the increasing ambient concentrations.

If sited correctly, background air monitoring stations should detect minimal increases in ambient concentrations resulting from regional anthropogenic sources.

6.3.4 Mitigative Management Actions

Once ambient air quality levels have been assigned and the primary sources and spatial extent have been defined, the need for management action is determined and appropriate management actions chosen by Alberta Environment and Sustainable Resource Development from Table 7 in this framework. Prior to determining the need for a management action, Alberta Environment and Sustainable Resource Development reviews whether other management frameworks or initiatives have already prompted management actions. Any already identified management actions are analyzed to understand their influences before additional actions are selected. Appropriate stakeholders may be invited to collaborate on implementing management actions. If upon analysis, the ambient air quality level has been attributed to natural events (such as wildfire) or transboundary transport, this will be taken into consideration when management actions are chosen. If natural sources are deemed to be the main influence of ambient concentrations at a particular station, no additional management action may be required.

The framework defines four ambient air quality levels, with Level 1 being the lowest and Level 4 the highest. Management actions associated with the lower levels are intended to provide time to address ambient concentrations to avoid reaching the ambient air quality limit. The stringency of management actions, compliance tools, and associated implementation timelines will increase if the ambient concentrations pass into a new level.

6.3.4.1 Level 1

- Continue to manage ambient air quality using existing management approaches, applying policies such as pollution prevention, continuous improvement and use of best available technology.
- Avoid or minimize degradation wherever reasonable or possible in accordance with the principles of emission minimization through employing appropriate technology.

6.3.4.2 Level 2

- If management actions are deemed necessary, steps would be taken as outlined in Table 7. Alberta Environment and Sustainable Resource Development will define implementation timelines, tools and parties including First Nations and Métis peoples to be involved in management actions by considering the ambient air quality levels and magnitude of trends as well as the type, location and number of air monitoring stations measuring those trends.

6.3.4.3 Level 3

- Within the response protocol, appropriate management actions for Level 3 are required to ensure that the annual average air quality limit is not exceeded, or that conditions do not move into Level 4 for the 99th percentile of the hourly data. Flexibility in the framework is achieved by providing an array of tools to address the situation after it has been assessed. Depending on the tool selected, stakeholder involvement and implementation will be identified by Alberta Environment and Sustainable Resource Development. Roles and responsibilities for Alberta Environment and Sustainable Resource Development and other parties are described in section 7.

6.3.4.4 Level 4

- In Level 4 for the annual ambient air quality triggers and limits, the acceptable ambient air quality limit has been exceeded, and mandatory actions are required so the air quality limit is no longer exceeded. There may be circumstances that do result in ambient air quality levels reaching Level 4 (e.g., adoption of lower AAAQOs).
- In Level 4 for the 99th percentile of the hourly data triggers and limits, the highest trigger has been exceeded. Appropriate management actions are required to reduce the likelihood that the hourly AAAQO is not exceeded.
- As described in Table 7, Alberta Environment and Sustainable Resource Development retains the responsibility to implement an emissions-reduction plan for the affected area. This will include identifying the parties including First Nations and Métis peoples to be involved in the plan as well as the timelines required to achieve the reductions necessary to get below the air quality limits. Potential tools for achieving the emissions reductions are listed in Table 8. Enforcement of the plans and communication of progress are required as part of implementation.

Table 8 includes a list of potential actions and tools that could be used to manage air quality as part of the management framework. The list is not exhaustive, but rather it can be used as a range of options for selection to manage air quality as appropriate. The table starts with the more restrictive tools that would typically be used at the higher air quality levels, but depending on the specific situation, Alberta Environment and Sustainable Resource Development and the parties involved may choose the tools that are deemed most effective. Management actions may require amendments to existing approvals. These amendments would be made in accordance with existing authority under the *Environmental Protection and Enhancement Act* including Director-initiated amendments to monitoring or reporting requirements, or amendments arising from unforeseeable effects.

Table 7. Mitigative Management Actions for Each Ambient Air Quality Level

Level	Potential Management Actions
4	Emission Reduction Plan and other Measures - Identify parties including First Nations and Métis peoples roles in management action - Define timelines for achieving reductions - In this level, emissions reductions are required if the ambient air quality limit has been exceeded
	Enforce Plan Communicate progress to public, stakeholders, First Nations and Métis peoples
3	Identify Pressures and Measures Required to Prevent Reaching Air Quality Limits - Identify stakeholders, First Nations and Métis roles and inclusion - Identify urgency of and need for measures - Identify, if required, measures and appropriate tools for managing ambient air quality - Implement identified action - Communicate to the public, stakeholders, First Nations and Métis peoples
2	Surveillance - Determine need for and placement of additional monitoring - Analyze monitoring data for trends - Communicate with stakeholders, and First Nations and Métis peoples (e.g., status of action and forecasts)
1	Verify Ambient Air Monitoring - Track and trend available data - No management actions beyond base regulatory systems - Communicate with stakeholders, and First Nations and Métis peoples (e.g., status of action)

Table 8. List of Potential Measures and Tools for Air Quality Management

Potential Measures and Tools to Enable Management Actions
- Restrictions on further emission sources
- Emission reduction requirements to allow for new sources
- Director-initiated approval amendments (in accordance with authority under EPEA)
- More stringent performance standards or regulations
- Emission caps including mechanisms for management
- Regional planning regulated under ALSA: mechanisms for managing non-regulated sources
- Approval conditions or restrictions
- Enforcement Orders and fines
- Environmental Protection Order
- Remedy
- Revise policies, performance standards for new or existing sources
- Codes of practice
- Economic instruments
- Memorandum of understanding
- Municipal bylaws, First Nations bylaws
- Ambient air quality management plan
- Air modelling
- Approval conditions to participate in airsheds, regional initiatives
- Additional regional monitoring is optional (assessed collaboratively by the environmental and community associations and Alberta Environment and Sustainable Resource Development)
- Education and awareness

6.3.4.5 Range of Mitigative Management Actions Available

Following the annual assessment, the main influences on ambient levels at each station are determined. This information will be used to identify the appropriate management actions and which parties would be most appropriate to engage.

Actions become more stringent as the ambient air quality level increases. Management actions include a range of measures and tools with varying degrees of rigour and are meant to be flexible to consider either more or less stringent action depending on the concentration trends and the magnitude above an ambient air quality trigger. If trends are downward, or the concentration level is just above an ambient air quality trigger, actions

taken may not need to be extensive; whereas if there are upward trends or the level is approaching the next ambient air quality trigger, actions taken may be more significant.

6.3.5 Oversight/Delivery of Management Actions

As noted above, the appropriate parties to be involved in the development and implementation of management actions will be identified. There will be shared responsibility amongst these parties to make sure the actions are taken. Alberta Environment and Sustainable Resource Development will have two roles. This includes ensuring that any changes in regulatory or management changes that are needed are undertaken, and serving in an oversight role for actions being taken by other parties.

In addition to the measures described in Table 7 and 8, the framework recognizes that analysis of future plans for development is required to address the need for and urgency of management actions. A key tool for this type of analysis is air dispersion modelling. While monitoring data are used to compare ambient concentrations to ambient air quality triggers and limits, modelling can be used to understand the relative impact of future plans on, and trends in, ambient concentrations.

Monitoring data are used to determine the ambient levels of the substance managed within the framework. Monitoring data are also used for trend analysis, assessment and attribution of ambient concentrations.

Modelling: A Tool for Assessment and Planning

Dispersion modelling is undertaken by proponents and operators when conducting Environmental Impact Assessments to evaluate the effect of proposed facilities or modifications to existing facilities on ambient air concentrations. This modelling function will continue as part of the regulatory process and results will be considered by Alberta Environment and Sustainable Resource Development in the context of the framework to understand the relative impacts of proposed projects on ambient concentrations in the region and the need to manage releases. Assessment of the reliability of the model predictions and investigation of proactive measures that can be used to minimize impacts to air quality will remain part of the planning process by proponents and Alberta Environment and Sustainable Resource Development.

While the modelling results will not be used to determine into which ambient air quality level a given area or station falls, it will be used for investigation and planning. Table 9 outlines the uses for modelling.

Table 9. Use of Modelling Results for Assessment and Planning

Level	Use by Alberta Environment and Sustainable Resource Development	Use by Emitters or Proponents
4	- Modelling to be used as planning tool as in Level 2, but also: - Understand relative influences for reduction plans and other measures.	- Provide emissions profiles and plans as requested by Alberta Environment and Sustainable Resource Development
3	- As in Level 2, but also: - Determine source attribution for increasing trend, forecast future trends	- Modelling required for proposed projects - Provide emissions profiles and plans as requested by Alberta Environment and Sustainable Resource Development
2	- Assess data and model for accuracy - Assess monitoring data, if available to validate model and baseline data - Refine emissions inventory for area, transboundary and point sources - Determine source attribution of increased ambient levels - Assemble forecast emission profiles (e.g., growth, decline or steady state) to determine monitoring needs - Plan for monitoring needs - Analyze trends to determine urgency of management actions	- Model new projects as required per existing regulations - Provide emissions profiles and plans as requested by Alberta Environment and Sustainable Resource Development
1	- Modelling (or update of existing models) initiated by Alberta Environment and Sustainable Resource Development - Report and track	- Model new projects as required per existing regulations

6.3.6 Evaluation

The current practice of annual reporting by WBEA and LICA will continue as will Alberta Environment and Sustainable Resource Development's analysis of ambient data collected through the airsheds' air monitoring stations. The results will continue to be available through the State of the Environment reporting process, described online at www.environment.alberta.ca/02488.html

Alberta Environment and Sustainable Resource Development will also use the annual assessments under this framework and other means to assess over time if any management actions that have been required are achieving the results that were anticipated. This is described in more detail below.

6.3.7 Communication

Communication is an important component of the framework. Although ambient air quality data present information about current ambient air quality, providing details of management actions taken in response to ambient air quality concentrations demonstrates to the public, stakeholders, and First Nations and Métis peoples that efforts are underway to effectively manage ambient air quality. Consultation with stakeholders, communities, and First Nations and Métis peoples on the appropriate follow-up management strategies will take place as required.

State of the Environment reporting will communicate the status of the ambient air quality and any management actions initiated under the framework or other initiatives or management frameworks. Communication will also include posting a report on the Government of Alberta's website.

Annual assessment results (i.e., ambient air quality levels assigned) as well as details on the influencing source(s) and which management actions have been chosen in response will be communicated regularly to the public, stakeholder, and First Nations and Métis peoples.

The preliminary assessment procedure outlined in step 2 will take place on an annual basis. A summary report of the assessment results will be completed annually.

This report will include episode analysis and assignment of ambient air quality levels to monitoring stations in the Lower Athabasca Region. Reporting will also include data from available continuous ambient monitors in the region that meet the data completeness criteria described in Appendix B. If management actions have been chosen by Alberta Environment and Sustainable Resource Development, these will also be described in the report; however, it is more likely that management actions will be chosen upon collaboration with relevant stakeholders and First Nations and Métis peoples.

Reports will be developed and issued with consideration for consistency with reporting done for other management frameworks within the region. The details of the contents and requirements are to be included in the implementation phase of the *Air Quality Management Framework*. Opportunities for integrated reporting on regional air quality and initiatives will be explored through the implementation of the frameworks.

7.0 Implementation

Implementation details, including timelines and resource allocation, will be determined when Cabinet has approved the *Lower Athabasca Regional Plan* and this framework is considered final.

Implementation planning will include:

- An inventory of tasks to meet the requirements of the framework including, at a minimum, identification and development of system components such as monitoring, evaluation and reporting mechanisms; protocols for assessment of conditions relative to objectives; management response expectations; and reporting processes and communication plans for ambient air quality and management actions activated by the framework.
- Confirmation of roles and responsibilities of various groups (Alberta Environment and Sustainable Resource Development, stakeholders, First Nations and Métis peoples, and others) for implementation of the framework and an assessment of resources needed to fulfill the tasks and commitments of the framework, including human resources and any missing data requirements.
- Ongoing evaluation of the framework's alignment with other policies and initiatives (national programs, provincial policies, by-laws) to ensure consistency of management intent.
- A timeline for implementation including key milestones and target dates for completion.

7.1 Roles and Responsibilities

Alberta Environment and Sustainable Resource Development, environmental and community associations, and emitters and project proponents all have a number of responsibilities related to managing emissions and ambient air quality. These roles and responsibilities are described only briefly in the context of the framework, so should not be regarded as an exhaustive list.

7.1.1 Alberta Environment and Sustainable Resource Development

Alberta Environment and Sustainable Resource Development is responsible for ensuring the framework is implemented, but collaboration and engagement of stakeholders remain key to the overall management intent. Alberta Environment and Sustainable Resource Development also:

- is responsible for annual review and assessment of ambient air quality data to determine ambient air quality levels at each air monitoring station
- is responsible for initiating a management response when required based on the assessment of data and other approaches such as forecasting future development (e.g., spatial, temporal)

- identifies stakeholders, First Nations and Métis roles for management planning and actions. If a multi-stakeholder process is required by the framework, the use of established multi-stakeholder groups (such as CEMA) will be considered
- assesses management actions implemented through other frameworks or initiatives to determine impacts on ambient air quality
- defines timelines and selects or recommends management approaches and tools, if required, to manage ambient air quality
- communicates to stakeholders the implementation status and selected management action.

7.1.2 Environmental Monitoring Associations

The main role of the environmental monitoring associations, such as airshed groups, will be data gathering and management for input into the ambient air quality assessment. More specifically, this includes:

- data gathering and analysis
- quality assurance and control
- air monitoring station design, management and reporting of air quality data.

7.1.3 Emitters and Proponents

Emitters and proponents include industrial sources and sources of emissions in communities and municipalities as well. As a result, there may be roles for all levels of government and government agencies within air quality management. Roles and responsibilities for emitters and proponents with respect to the framework include:

- participating in airshed groups and other regional initiatives for ambient air monitoring
- modelling and assessing how current and planned operations influence local ambient air quality
- providing emissions data to Alberta Environment and Sustainable Resource Development, as required
- participating in ambient air quality management actions, if identified (e.g., development of plans or implementation of reductions)
- reporting on progress of implementation of management actions, as required.

8.0 Integration

This management framework is part of a series of management frameworks developed by Alberta Environment and Sustainable Resource Development in support of the Government of Alberta's *Lower Athabasca Regional Plan*. As the regional plan is implemented, all of the outcomes and objectives in it, including those for air, surface water and groundwater, will be considered in planning and decision-making for the region by all provincial government departments and municipal governments. This will help to drive integration across environmental media.

8.1 Identification of Substances to Manage

While NO_2 and SO_2 provide a starting point for the development of the framework, other substances are also of concern from an ambient air quality perspective. A process is required to identify substances that require active management in the Lower Athabasca Region. The objectives of existing associations (WBEA and LICA), the Regional Municipality of Wood Buffalo (RMWB), and the Cumulative Environmental Management Association (CEMA) include identifying substances of concern for their areas. Alberta Environment and Sustainable Resource Development, working with the associations, will assess whether the substances identified could be incorporated into (or included in) the framework. This would work well for substances that have established AAAQOs and are monitored in the area.

Substances for which no AAAQOs have been established, or for which regional limits are considered desirable or appropriate, the process proposed through the *Air Contaminants Management Framework* (CEMA, 2009) is recommended to identify, prioritize and address these substances.

9.0
Abbreviations and Acronyms

Abbreviation/Acronym	Description
AAAQO	Alberta Ambient Air Quality Objective
ALSA	*Alberta Land Stewardship Act*
CAMS	Comprehensive Air Management System
CASA	Clean Air Strategic Alliance
CEMA	Cumulative Environmental Management Association
EPEA	*Environmental Protection and Enhancement Act*
LICA	Lakeland Industrial Community Association
RMWB	Regional Municipality of Wood Buffalo
WBEA	Wood Buffalo Environmental Association
ppb	Parts per billion
$\mu g/m^3$	Micrograms per cubic metre

10.0 Terminology

Air Quality ..... The composition of air, with respect to quantities of substances therein, and/or a measure of the health-related and visual characteristics of the air; used most frequently in connection with standards against which the contribution of the particular source can be compared.

Airshed ..... An airshed is a geographic area that, because of emissions, topography, climate and meteorology, typically experiences similar air quality. (CASA, 2009b)

Airshed Zone ..... Regional partnership associations that include government, industry, environmental organizations and the general public. These partnerships are responsible for air quality monitoring and in some cases air quality management for a specific region of Alberta. Alberta presently has nine airshed zones. (CASA, 2009b)

Ambient Air ..... Outside air; any portion of the atmosphere not confined by walls and a roof to which the general public has access.

Nitrogen Dioxide (NO_2) ..... Toxic pungent reddish-brown gas formed by the reaction of atmospheric ozone with the nitric oxide produced from combustion.

Nitrogen Oxides ..... A general term pertaining to compounds of NO, NO_2, and other oxides of nitrogen. Nitrogen oxides are typically created during combustion processes and are major contributors to smog formation and acid deposition.
(Oxides of Nitrogen, NOx)

Pattern Recognition ..... A grid of passive samples can be used to get a comprehensive picture of ambient air quality across the province. Data gathered in this way can be used to create a monthly and annual spatial map of province-wide air pollutant levels, and could be used to address long-term trends in air quality. (CASA, 2009b)

Source (of Emissions) ..... There are many sources of emissions, but these have generally been grouped into two categories: emissions from point and non-point sources. A **point source** is a stationary location or fixed facility from which substances are discharged; e.g., a smokestack. A **non-point source** is a pollution source that is not recognized to have a single point of origin. Common non-point emission sources are agriculture, forestry, urban, mining, construction, and city streets. (CASA, 2009a)

Sulphur Dioxide (SO_2).....A strong smelling, colourless gas that is formed by the combustion of fossil fuels containing sulphur. Sour gas processing plants, oil sands processing plants and coal-fired power generating plants are major sources of SO_2.

Transboundary (Transport).....The long-range movement of emissions and pollutants across political or pre-determined spatial borders. Transboundary pollution refers to substances that originate in one jurisdiction, but have adverse effects in another area/jurisdiction at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources. (CASA, 2009b)

11.0 References

Please note that in May 2012, the Government of Alberta brought together the ministries of Environment and Water and Sustainable Resource Development to create one ministry called Alberta Environment and Sustainable Resource Development.

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12.0 Appendices

Appendix A: Calculation of Ambient Air Quality Triggers for the Lower Athabasca Region

The 99th percentile is often used by scientists to represent the peak value in a dataset. For ambient air quality data, the annual 99th percentile one-hour value is the concentration that is higher than 99 per cent of the one-hour concentrations recorded throughout the year. In other words, only one per cent of the ambient hourly concentrations observed during the year fall above the 99th percentile concentration. Scientists often find the 99th percentile concentration more useful in tracking trends than the single, maximum value because the maximum hourly value often represents outlying conditions.

Ambient air quality triggers (both the annual average and the 99th percentile of the hourly data) are used to initiate a more detailed review of the sources and conditions that have contributed to the ambient concentrations. The ambient air quality triggers are designed so appropriate actions can be planned and implemented to prevent the annual ambient air quality limit or AAAQOs from being exceeded. The 99th percentile ambient air quality triggers, therefore, will be used to plan and implement actions to reduce the probability that the hourly AAAQO will be exceeded.

Determining the 99th Percentile of the Hourly Data Ambient Air Quality Triggers

To determine the Level 4 ambient air quality trigger for the 99th percentile, a dataset with multiple hourly AAAQO exceedances could be used to understand the relationship between the AAAQO and the 99th percentile. Exceedances of the hourly AAAQO have not occurred at all of the Lower Athabasca Region's air monitoring stations.

The relationship between the 99th percentile ambient air concentration and the maximum hourly concentration will be characteristic of specific locations. This is due to the emission source type, magnitude and location relative to the air monitoring stations. The relationship between the 99th percentile and the maximum hourly concentration was assumed to be consistent.

The 99th percentile ambient air quality triggers were determined based on the relationship between historical 99th percentile ambient concentrations of NO_2 and SO_2 and the maximum hourly concentrations. This relationship was then used to calculate a Level 4 ambient air quality 99th percentile compared to the current hourly AAAQOs.

To be an effective planning tool, there should be no or very few exceedances of the hourly AAAQO at the 99th percentile air quality trigger for Level 3. If the ambient air quality trigger is exceeded for Level 4, exceedances of the hourly AAAQO are likely to have occurred. The specific circumstances of maximum hourly values will be reviewed during the annual assessment if Level 3 or 4 is triggered.

The first step was to determine the 99th percentile and maximum of the hourly concentrations for each of the continuous air monitoring stations in the Lower Athabasca Region. For each year from 2003-2009, annual 99th percentile was divided by the maximum value for that year to give the ratio of the 99th percentile to the maximum for the year. This fraction was plotted as a percentage for each year and for each air monitoring station in the Lower Athabasca Region.

The average fraction for all of the Lower Athabasca continuous monitoring stations for all of the years analyzed was determined for NO_2 and the average of community stations for all the years analyzed was determined for SO_2. These percentages were then multiplied by the AAAQO to determine the ambient air quality triggers for the 99th percentile. The calculated values were compared to the historical data to ensure that the air quality triggers met the intent of the framework. In other words, if hourly exceedances were experienced at an air monitoring station, the data should indicate a Level 4 assessment. If there were no exceedances, but there were peaks nearing the AAAQO, the assessment should indicate Level 3.

For NO_2 the average fraction of the 99th percentile compared to the maximum concentrations was 58 per cent. Multiplying the current NO_2 hourly AAAQO of 159 ppb by 58 per cent equals 92 ppb, which was used to represent the Level 4 ambient air quality trigger. This method could be used to determine new ambient air quality triggers when the AAAQOs are revised. Levels 3 and 2 were then calculated as approximately 2/3 and 1/3 of the Level 4 trigger value, respectively. Level 2 ambient air quality trigger was 30 ppb and the trigger for Level 3 was 62 ppb. The graph showing the ratios is illustrated in Figure A.

The same methodology was used to derive the SO_2 99th percentile ambient air quality triggers, but only the community stations were used. This change was made because the sources of SO_2 are point industrial sources and the intent of the framework is to be protective of human health. The average fraction of the community stations 99th percentile SO_2 values compared to the maximum concentrations was 21 per cent. Multiplying the hourly AAAQO (172ppb) by 21 per cent yielded a Level 4 ambient air quality trigger of 36 ppb. The 99th percentile of the ambient air quality trigger for Level 2 became 12 ppb, and for Level 3, it was 24 ppb. The graph showing the relationship between the 99th percentile and the maximum values is illustrated in Figure B.

Upon review of the trigger levels resulting from this method, stations seemed to fall logically into ambient trigger levels that made sense, based on the historical data. Where exceedances of the one-hour AAAQO were occurring (e.g., the Mannix station with SO_2), the stations fell in Level 4; stations with hourly concentration well below the AAAQO fell in Level 2 or Level 1. At the Mannix station, SO_2 exceedances were recorded in most years, but none were recorded in 2009.

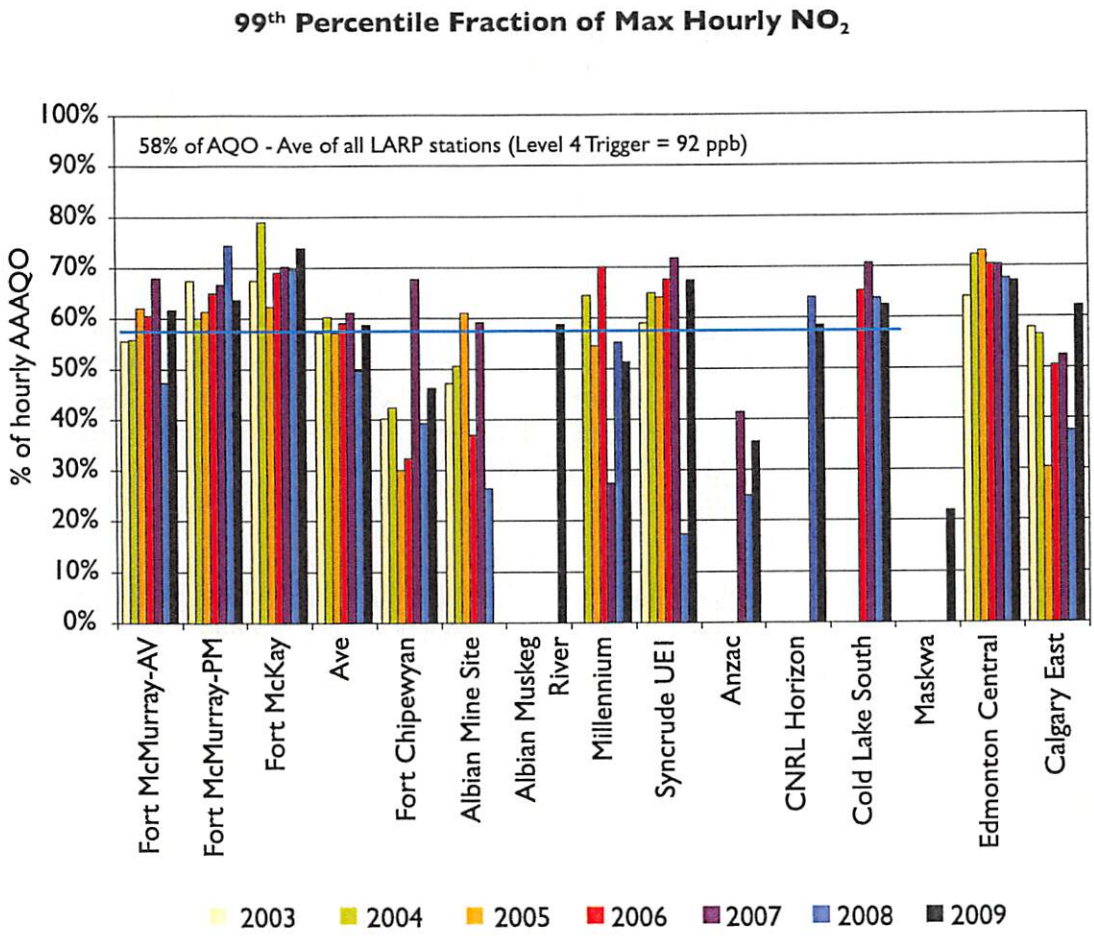


Figure A
99th Percentile of NO_2 Compared to the Maximum Hourly NO_2 Concentrations

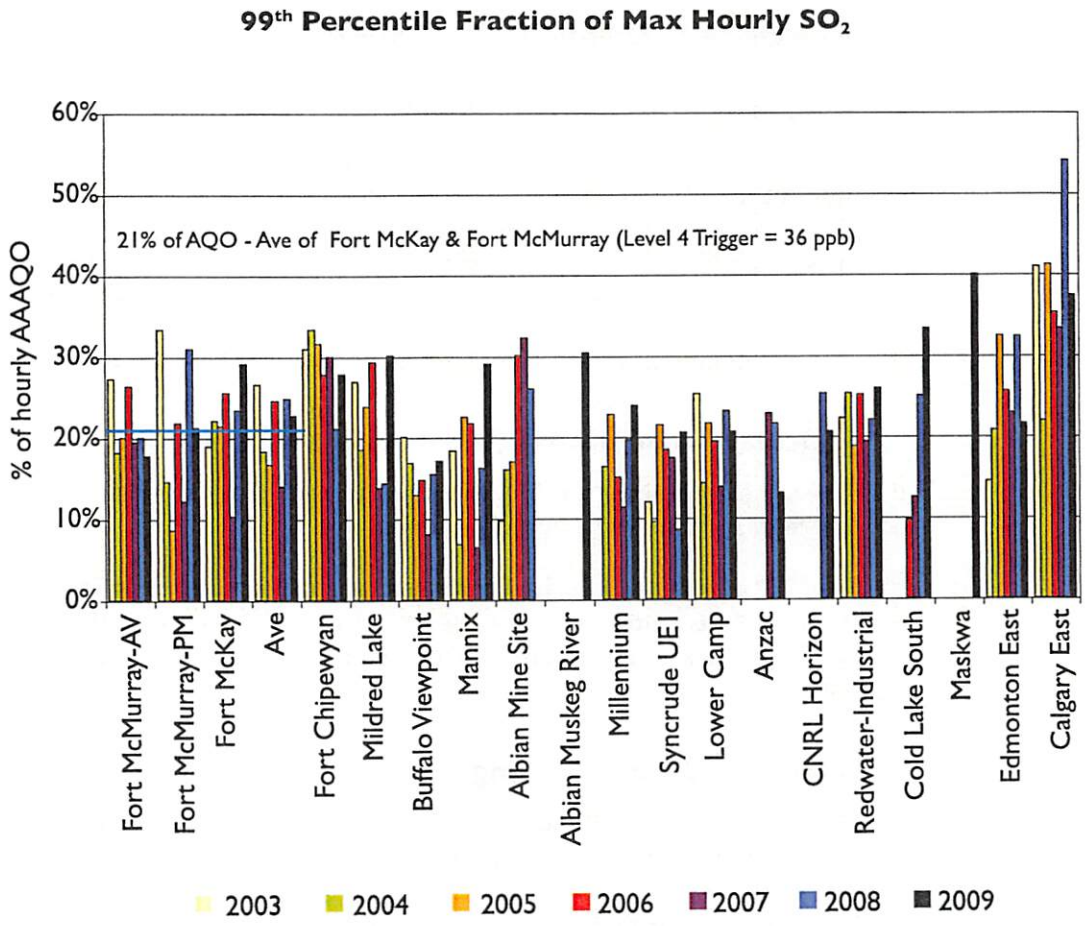


Figure B
99th Percentile of SO_2 Compared to the Maximum Hourly SO_2 Concentrations

Appendix B: Calculation of NO_2 and SO_2 Metrics

Calculation of Annual Metrics

The annual metrics are calculated by first downloading hourly NO_2 and SO_2 data from the CASA Data Warehouse at www.casadata.org. Data is downloaded using the "Download Data" report link and by requesting data from all continuous stations at once. One year is downloaded at a time and the stations within the Lower Athabasca Region can be selected. The arithmetic mean is then taken for all hourly values for the year, for each station.

The annual average is then compared to the annual ambient air quality triggers and limits.

Calculation of Hourly (99th Percentile) Metrics

The same hourly NO_2 and SO_2 data that are used for calculating the annual metrics are used for calculating the 99th percentile metrics.

The 99th percentile of the hourly concentrations is calculated for each station and compared to the 99th percentile ambient air quality triggers. The results are then tabulated and graphed for viewing trends over time. The table and graphs will be updated each year to add on the new year's data.

Notes on Data Handling

The hourly NO_2 and SO_2 data are checked for data completeness on an annual basis. The completeness criteria are modified from Alberta's *Particulate Matter and Ozone Management Framework*. At least 75 per cent data completeness is required for each year (75 per cent of hours in one year have data available). Datasets from air monitoring stations not meeting the data-completeness criteria are not included in the assessment of triggers and limits.

Rounding conventions for the NO_2 and SO_2 metrics also mirror the Canada-Wide Standards for Particulate Matter and Ozone and Alberta's *Particulate Matter and Ozone Management Framework*. The NO_2 and SO_2 levels are presented in rounded whole numbers, or to one part per billion. The assignment of an ambient air quality level to a station under the framework will also be based on whole numbers. This is done to be clear about assigning an action level to a station.

For example, the annual air quality limit for NO_2 is 24 ppb. In order to exceed this limit, a station must have an annual average of 24 ppb or greater. Any value above this limit would be assigned to Level 4 (see Table 5) and anything at or below the limit would be assigned to Level 3. As such, a value of 24 ppb would be below the Level 4 trigger, while a value of 25 ppb would be above.

Monitoring stations can be added and removed from year to year. As new stations are added, and data completeness criteria are met, they will be included in the assessment process.

Appendix C: Investigation and Data Analysis

Episode Analysis and Demonstrating the Influence

The episode analysis procedure will follow the analysis structure from the *Particulate Matter and Ozone Management Framework*. Alberta Environment and Sustainable Resource Development will analyze individual NO_2 and SO_2 episodes on an annual basis and try to discern the source or influence of each episode. If it can be demonstrated that an ambient air quality trigger is exceeded as a result of natural or transboundary influences, management actions will be adjusted accordingly or could be deemed unnecessary.

In this document, the term **exceedance** refers to an exceedance of an ambient air quality limit or trigger; either annual or 99th percentile, as described above. An example of an exceedance would be an annual average NO_2 concentration greater than 24 ppb (Level 4 exceedance), or 99th percentile NO_2 concentration of greater than 92 ppb after rounding (Level 4 exceedance). In the same way, there can be exceedances of the Level 3 and Level 2 ambient air quality triggers, which then require analysis.

The term **episode** is used to describe elevated one-hour concentrations or events that contribute to an ambient air quality trigger exceedance. These can occur over a defined time frame and area. An example of an episode could be one-hour NO_2 concentration greater than 92 ppb (in a year that exceeds the 99th percentile Level 4 trigger). Episodes can occur at one or more stations over the course of a day or over consecutive days, and can include several adjacent hours. Grouping episodes (spatially or temporally as is reasonable) is a convenient way to describe NO_2 or SO_2 events that occur during the same time frame and are triggered by the same mechanism(s).

The suite of management actions outlined in Table 7 of the framework become increasingly more stringent as you move from Level 2 to Level 4, with Level 4 actions including mandatory emissions reductions. Management actions in Level 2 focus more on education and awareness, surveillance and possible forecasting into the future. Following the progression of management actions in Table 7, the analysis procedure for NO_2 and SO_2 episodes will be more rigorous for stations in Level 3 and 4 and less rigorous for stations in Level 2.

In order to demonstrate what influenced an ambient air quality trigger exceedance (be it anthropogenic emissions, a natural event or transboundary flow), hourly NO_2 or SO_2 concentrations contributing to the exceedance will be scrutinized. The CASA *Particulate Matter and Ozone Management Framework Guidance Document* provides the following definitions for transboundary, background and natural influences:

> **Background or natural influence** – concentrations observed in remote areas that are relatively unaffected by local pollution sources, or those resulting from natural events (e.g., forest fires).
>
> **Transboundary influence** – evidence of air flow from a transboundary source region, so that the pollutant concentration of the transboundary air parcel, as measured at a designated upwind monitor, is within 10 per cent of, or higher than, the ambient air quality trigger.

Analysis Procedure

The episodes contributing to the 99th percentile ambient air quality trigger exceedance are identified and analyzed to determine the source. If an individual year exceeds the ambient air quality trigger in question, then episodes within that year would be analyzed according to the procedure below. Years where the ambient air quality trigger in question is not exceeded are not further scrutinized.

Ambient air quality levels are assigned to individual monitoring stations. Once this is done, one station would be analyzed according to the ambient air quality level to which it is assigned. For example, if a station is assigned to Level 3, episodes would be analyzed against the Level 3 ambient air quality trigger, starting with reviewing the annual 99th percentile value for that station.

The same procedure is followed for exceedances of the annual metric. Alberta Environment and Sustainable Resource Development will make the decision on how many of the top one-hour concentrations will be analyzed to determine the main influence on ambient concentrations.

The detailed episode analysis procedure includes the following steps:

a) Identify hourly episodes and gather background (meteorological) data.
   - For an annual average or 99th percentile exceedance, arrange the daily maximums (one-hour NO_2 or SO_2 concentrations) from highest to lowest and identify hourly episodes to analyze.
   - Beginning with the highest concentration, each one-hour value in exceedance of the 99th percentile ambient air quality trigger (e.g., 92 ppb for Level 4) is analyzed to determine the source and what the main influence is (anthropogenic, natural or transboundary). For annual ambient air quality trigger exceedances, Alberta Environment and Sustainable Resource Development will decide how many hourly values will be analyzed.

b) Analyze the data based on the following considerations (choosing which are appropriate):
   - time of year exceedance takes place
   - spatial and temporal extent
   - diurnal variation of pollutants
   - correlation with other pollutants
   - meteorology (temperature, insolation, wind speed and direction, weather maps)
   - back trajectories
   - forest fires.

c) Seek out auxiliary data if appropriate (modelling output, emissions data, incident reports, facility operations information).

d) Form a conclusion as to the cause of the episode.

For the 99th percentile ambient air quality triggers, this episode analysis procedure continues until a one-hour average NO_2 or SO_2 concentration falls below the trigger value in question.

As mentioned, for the annual ambient air quality triggers, Alberta Environment and Sustainable Resource Development will decide how many of the top one-hour concentrations will be analyzed to determine the main influence on ambient concentrations for that year.

Simplifying the Process

In order to simplify the analysis procedure, it is helpful to organize the daily maximum exceedances into episodes. This involves analyzing exceedances together as a unit when they occur over common time periods (consecutive days), in the same general area (airshed zone or adjacent airshed zones) and under the same atmospheric conditions. This may not always be appropriate, depending on the episode in question, so this would be done with discretion. A good example of where this might be appropriate is during a forest fire event that spans a few days.

Alberta Environment and Sustainable Resource Development has developed an automated tool, using Microsoft Excel, to help analyze particulate matter and ozone episodes for the *Particulate Matter and Ozone Management Framework*. This tool, called the "simplified procedure" is populated with pollutant and meteorological data for all Alberta stations each year. A date and station can be chosen by pressing a button and completing a dialogue box. Graphs of pollutant concentration and meteorology are automatically plotted for the date chosen, and wind roses are also displayed. This program already includes NO_2 and SO_2 data, so therefore can be used for the framework assessments.

The analysis of NO_2 and SO_2 concentrations falling within Level 2 should not require as detailed analysis as concentrations within Level 3 and 4. The simplified procedure tool can also be used to infer the source of episodes falling in Level 2, but likely back trajectories, modelling and emissions data will not be necessary at this level. However, these tools are available to use whenever warranted.

Data Requirements

To analyze either an NO_2 or SO_2 episode according to the detailed analysis procedure outlined above, the following information should be obtained.

- Back trajectories for the site and date in question (obtained from Environment Canada as per particulate matter and ozone assessment protocol).
- Forest fire data, which is gathered from either satellite images (from the Canada Forest Service) or from provincial websites (Alberta and B.C.). A Microsoft Excel macro has been created by Alberta Environment and Sustainable Resource Development to plot the trajectory and forest fire information on maps of Alberta and North America for visual analysis.

- Meteorological data, including hourly temperature, relative humidity, wind speed, wind direction and insolation. Not all parameters are available for all sites. Temperature, relative humidity and insolation are graphed by station on an hourly basis. Wind speed and direction are displayed using wind roses. Macros have been developed by Alberta Environment and Sustainable Resource Development to more swiftly compile and present these data as part of the "simplified procedure" tool.
- Additional information which may be of use could include concentrations of other pollutants (NO, CO, O_3, and $PM_{2.5}$). Graphs of hourly data are produced to compare the relative concentrations of these pollutants.

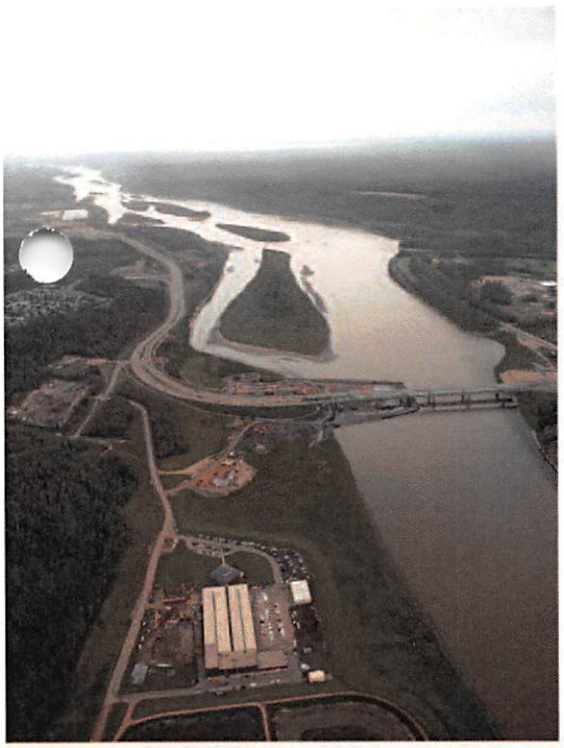
Conclusions on the source of each episode will be based on review and analysis of this data, experience with Alberta data and conditions, and evidence from the specific circumstances surrounding each episode (including any facility operation information). Ultimately, it is up to the analyst(s) to use the evidence and circumstances surrounding the episode, along with their judgment, to ascertain the most probable source of the episode. This may or may not require the gathering and request of additional data (which potentially includes modelling).

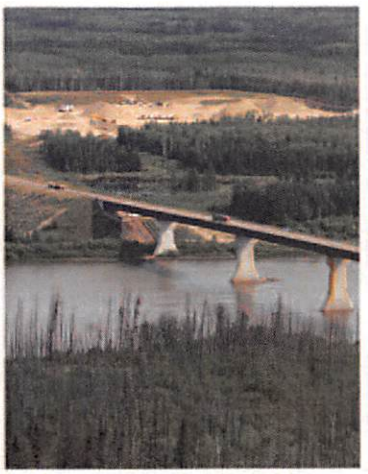
Lower Athabasca Region

Surface Water Quality Management Framework for the Lower Athabasca River

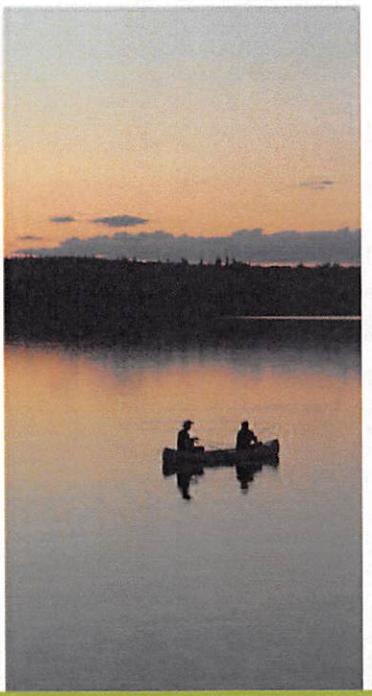
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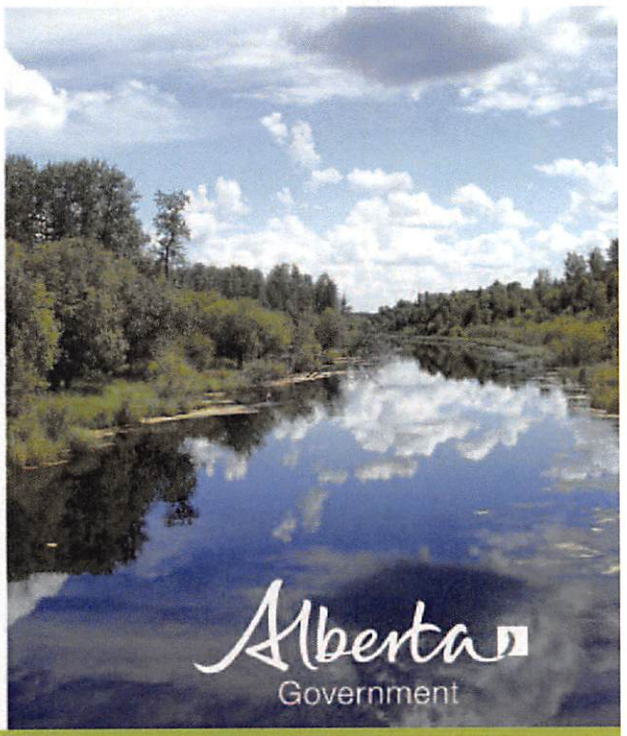
Land-use Framework













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1.0 Introduction

Alberta Environment and Sustainable Resource Development's three Lower Athabasca Region management frameworks were developed using input from different stakeholders within the Lower Athabasca Region including industry, First Nations and Métis peoples, and non-governmental organizations. As part of a series developed by the department for the Government of Alberta's *Lower Athabasca Regional Plan*, these frameworks are designed to maintain flexibility and to proactively manage cumulative effects to air quality, surface water quality and groundwater quality and quantity within the Lower Athabasca Region. The frameworks provide context for development and related regulatory processes and facilitate sustainable resource management. They are intended to add to and complement, not replace existing policies, legislation, regulations and management tools.

The frameworks are policy documents that will be implemented and given legal authority as specified in the regional plan, and through Alberta Environment and Sustainable Resource Development's and potentially other departments' mandates and legislation.

The **Air Quality Management Framework** provides an additional component for the region in the overall air quality management system. This includes the setting of ambient air quality triggers and limits for nitrogen dioxide (NO_2) and sulphur dioxide (SO_2) with guidance for long-term decision-making and management.

The **Surface Water Quality Management Framework** focuses on the lower Athabasca River downstream of the Grand Rapids to the Athabasca River Delta. It sets surface water quality triggers and limits for 38 indicators measured at the Old Fort monitoring station.

The goal of the **Groundwater Management Framework** is to enhance the existing system to manage non-saline groundwater resources across the Lower Athabasca Region including management of potential cumulative effects on these resources. It establishes indicators of groundwater quality and quantity and the method for developing triggers and limits. This document forms the basis for more technical, detailed documents that have been prepared for each of the groundwater management areas in the region. These are *Groundwater Management Framework* supporting documents for the:

- North Athabasca Oil Sands Area
- South Athabasca Oil Sands Area
- Cold Lake – Beaver River Area

Please note that in May 2012, the Government of Alberta brought together the ministries of Environment and Water and Sustainable Resource Development to create one ministry called Alberta Environment and Sustainable Resource Development.

2.0 Purpose

The framework described in this document is part of the shift to cumulative effects management. It seeks to balance anticipated development with environmental protection. The use of indicators of surface water quality and corresponding triggers and limits helps to clearly define the management of cumulative effects of development and contributes to the achievement of the desired regional objective for surface water quality.

This *Surface Water Quality Management Framework for the Lower Athabasca River* was prepared by Alberta Environment and Sustainable Resource Development for the *Lower Athabasca Regional Plan*, one of seven regional plans being advanced under the *Alberta Land Stewardship Act* and the *Land-use Framework*.

The Lower Athabasca Region is the focus of major industrial development that is driving Alberta's and Canada's economy. Increasing population and industrial expansion is expected to continue in the coming years making management frameworks important components of the regional plan.

This framework builds on, but does not replace, existing provincial legislation and policy on water quality, wastewater and the aquatic environment. It will not replace existing management systems such as spill reporting or drinking water surveillance. It will, however, fill a key gap by providing a framework in which to monitor and manage long-term, cumulative changes in water quality within the lower Athabasca River.

Goals of the Surface Water Quality Management Framework

- Identify ambient surface water quality triggers (WQTs) and ambient surface water quality limits (WQLs) to protect surface water quality, clarify Government of Alberta expectations, address cumulative effects, and support pollution prevention and proactive management strategies.
- Enhance transparency and assurance through regular monitoring, evaluation and reporting on ambient surface water quality conditions within the lower Athabasca River from downstream of the Grand Rapids to the Athabasca River Delta.

2.1 Regional Context

The Lower Athabasca Region spans the boundaries of three major river basins – the Athabasca River basin, the Beaver River basin and the Peace/Slave River basin. The region has extensive natural resource development potential in the oil sands, natural gas and forestry sectors. Residents have expressed concerns about development within the region and its impact on water quality, particularly within the Athabasca River downstream of the oil sands.

The Athabasca River flows northeast approximately 1,400 kilometres from the Athabasca Glacier in the Columbia Icefields to where it drains into the Athabasca River Delta near Lake Athabasca. From there, the water flows north as the Slave River into Great Slave Lake and ultimately drains into the Arctic Ocean, by way of the Mackenzie River.

This framework applies to the lower section of the Athabasca River from just downstream of the Grand Rapids (approximately 135 kilometres upstream of Fort McMurray) to the Athabasca River Delta (Figure 1).

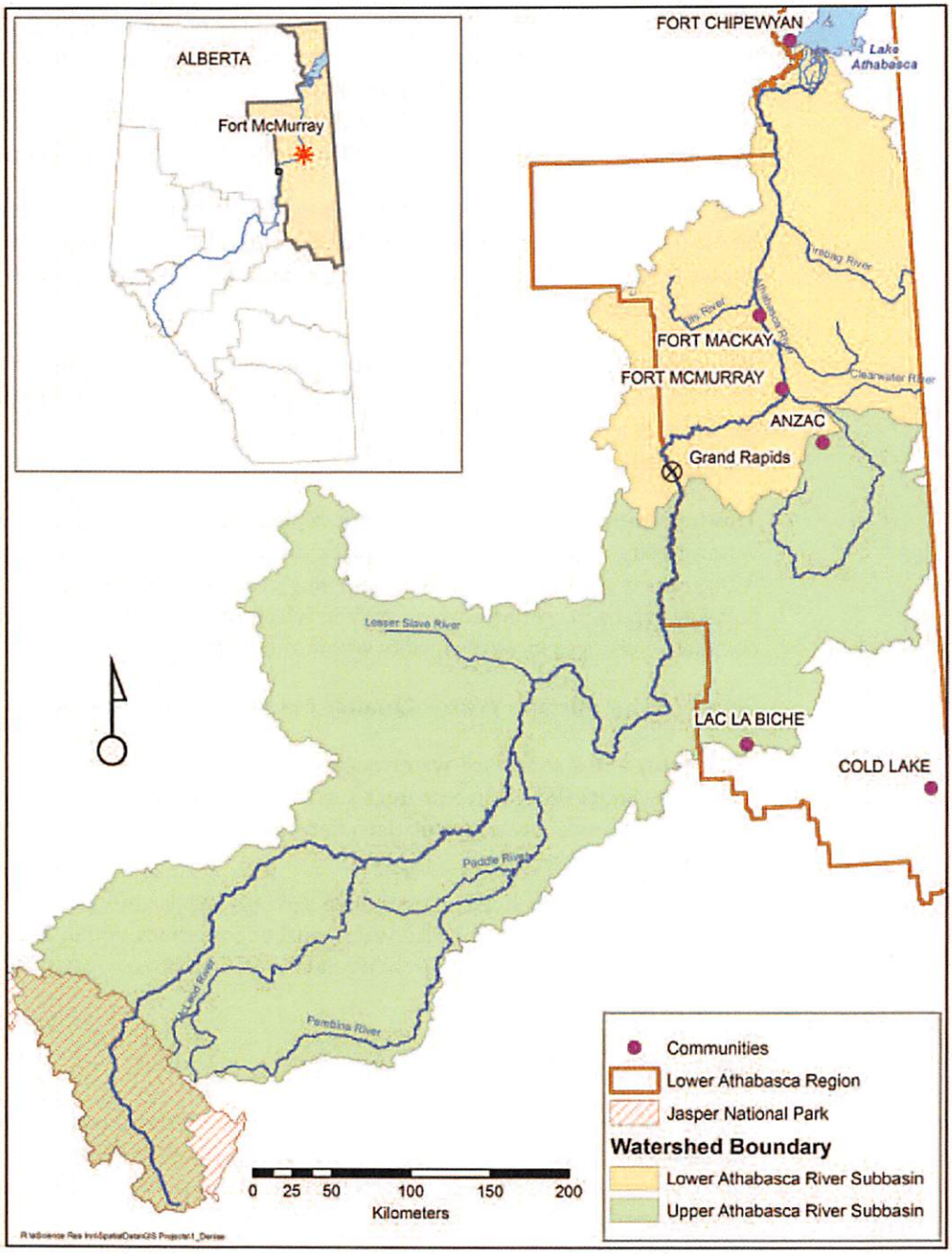


Figure 1
Map of the Athabasca River Basin and Boundary of the Lower Athabasca Region

Note: The *Surface Water Quality Management Framework* for Lower Athabasca Region focuses on the lower Athabasca River downstream of the Grand Rapids to the Athabasca River Delta.

2.2 Framework Development

The *Lower Athabasca Regional Plan* is one of seven regional plans being developed under the *Land-use Framework* (2008) to acknowledge the diversity of Alberta's regions, while coordinating provincial decisions about Crown lands and local land-use decisions.

In 2010, the Government of Alberta led a consultation process about the *Lower Athabasca Regional Plan* that involved gathering feedback on key aspects of advice provided by the Regional Advisory Council and on the management frameworks. To develop this framework as part of that regional planning process, work was gathered from the Cumulative Environmental Management Association's (CEMA) Surface Water Working Group (WRS 2003, Golder 2007). The initial drafting and detailed revision of this framework relied on technical and editorial input from federal regulators, industry, multi-stakeholder organizations, non-governmental groups and First Nations and Métis peoples. An engagement process led by Alberta Environment and Sustainable Resource Development (AESRD) involved targeted stakeholders as well as acceptance of written feedback about the framework.

All technical and editorial input from consultation and engagement was considered as the framework was developed. Overall, the comments received during the engagement and consultation processes supported the framework as a beneficial tool for environmental management within the Lower Athabasca Region.

3.0 Key Concepts and Principles

Two drivers have guided this framework. The first is the need to build on provincial environmental protection and management policies and principles. The second is the need to adopt a cumulative effects management system in the region.

3.1 Provincial Policy Direction

One of the purposes of regional plans is to translate provincial policy to the regional scale. The *Surface Water Quality Management Framework for the Lower Athabasca River* helps to do that.

By reflecting the ongoing desire to balance environmental, economic and social considerations, this framework aligns with the goals of Alberta's *Land-use Framework* and other key policies including *Water for Life* and the *Regional Sustainable Development Strategy for the Athabasca Oil Sands Area* (1999a).

In addition, the need for integration is central to the provincial *Strategy for the Protection of the Aquatic Environment* found in the *Framework for Water Management Planning*. Comprehensive management of the region's surface water resources will require careful and integrated management of three linked ecosystem components: water quality, water quantity and the aquatic environment. Although the current focus of the *Surface Water Quality Management Framework for the Lower Athabasca River* is on managing surface water quality within a specific reach of the Athabasca River, continuing work in the region will contribute to the direction for integration.

3.2 Cumulative Effects Management and Management Frameworks

The Government of Alberta has made a commitment to cumulative effects management that focuses on achievement of outcomes, understanding the effects of multiple development pressures (existing and new), assessing risk, collaborative work with shared responsibility for action, and improved integration of economic, environmental and social considerations. It also follows an adaptive management model; which means decision makers learn from experience and new information and adapt to changing social expectations and demands. Performance management is an essential element providing information on environmental conditions and identifying the need for any adjustments and changes on an ongoing basis. The development of management frameworks is an important approach being used to accomplish the shift to a cumulative effects management system. They will play an important role in long-term planning and decision-making in accordance with the outcomes defined in the regional plan.

The management framework approach is depicted in Figure 2.

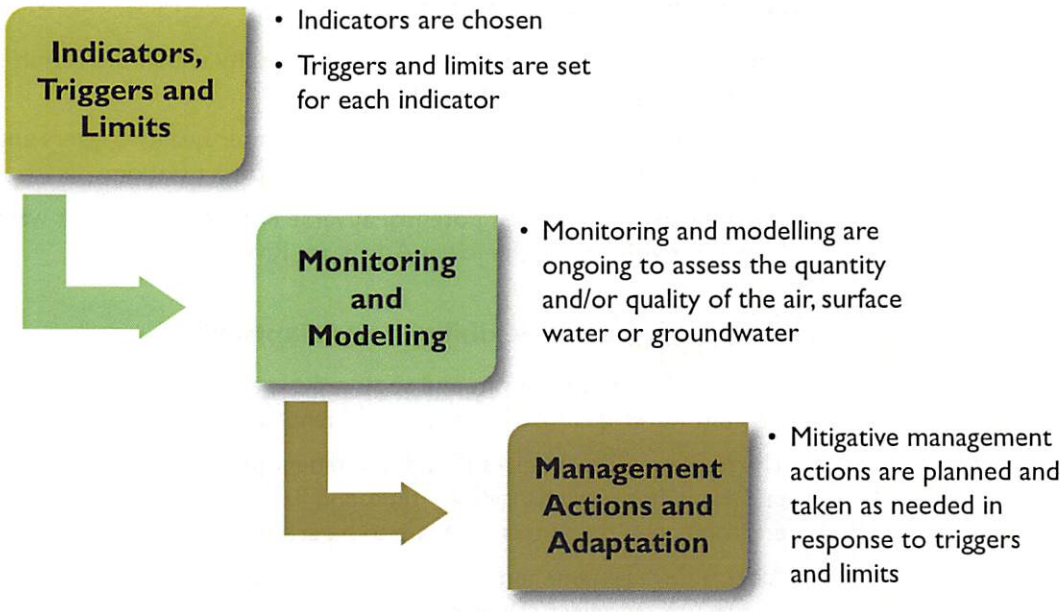


Figure 2
The Management Framework Approach

3.3 Key Principles

The following are key concepts and principles that form a foundation for the management framework.

3.3.1 Surface Water Quality Management

- New activities and pressures on the lower Athabasca River will be monitored and evaluated relative to a more conservative benchmark than before, namely historical conditions. That does not mean that departures from historical water quality conditions will not be allowed, but rather that the cumulative environmental risks of future departures need to be comprehensively assessed and mitigated before they will be allowed.
- Pollution prevention and continuous improvement as outlined in Alberta Environment's Industrial Release Limits Policy (2000) will remain key management principles, although departures from historical water quality conditions may be allowed.

3.3.2 Builds on Existing Legislation, Regulations and Policies

- The framework is intended to add to and complement, not replace, existing policies, legislation and regulations.
- The framework is consistent with provincial policies, strategies and frameworks, and with the stated desired outcomes for the region.

3.3.3 Applies a Regional Perspective

- The framework proactively manages water quality within the region with consideration of human population and ecosystem health.
- The framework assigns and applies ambient water quality triggers and limits to identified substances as measured at the Old Fort monitoring station.
- The framework addresses potential adverse impacts on ambient water quality from human activities along the lower Athabasca River.

3.3.4 Incorporates Flexibility and Adaptability

- A range of potential actions and tools are expected to be used, as required, to manage ambient water quality with respect to identified indicators.
- The framework recognizes that development plans, technology and scientific understanding may change over time, and flexibility is needed to ensure that the desired environmental outcomes continue to be achieved.
- Alberta Environment and Sustainable Resource Development will review and update the framework to reflect changes in information, knowledge and continuing work on water quality indicators.

3.3.5 Clearly Communicates

- The framework supports long-term certainty in Alberta's policy and regulatory process. It provides clarity for industry, early in the design cycle, about restrictions on wastewater releases that may be needed to avoid cumulative impacts on the receiving water environment.
- The system described in this framework and the expectations for surface water quality management are clearly defined and transparent.

3.3.6 Involves Partnerships

- Citizens, communities, industry and government must share the responsibility for water management. As with framework development, Alberta Environment and Sustainable Resource Development will continue to involve stakeholders, First Nations and Métis peoples, and working groups who live and work in the area as the framework is implemented.

4.0 The Current Management System

4.1 Regulatory and Policy Context

A stringent regulatory system governs municipal and industrial releases into rivers in Alberta. At present, notable releases to the lower Athabasca River are limited to wastewater from the city of Fort McMurray and one industrial release from oil sands operations. Any proposed new municipal or industrial releases would require the proponent to assess the potential effects as part of environmental impact assessments and/or applications for operating approvals under the *Environmental Protection and Enhancement Act*. Water resources are also managed under the provincial *Water Act*. A licence under this act is needed to use water. Impacts to water quality can be considered when applications for licences are being reviewed. The *Water Act* also includes provisions to address activities that can affect watercourses.

There are also major policies that guide management and planning for the protection and maintenance of surface water quality. This includes *Water for Life* and the *Framework for Water Management Planning*. Additional policy context for the framework is provided by the *Regional Sustainable Development Strategy for the Athabasca Oil Sands Area* (1999a) and *Responsible Actions: A Plan for Alberta's Oil Sands* (2009). Table 1 summarizes the key legislation and policies, strategies and agreements currently governing surface water quality including transboundary considerations.

4.2 Transboundary Considerations

When rivers flow from one province or territory to the next, there are transboundary agreements in place to ensure that adequate water quality and quantity are maintained. The Athabasca River (along with the north-flowing waters of the Clearwater and Slave rivers) is part of the *Mackenzie River Basin Transboundary Waters Master Agreement*. This agreement has been in effect since 1997 when it was signed by the governments of Canada, British Columbia, Alberta, Saskatchewan, Northwest Territories and Yukon.

The agreement established common principles for cooperative water management and the Mackenzie River Basin Board to facilitate application of these principles. The *Master Agreement* also commits jurisdictions to the development of bilateral water management agreements that will establish specific water quality and quantity objectives. Alberta and the Northwest Territories have established a target of having a bilateral agreement in place by 2012. Both jurisdictions are actively collecting and sharing all relevant information that will inform the negotiations.

Table 1: Key Legislation and Policy for Managing Surface Water Quality in the Lower Athabasca Region

Governance	Jurisdiction
Provincial Acts, Regulations and Authorizations	
Alberta Land Stewardship Act (ALSA)	Provincial / Regional
Environmental Protection and Enhancement Act (EPEA)	Alberta
Water Act	Alberta (*Water Act*)
Approvals, monitoring and reporting requirements	Alberta (EPEA)
Compliance and enforcement	Alberta (EPEA)
Licences, approvals, monitoring and reporting requirements	Alberta (*Water Act*)
Compliance and enforcement	Alberta (*Water Act*)
Guidelines	
Surface Water Quality Guidelines for Use in Alberta	Alberta
Canadian Environmental Quality Guidelines	Canadian Council of Ministers of the Environment (CCME)
Guidelines for Canadian Drinking Water Quality	Health Canada
Guidelines for Canadian Recreational Water Quality	Health Canada
Policies	
Framework for Water Management Planning	Alberta
Industrial Release Limits Policy	Alberta
Water Quality Based Effluent Limits Procedures Manual	Alberta
Strategies	
Regional Sustainable Development Strategy for the Athabasca Oil Sands Area	Alberta
Responsible Actions: A Plan for Alberta's Oil Sands	Alberta
Strategy for the Protection of the Aquatic Environment	Alberta
Water for Life	Alberta
Land-use Framework	Provincial / Regional
Agreements	
Mackenzie River Basin Transboundary Waters Master Agreement	Federal-Provincial-Territorial
Federal Acts	
Canadian Environmental Protection Act	Canada
Fisheries Act	Canada

4.3 Characterization of Surface Water Quality within the Region

Water quality varies considerably along the length of the Athabasca River. It is influenced by natural factors (e.g., geology and soils), as well as point- and non-point source inputs from human development (e.g., industrial wastewater and urban runoff). The Athabasca River receives continuous releases from five pulp mills and four municipal wastewater treatment plants upstream of the Grand Rapids. As mentioned earlier, notable wastewater loadings to the lower Athabasca River are limited to treated municipal wastewater from the city of Fort McMurray and one industrial release from an oil sands operation.

Spring runoff naturally results in seasonal increases in total suspended solids (TSS) and turbidity within the Athabasca River. Both nutrients and total metals are associated with the particles suspended in the runoff, and these indicators also increase during high flows. As a result, seasonal exceedances of water quality guidelines are relatively common.

The water quality at the Long-term River Network (LTRN) monitoring sites upstream of Fort McMurray and at Old Fort have consistently demonstrated Alberta River Water Quality Index (ARWQI) ratings in the "good" to "excellent" range. Both sites have had occasional guideline exceedances for nutrients and metals. Pesticides such as 2,4-D and MCPA have also been detected at the Old Fort site, but at concentrations below guidelines. Section 4.4 expands on the descriptions of the LTRN and other monitoring programs.

Total phosphorus and other nutrients increase along the length of the Athabasca River. This spatial pattern is thought to be due to a combination of point sources (i.e., pulp mills and municipal wastewater) non-point sources (e.g., agriculture and road and pipeline networks) and tributary inputs (North-South 2007).

Several hydrocarbons (including total phenolics, naphthenic acids (NAs) and polycyclic aromatic hydrocarbons (PAHs) are present at low concentrations in the lower Athabasca River. This is thought to be largely due to the region's natural bitumen deposits (North-South 2007). However, industrial sources of these contaminants do exist, and have the potential to increase loading to aquatic systems within the region through a variety of pathways (Hatfield Consultants et. al. 2009) if not managed carefully.

Climatic conditions may also impact water quality in the lower Athabasca River. Significant increasing trends were found for several indicators sampled at the Old Fort station between 1987 and 2007 (Hebben 2009). These increasing trends include pH, turbidity and non-filterable residue, as well as several nutrients and metals. Although many of these variables can be closely related to sediment loads within a river, these trends could also be related to decreasing stream flows in the lower Athabasca River or other causes (Hebben 2009).

4.4 Current Surface Water Quality Monitoring in the Region

Alberta Environment and Sustainable Resource Development's monitoring, evaluating and reporting of surface water quality includes the Long-term River Network (LTRN), which supports the ARWQI and periodic trend assessments (e.g., Hebben 2009). The department also leads and supports various water quality research initiatives in the area including the comprehensive contaminant load study described below. Other water quality monitoring in

the region includes the Regional Aquatics Monitoring Program (RAMP), facility-specific monitoring (industrial and municipal approval and licence holders), and various federal government monitoring and research initiatives. Please see Figure 3 for locations of select Alberta Environment and Sustainable Resource Development water quality monitoring stations.

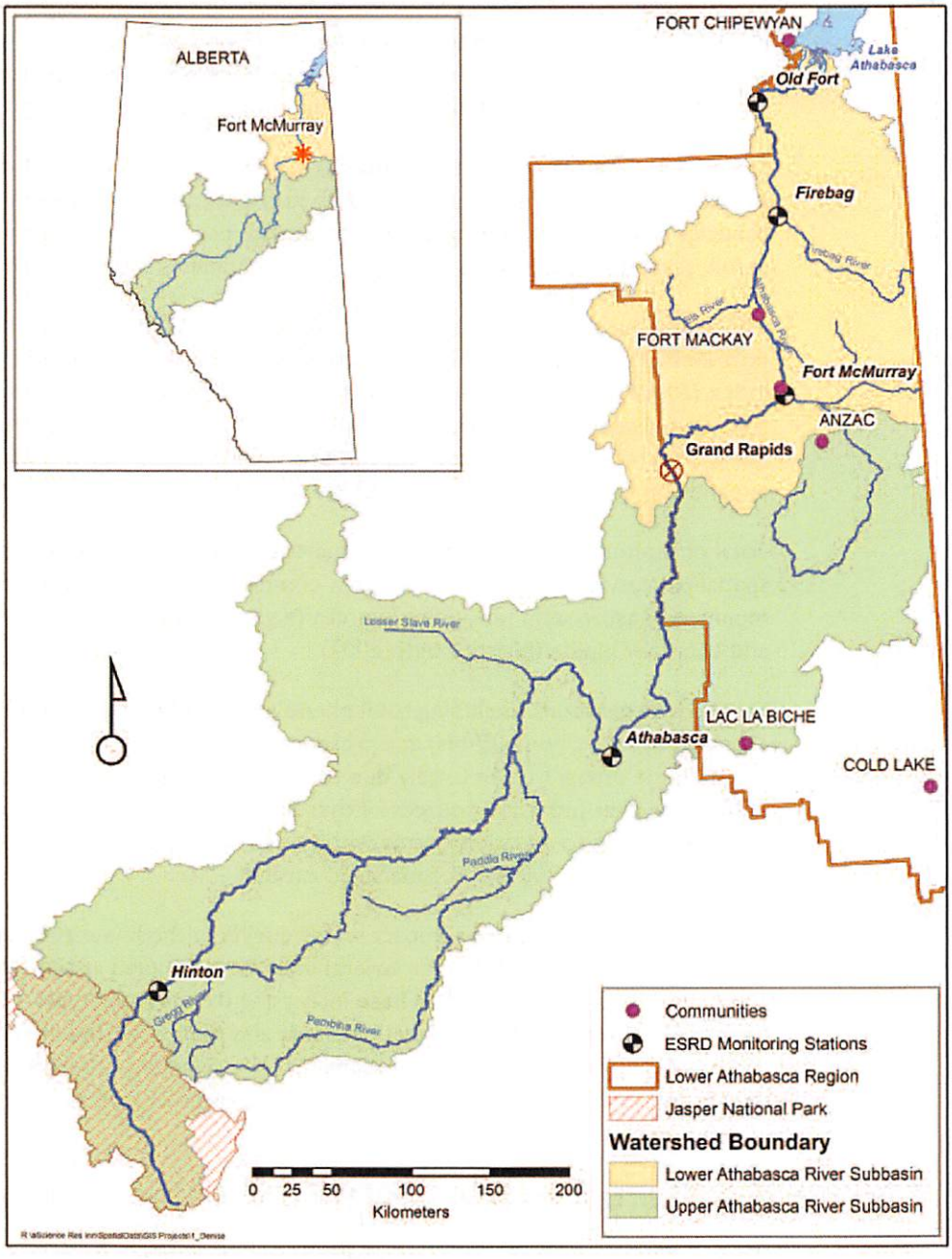


Figure 3
Map of the Athabasca River Basin Showing Select Alberta Environment and Sustainable Resource Development Surface Water Quality Monitoring Stations

4.4.1 Long-term River Network

The LTRN program focuses on known problem areas and sources of pollution within larger rivers. Existing network sites were selected because: (1) they are accessible; and (2) river waters are well-mixed with respect to tributary and point source inputs. Network sites are generally located upstream and downstream of municipal and industrial development, or otherwise spaced at important locations on river systems.

Alberta Environment and Sustainable Resource Development has four LTRN sites on the Athabasca River – two of which are on the lower Athabasca River: the Athabasca River upstream of Fort McMurray and the Athabasca River at Old Fort (Figure 3). A suite of water quality indicators are sampled at these sites on a regular basis. The Old Fort site has been monitored since 1977, while the site upstream of Fort McMurray has been in operation since 2002. The department has also been monitoring other sites in the area regularly since 2008, including one on the mainstem – the Athabasca River upstream of the Firebag River – and co-ordinates the monitoring of seven sites on the Muskeg River, a major tributary to the lower Athabasca River with significant oil sands activity within its basin.

4.4.2 Alberta River Water Quality Index

The ARWQI summarizes complex data into a simple descriptor of water quality and provides a snapshot of annual water quality conditions. Data is collected for 22 metals, 17 pesticides, six nutrients and two bacteria indicators through the province's LTRN. These data are then compared to water quality guidelines and calculated into an average index rating, as follows:

Excellent: Guidelines are almost always met. This is considered the "best" water quality.

Good: Guidelines are occasionally exceeded, but usually by small amounts. Threat to quality is minimal.

Fair: Guidelines are sometimes exceeded by moderate amounts. Quality occasionally departs from desirable levels.

Marginal: Guidelines are often exceeded, sometimes by large amounts. Quality is threatened and often departs from desirable levels.

Poor: Guidelines are almost always exceeded by large amounts. Quality is significantly impaired and is well below desirable levels. This is considered the "worst" water quality.

Water quality at the Old Fort site has been assessed annually since 1996 through the ARWQI. The ARWQI is included as a provincial performance indicator in the Alberta government's *Measuring Up Annual Report*. More information on the ARWQI is available through Alberta Environment and Sustainable Resource Development's website at www.environment.alberta.ca.

4.4.3 Comprehensive Contaminant Load Study

In 2009, the department initiated a comprehensive contaminant load study to assess contaminants in environmental media (e.g., water, air and soil) within the lower Athabasca River basin in the mineable oil sands region. The study is investigating metals including arsenic and mercury as well as hydrocarbons such as PAHs and NAs. The overall goal is to address a number of questions related to the potential impacts of oil sands operations on the transport and accumulation of contaminants along the Athabasca River into the Peace-Athabasca Delta and western Lake Athabasca, and the implications of this to ecosystem and human health.

The water quality component of the study consists of monthly bulk water sampling and the deployment of passive sampling devices (semi-permeable membrane devices for PAHs, polar organic chemical integrative samplers for NAs, and diffusive gradients in thin films for metals) at 11 sites within the region. Six of these sites are located on the lower Athabasca River main stem (two are LTRN sites) and five on larger tributaries. The study is expected to be completed in 2012.

4.4.4 Regional Aquatics Monitoring Program

The Regional Aquatics Monitoring Program (RAMP) is a multi-stakeholder aquatic monitoring program that "strives to achieve a holistic understanding of potential effects of oil sands development on aquatic systems, as well as address specific issues important to communities of the region" (Hatfield et. al. 2009). The program devotes effort to a broad geographic scale that includes the Athabasca River mainstem and tributaries, the Peace-Athabasca Delta and small lakes throughout the oil sands region. The program includes long-term monitoring of the physical, chemical and biological environment. The core elements of RAMP and the approach have remained relatively consistent over time, but the design of the program continues to be refined in response to new information, stakeholder input and technical peer reviews. Results of the RAMP program, including the complete database, are available to the public through a dedicated website at www.ramp-alberta.org/RAMP.aspx.

4.4.5 Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring

Under the joint implementation plan, the Governments of Alberta and Canada are working together to implement a world class monitoring program for the oil sands that integrates all environmental components—air quality, water quality, water quantity, aquatic ecosystems, terrestrial biodiversity and habitat. Implementation of the plan will result in improved knowledge of the state of the environment in the oil sands area and an enhanced understanding of cumulative effects. The expanded water monitoring program will increase the amount of site-specific, reach-specific and regional scale information, including spatial and temporal status and trends in contaminant loadings. More information on the joint monitoring plan for oil sands is available through Alberta Environment and Sustainable Resource Development's website at www.environment.alberta.ca.

5.0 Regional Objective

In support of the outcomes of the *Lower Athabasca Regional Plan*, this management framework establishes the following regional objective for surface water quality:

>> Water quality in the lower Athabasca River is managed so current and future water uses are protected.

For the purposes of this framework, water uses include: protection of aquatic life, drinking water, recreation and aesthetics, agricultural and industrial. To better describe the water quality objective, indicators have been chosen and triggers and limits established for those indicators.

5.1 Indicators

Indicators provide information about whether or not a regional objective is being met.

Since long-term water quality data are available for the Old Fort monitoring station, and it is located downstream of oil sands development, indicators for the lower Athabasca River were chosen from among the parameters being measured at Old Fort. Ambient water quality triggers and water quality limits were then developed for those indicators. As soon as possible, triggers and limits will also be developed for Alberta Environment and Sustainable Resource Development's monitoring station on the Athabasca River upstream of the Firebag River, since that site is closer to current oil sands development.

Long-term data are used to establish historical conditions for the indicators included in this framework. In addition, the indicators chosen for the framework were selected because they:

- have known concentrations in existing or potential wastewater releases that exceed concentrations in the Athabasca River by two-fold or more.
- exhibit a downstream increase (and therefore loading) to the lower Athabasca River between the upstream of Fort McMurray and Old Fort LTRN monitoring stations.

Thirty-eight indicators met the selection criteria and were not overly affected by censored data (missing observations or values below method detection limits). The indicators selected include a variety of toxic and non-toxic water quality substances and of these, 11 are classified as general indicators and 27 as metal indicators.

- **11 General Indicators**: calcium, chloride, magnesium, potassium, sodium, sulphate, total dissolved phosphorus, total phosphorus, nitrate, total ammonia, total nitrogen.
- **27 Metal Indicators**: (total and dissolved except where noted) aluminum, antimony, arsenic, barium, beryllium (total only), bismuth (total only), boron, cadmium, chromium, cobalt, copper, iron, lead, lithium, manganese, mercury (total only), molybdenum, nickel, selenium, silver (total only), strontium, thallium, thorium, titanium, uranium, vanadium and zinc.

Polycyclic aromatic hydrocarbons and NAs are also important indicators of concern given their toxicity and potential for natural and industrial loading to the lower Athabasca River. Nevertheless, these substances are not currently on the indicator list, as important science gaps exist around the identification, quantification, and toxicity of NAs. Moreover, reliable approaches to quantify PAHs at the low concentrations found in water, as well as our understanding of their toxicity in aquatic environments, are still evolving. Challenges in identifying and measuring NAs and PAHs have limited the collection and availability of data for these indicators within the lower Athabasca River.

Despite these challenges, Alberta Environment and Sustainable Resource Development has begun monthly sampling for NAs using the best available methods, at all three AESRD stations on the lower Athabasca River. Moreover, monthly sampling for PAHs has also recently been implemented at all three stations, and complementary approaches such as the use of semi-permeable membrane devices are currently being explored to address the frequent non-detects for these indicators. Once a reliable dataset has been compiled for the Athabasca River stations at Old Fort and upstream of the Firebag, triggers will be developed. In the meantime, AESRD will continue to evaluate the incoming PAH and NA data and will work to fill the science and data gaps that currently limit the inclusion of these parameters in this framework.

The indicator list presented in this framework is expected to change over time in response to new information including additional monitoring data, new contaminants of concern, or as we gain a greater understanding of the behaviour and fate of contaminants within the lower Athabasca River. The department will continue to monitor and report on a variety of other water quality parameters not identified through this indicator selection process, through its monitoring and reporting on other stations on the lower Athabasca River.

5.2 Triggers and Limits

Ambient water quality triggers (WQT), calculated from historical monthly or quarterly samples from the Old Fort monitoring station, are an "early warning system" that signal potential change in ambient environmental conditions in the lower Athabasca River. They are set very conservatively at values that have historically been observed at the Old Fort monitoring station, therefore not all trigger exceedances signal real or meaningful change. Nevertheless, trigger exceedances provide an early opportunity to examine an indicator to determine whether or not change is occurring. Triggers are based on the premise that deviations from existing water quality are acceptable, provided they are closely monitored and managed.

Water quality limits (WQL) derived from provincially-accepted water quality guidelines represent conditions where the risk of adverse effects is heightened. Exceedance of the WQT indicates that a statistically significant change from historical conditions may have occurred, while exceedance of the WQL indicates that designated water uses may not be protected.

The steps involved in setting the WQTs and WQLs are linked to the selected water quality indicators, as depicted in Figure 4.

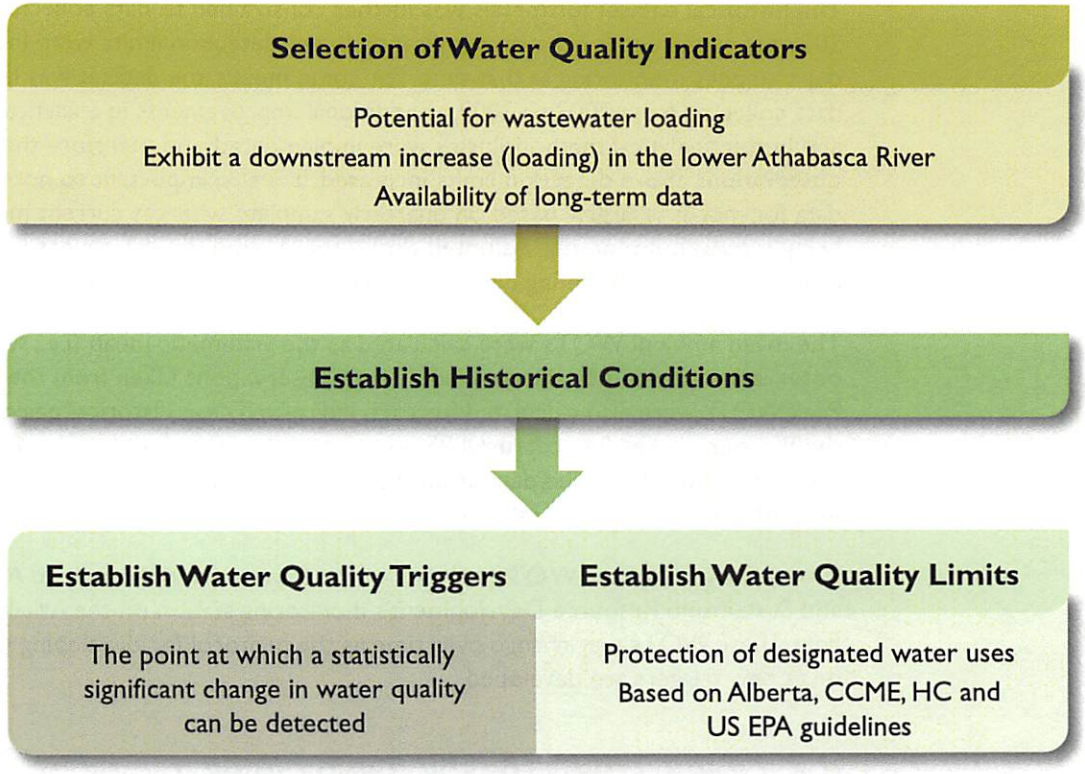


Figure 4
The Steps to Establish Surface Water Quality Triggers and Limits

5.3 Setting Water Quality Triggers (WQTs)

To determine the historical range of water quality within the lower Athabasca River, the available historical data were compiled for each indicator. Data collected at the Old Fort monitoring station from 1988 to 2009 were used to establish historical conditions for the general indicators. There were several reasons for limiting the dataset to these dates:

- Samples collected before 1988 were often analysed by different analytical techniques with less sensitive detection limits.
- Data collected before 1988 were often incomplete and did not have 12 full months represented. As several indicators exhibit significant seasonal differences, the missing samples, especially from the winter months, would bias the long-term statistical distribution of the indicator.
- In 1987, the monitoring sites were transferred from Environment Canada to Alberta Environment. Distinct differences (step trends) were evident in several indicators between those samples collected prior to and after 1988 (Hebben 2009). Potential biases in the long-term statistics were avoided by using the data collected after 1987.

The historical dataset for metals was further constrained to data collected from 1999 to 2009 for many metals because significantly lower detection limits were instituted in the department's monitoring at that time. For some metals, the dataset was largely restricted to data collected from 2003 to 2009, as additional improvements in analytical detection levels and better analytical methodologies were implemented, and therefore the number of observations above detection limits increased. It is also important to note that the historical data for metals is largely based on quarterly sampling, whereas current metal sampling is being carried out monthly. As noted above, these temporal differences may require special attention when interpreting differences between historical and current conditions.

The mean ambient WQTs were calculated as the arithmetic mean (i.e., sum of all the observations divided by the total number of observations taken from the historical datasets). Peak WQTs were also calculated for each indicator. These historical peaks were defined as the 95th percentiles (i.e., captured 95 per cent of the historical dataset). Tables showing the summary statistics for the data used to generate general and metal indicator triggers are presented in Appendix A (Tables A1 and A2).

Please note that the WQTs included in this framework only apply to Alberta Environment and Sustainable Resource Development's monitoring station on the Athabasca River at Old Fort. These WQTs may change over time as the protocol for developing triggers is finalized or as new triggers are developed.

5.4 Setting Water Quality Limits (WQLs)

In addition to their current use in the regulatory system, water quality guidelines were used to define ambient WQLs for each surface water quality indicator in this framework. A surface water quality guideline, according to the Canadian Council of Ministers of the Environment (CCME), "is a numerical concentration or narrative statement recommended to support and maintain a designated use".

The guidelines chosen as WQLs for the Old Fort monitoring station followed an order of priority. Depending on availability, guidelines for each indicator were selected first from the Alberta Water Quality Guidelines for the Protection of Aquatic Life (AENV 1999) and then from the most stringent of the following guidelines:

- CCME Water Quality Guidelines for the Protection of Aquatic Life (www.st-ts.ccme.ca)
- CCME Water Quality Guidelines for the Protection of Agricultural Water Uses (www.st-ts.ccme.ca)
- Guidelines for Canadian Drinking Water Quality (Health Canada 2010)
- Guidelines for Canadian Recreational Water Quality (Health and Welfare Canada 1992)
- United States Environmental Protection Agency's (U.S. EPA) Aquatic Life Criteria (U.S. EPA 2009).

Only chronic guidelines were considered when examining protection of aquatic life guidelines.

Generic provincial guidelines were not used to set WQLs when the following situations applied:

- guidelines were lower than historical concentrations and/or WQTs
- no provincially acceptable guidelines were available.

Of the 38 water quality indicators currently included in this framework, 10 had guidelines that were lower than historical concentrations at the Athabasca River monitoring station at Old Fort, and seven did not have an existing guideline value.

The WQLs for the lower Athabasca River should be expected to change over time as existing guidelines are updated and new guidelines are developed.

Please note that the WQLs included in this framework only apply to Alberta Environment and Sustainable Resource Development's monitoring station on the Athabasca River at Old Fort.

5.4.1 Triggers and Limits for General Indicators

The general water quality indicators include several major ions and nutrients. These substances are ubiquitous in natural waters and can occur at concentrations that negatively impact the aquatic ecosystem and other water uses. Table 2 provides the WQTs and WQLs established for general water quality indicators within the lower Athabasca River as measured at the Old Fort monitoring station.

Table 2: Ambient Surface Water Quality Triggers and Limits for the Athabasca River at Old Fort – General Indicators

Note: All values are in mg/L.

General Indicator	Surface Water Quality Triggers		Surface Water Quality Limit
	Mean	Peak	
Calcium (Ca^{2}+)	34.7	48.9	1,000[b]
Chloride (Cl^{-})	20.2	45.0	100[b]
Magnesium (Mg+)	9.5	13.7	-
Potassium (K^{+})	1.4	2.1	-
Sodium (Na^{+})	21.5	43.7	200[c]
Sulphate (SO_4^{-})	26.7	41.4	500[c]
Total Dissolved Phosphorus (TDP)	0.016	0.032	-
Total Phosphorus (TP)	0.074	0.261	-
Nitrate (NO_3-N)	0.092	0.264	2.935[a]
Total Ammonia (NH_{3+4}-N)	0.05	0.12	Varies with pH and temperature[d,l]
Total Nitrogen (TN)	0.597	1.041	-

a CCME Guidelines for the Protection of Aquatic Life

b CCME Guidelines for the Protection of Agricultural Water Uses

c The Guidelines for Canadian Drinking Water Quality

d US EPA Aquatic Life Criteria

l Fish early life stages present: chronic criterion = $((0.0577/(1 + 10^{7.688-pH})) + (2.487/(1 + 10^{pH-7.688}))) \times MIN(2.85, 1.45 \cdot 10^{0.028\,(25-T)})$. See Table A3 for computed temperature and pH-dependent total ammonia values and Table A4 for temperature and pH values from the Old Fort monitoring station.

5.4.2 Triggers and Limits for Metal Indicators

The metal indicators in this framework include a wide variety of elements. Some are essential for aquatic life (e.g., zinc), but excessive or deficient concentrations can be problematic. Metals can enter surface waters through natural processes, but are also present in industrial and municipal wastewater releases. Table 3 provides the WQTs and WQLs established for metal indicators within the lower Athabasca River. Although triggers have been developed for both dissolved and total metals, WQLs only apply to the total metals.

Table 3: Ambient Surface Water Quality Triggers and Limits for the Athabasca River at Old Fort – Metal Indicators

Note: All values are µg/L; D=dissolved, T=total.

Metal Indicator	Surface Water Quality Triggers		Surface Water Quality Limit
	Mean	Peak	
Aluminum D	16	49	-
Aluminum T	1533	6454	-
Antimony D	0.107	0.202	-
Antimony T	0.148	0.388	6[c,1,2]
Arsenic D	0.5	0.7	-
Arsenic T	1.1	2.5	5[a]
Barium D	52.6	73.7	-
Barium T	79.3	147.6	1,000[c]
Beryllium T	0.077	0.269	100[b,3]
Bismuth T	0.0172	0.0564	-
Boron D	26	40	-
Boron T	48	69	500[b]
Cadmium D	0.0997	0.5150	-
Cadmium T	0.3	1.2	-
Chromium D	0.41	0.65	-
Chromium T	3	8	50[c]
Cobalt D	0.07	0.11	-
Cobalt T	0.8	2.2	50[b]
Copper D	1.6	3.6	-
Copper T	3.1	7.2	-
Iron D	185	372	-
Iron T	1899	5821	-
Lead D	0.56	0.56	-
Lead T	3.3	7.0	-
Lithium D	6	9	-

Metal Indicator	Surface Water Quality Triggers		Surface Water Quality Limit
	Mean	Peak	
Lithium T	9	12	2,500[b]
Manganese D	12	36	-
Manganese T	65	141	-
Mercury T	0.0051	0.0159	-
Molybdenum D	0.7	1.2	-
Molybdenum T	0.9	1.6	10[b]
Nickel D	1.6	4.7	-
Nickel T	3.4	8.2	Varies with hardness[d,4]
Selenium D	0.229	0.409	-
Selenium T	0.333	0.581	1[a]
Silver T	0.0243	0.0677	0.1[a]
Strontium D	215	361	-
Strontium T	225	361	-
Thallium D	0.0238	0.1137	-
Thallium T	0.0546	0.1751	0.8[a]
Thorium D	0.0284	0.0942	-
Thorium T	0.35	1.44	-
Titanium D	2	7	-
Titanium T	30	104	-
Uranium D	0.313	0.381	-
Uranium T	0.4	0.7	10[b,5]
Vanadium D	0.450	0.698	-
Vanadium T	4	16	100[b]
Zinc D	4.5	12.4	-
Zinc T	12.3	25.6	-

a CCME Guidelines for the Protection of Aquatic Life
b CCME Guidelines for the Protection of Agricultural Water Uses
c The Guidelines for Canadian Drinking Water Quality
d U.S. EPA Aquatic Life Criteria
1 Developed as an interim maximum acceptable concentration
2 Faucets should be thoroughly flushed before water is taken for consumption or analysis
3 Livestock watering guideline is interim
4 Total nickel CCC = $e^{0.846(\ln \text{hardness})+0.0584}$ µg/L, where hardness is measured in mg/L $CaCO_3$. See Table A4 for alkalinity ($CaCO_3$) values from the Old Fort monitoring station
5 Interim guideline

6.0
The Management System

This framework brings the following new elements to the existing system:

- establishing a surface water quality objective for the lower Athabasca River
- identifying key indicators for that objective
- setting of triggers and/or limits for those indicators
- identifying the management response when triggers and limits are exceeded.

Within this framework, ambient surface water quality levels have been assigned to identify where ambient water quality conditions are in relation to the triggers and limits and to define the corresponding management response. When ambient surface water quality levels change, the main influences are identified, and the appropriate management actions can be applied if needed.

At present, surface water quality levels have been assigned to the Athabasca River at the Old Fort monitoring station. In the future, additional triggers and limits will be included in this management framework as the monitoring station upstream of the Firebag River and possibly other stations are added.

Alberta Environment and Sustainable Resource Development will use the ambient surface water quality levels to:

- describe ambient water quality conditions in the lower Athabasca River as measured at the Old Fort monitoring station
- initiate the management response outlined in this framework when monitoring indicates undesirable trends are developing or triggers and/or limits are being exceeded
- assess the impacts of water quantity management on water quality conditions
- in conjunction with water quantity and water quality models, evaluate water and reclamation policy options on the lower Athabasca River.

It is important to understand that this framework is intended to be used to monitor and manage long-term, cumulative changes in water quality in the lower Athabasca River, and not intended to replace existing management systems such as spill reporting, drinking water surveillance, or facility or activity-specific regulation.

Overall, this framework fits within, and supports, the broader provincial water legislation and policy framework that applies to the lower Athabasca River. The management approaches presented in this framework to manage ambient surface water quality are collective requirements that apply to all regulated water users or parties releasing substances to the lower Athabasca River. The framework requirements do not replace existing policies guiding development of individual facility approval and licence conditions; they are additional requirements that will formally be incorporated into new applications and into approval and licence amendments and renewals.

Elements from the framework will be included in the *Lower Athabasca Regional Plan* and will be implemented as part of that plan with legal force as provided by the *Alberta Land Stewardship Act*. The ambient WQTs and WQLs come into effect when the regional plan is approved.

6.1 Assignment of Surface Water Quality Levels

To help define where ambient water quality conditions sit relative to the triggers and limits, surface water quality levels are assigned for each indicator. Level 1 represents ambient conditions within the range of historically observed conditions; there are no trigger exceedances in Level 1. Level 2 indicates a shift away from historical conditions, where there is a trigger exceedance and the potential development of an undesirable trend. Level 3 indicates the exceedance of a water quality limit. The management focus also varies depending on the surface water quality level (Table 4).

The purpose of assigning the three levels is to identify where ambient conditions are in relation to the defined ambient surface WQTs and WQLs. Assignment of levels also provides a way to manage changes in surface water quality so that they do not compromise the protection of aquatic life and other water uses.

There are corresponding management intentions for each of the three ambient water quality levels. The idea is to prevent ambient surface water quality concentrations from approaching or reaching Level 3, as defined by the WQL, by proactively monitoring and managing water quality indicators in Level 2.

LEVEL 1

Level 1

Ambient water quality conditions are within mean and peak historical values. Approval and licence conditions are being implemented and water, wastewater and aquatic ecosystem policy is being applied.

Level 2

Ambient water quality conditions are shifting away from mean and/or peak historical conditions. Level 2 conditions are statistically defined and do not necessarily signal additional environmental risk. Confirming whether an undesirable trend is developing and evaluating the consequences of that trend is central to deciding on the need for action. The proximity of each indicator to its limit varies; consequently, a range of management actions may be used in Level 2 to address individual situations depending on urgency and potential risk. Level 2 conditions are defined by WQTs.

LEVEL 2

LEVEL 3

Level 3

Water quality conditions exceed the limit established to protect the most sensitive water use for a given indicator. Human contributions to the indicator are documented and suspected of posing additional, unacceptable risk to human or ecosystem health. Level 3 conditions will be avoided through careful management of activities influencing the indicator in Level 2 and good wasteload management. Level 3 conditions are defined by WQLs.

Table 4: Description of Ambient Surface Water Quality Levels

Level	Description	Management Intent
3	Exceedance of water quality limits.	Improve ambient water quality to below limits.
	Limit	
2	Exceedance of water quality triggers.	Proactively maintain water quality below limits. Improve knowledge and understanding of trends.
	Trigger	
1	Mean and peak water quality conditions at or better than historical water quality conditions.	Apply standard regulatory and non-regulatory approaches to manage water quality.

6.2 Working with the Current Data

There are two ions, four metals and one dissolved nutrient for which no guidelines exist, and therefore no limit was set in this framework. There are also some indicators with mean and/or peak historical values that are higher than provincially-accepted guidelines. These include two nutrients: total phosphorus and total nitrogen; and eight metals: total aluminum, total cadmium, total copper, total iron, total lead, total manganese, total mercury and total zinc (Table 5). In addition, several of the indicators have maximum observed historical values (Tables A1 and A2) that are close to, or exceed, the WQL. These indicators will need to be followed carefully as relatively small changes in contaminant loading (natural or anthropogenic) may lead to limit exceedances.

With the exception of total manganese, all of the indicators with historical exceedances were higher than chronic guidelines or chronic criteria for the protection of aquatic life. When guidelines are naturally exceeded within aquatic ecosystems, these indicators are typically present in forms that reduce their toxicity (CCME 1999). In the Athabasca River, this is thought to be associated with high concentrations of suspended particulate matter; however more work is needed to confirm this notion.

For indicators with historical exceedances of guidelines, Alberta Environment and Sustainable Resource Development will evaluate and prioritize the need for investigation and management of these exceedances. Investigation and/or the development of management options may require additional source characterization and water, sediment and biological monitoring to better define or evaluate the issue. If significant human influences are found and are suspected of posing additional, unacceptable risk, indicators with historical exceedances may be assigned to Level 3 and require mandatory management action.

For indicators where no guideline exists or indicators with historical exceedances of guidelines, Alberta Environment and Sustainable Resource Development will evaluate and prioritize the development of acceptable limits. The preferred method for defining acceptable risk is to develop a site-specific guideline using CCME protocols. It should be noted that limits will not be developed for dissolved metals at this time, but trigger exceedances will require follow-up.

A report summarizing conditions at the Old Fort monitoring station will be prepared once the Lower Athabasca Regional Plan is approved. This report will describe the status of each water quality indicator relative to the surface water quality levels described in Table 4.

Table 5: Surface Water Quality Indicators with Historical Conditions in the Athabasca River at the Old Fort Station that Exceed Water Quality Guidelines

Note: Guidelines are total concentrations except copper.

Indicator	Unit	Water Quality Guideline
Aluminum	µg/L	5 or 100[b,1]
Cadmium	µg/L	Varies with hardness[b,2]
Copper	µg/L	7[a,3]
Iron	µg/L	300[b]
Lead	µg/L	Varies with hardness[e,4]
Manganese	µg/L	50[d]
Mercury	µg/L	0.005[a,5]
Total Phosphorus	mg/L	0.05[a]
Total Nitrogen	mg/L	1.00[a]
Zinc	µg/L	30[b]

a Alberta Guidelines for the Protection of Freshwater Aquatic Life

b CCME Guidelines for the Protection of Aquatic Life

c CCME Guidelines for the Protection of Agricultural Water Uses

d The Guidelines for Canadian Drinking Water Quality

e US EPA Aquatic Life Criteria

1 5 µg/L if water pH < 6.5, 100 µg/L if water pH ≥ 6.5. See Table A4 for pH values from the Old Fort monitoring station

2 Total cadmium = $10^{0.86[\log 10(\text{hardness})]-3.2}$ µg/L, where hardness is measured in mg/L $CaCO_3$. See Table A4 for alkalinity ($CaCO_3$) values from the Old Fort monitoring station

3 The Alberta guideline is for acid extractable copper, however it is being applied to total recoverable copper (a more conservative application of the guideline)

4 Total lead CCC = $e^{1.273(\ln \text{hardness})-4.705}$ µg/L, where hardness is measured in mg/L $CaCO_3$ See Table A4 for alkalinity ($CaCO_3$) values from the Old Fort monitoring station

5 The Alberta guideline for total mercury is draft.

6.3 Management Response

The terms management response and management action have distinct meanings in the context of this management framework. The management response is a set of steps that will be undertaken (all or in part) if an ambient surface water quality trigger or limit is believed to have been exceeded. Part of the management response is determining the need for management actions.

The management response begins with verifying whether an ambient surface WQT or WQL has been exceeded. Depending on the findings of assessment and investigation, the contributing parties responsible for reaching the ambient surface WQT or WQL may be required to take mitigative management actions. Alberta Environment and Sustainable Resource Development will provide oversight of the management actions, evaluate the effects of implementation, and communicate progress toward meeting regional outcomes.

The framework addresses the cumulative effects of point sources and non-point sources on general and metal indicators. It enables the identification of local and regional contaminant sources that contribute to ambient concentrations reaching WQTs and WQLs, and ensures that appropriate actions are taken when the triggers and limits are exceeded. The intent is to use appropriate place-based measures to address specific circumstances.

It should be noted that this management response does not replace other responses that are taken as part of ensuring compliance under the environmental regulatory system.

Further description of the regional management response follows.

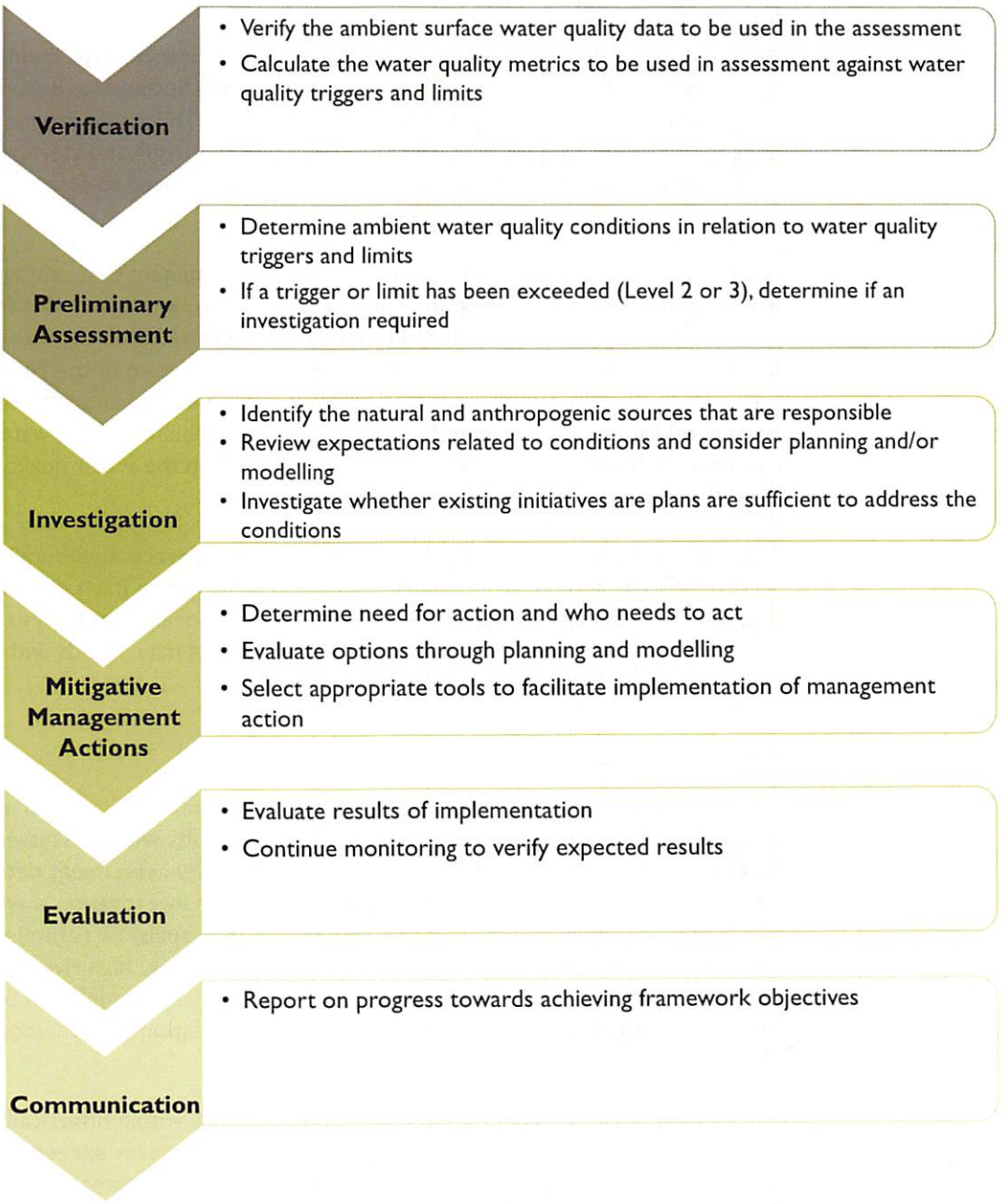


Figure 5
Management Response

6.3.1 Verification

The monitoring data used to assess ambient surface water quality conditions as part of this framework will be verified by Alberta Environment and Sustainable Resource Development. Verification involves ensuring the integrity of the data. This could include looking at sample collection, sample analysis, data validation, and data reporting and storage. Once the data have been verified, the water quality metrics that will be used to assess ambient conditions relative to triggers and limits will be calculated.

Alberta Environment and Sustainable Resource Development's current ambient surface water quality monitoring program will be augmented to implement this framework. Water quality indicators will be monitored monthly at all three AESRD monitoring stations on the lower Athabasca River: upstream of Fort McMurray, upstream of the Firebag River and at Old Fort. Until sufficient data are available to develop triggers and limits for AESRD's Firebag River monitoring station, reporting on the status of ambient surface water quality triggers and limits in the lower Athabasca River will be based on the water quality data collected from the department's Old Fort monitoring station.

The historical datasets for the general (1988-2009) and trace metals indicators (generally 1999-2009) will be compared against annual monitoring data from the Old Fort monitoring station to identify large-scale changes. Less frequent, longer-term analysis will monitor for subtle trends that may not be evident in a single year of data. Trends within and between levels will be identified and considered.

6.3.2 Preliminary Assessment

Once the ambient surface water quality monitoring data is verified, and indicator annual means, peaks and other metrics are calculated, the results will be assessed against ambient surface WQTs and WQLs (Appendix B). This preliminary assessment determines if a trigger or a limit has been exceeded and evaluates whether an investigation is warranted. Part of this assessment involves ensuring that rare events (e.g., spills) or natural circumstances that cannot be controlled through wastewater management (e.g., high river flows) are understood as part of the annual assessment. This will be accomplished by consulting upstream monitoring data and other supporting information (e.g., meteorological data) to check for potential causes.

Additionally, because WQTs are set very conservatively within historically observed values at the Old Fort monitoring station, false positives (i.e., a trigger is exceeded, but no change has occurred) should be expected. For this reason, Alberta Environment and Sustainable Resource Development may choose not to initiate an investigation until more evidence exists that an undesirable trend is developing.

6.3.3 Investigation

When a WQT or WQL is exceeded and the preliminary assessment confirms the need for an investigation, Alberta Environment and Sustainable Resource Development has a two-phased approach. Relevant stakeholders, First Nations and Métis peoples may be included in the investigation, and parties that are potentially contributing to the problem may be asked to conduct portions of the investigation.

In phase 1, gaps in knowledge and data are identified. Activities are conducted to define and characterize the problem. The results of this characterization are evaluated relative to regional conditions and desired outcomes. Alberta Environment and Sustainable Resource Development will decide whether a more comprehensive, phase 2 investigation is needed or what mitigation actions, if any, are required.

In phase 2, terms of reference are developed for a comprehensive evaluation of risks to human and aquatic ecosystem health. A comprehensive evaluation is conducted and its results are assessed. The investigation determines if mitigation is required.

A management plan and management actions will be required if the phase 2 investigation indicates mitigation is required to avoid an unacceptable risk to the aquatic environment or human health.

6.3.4 Mitigative Management Actions

Mitigation includes any action that is needed due to changes, or trends, in surface water quality conditions that are deemed unacceptable. Changes from existing conditions will be carefully monitored and impairment of water uses will be avoided by the use of WQTs (Level 2) and by managing indicators so that they do not reach the WQL and enter Level 3.

The intent of mitigative management action is to halt the problem, set a goal and manage the problem until that goal is met. Before determining whether mitigative management action is needed, Alberta Environment and Sustainable Resource Development will determine if other management frameworks have been triggered, or if other initiatives are taking steps to address the issue. Mitigative management actions may require amendments to existing approvals. These amendments would be made in accordance with existing authority under the *Environmental Protection and Enhancement Act* including Director-initiated amendments to monitoring or reporting requirements, or amendments arising from unforeseeable effects.

Alberta Environment and Sustainable Resource Development will determine which stakeholders will be involved in the mitigative actions and what aspects of the process they will be responsible for (e.g., monitoring, data analysis, modelling and/or technology assessment). Alberta Environment and Sustainable Resource Development will be responsible for all key decisions about mitigative management actions and will retain overall accountability for the effectiveness of the action.

6.3.4.1 Level 1

When ambient water quality conditions are at Level 1, water quality is within historically observed conditions (i.e., mean and peak values at or better than the mean or peak historical conditions). There should be little to no risk of detectable impacts to water quality or the aquatic environment.

When water quality conditions are at Level 1, management for Alberta Environment and Sustainable Resource Development includes operation of the existing regulatory system and conducting ambient water quality monitoring and reporting. For regulated parties, the expectation is that they are operating within the terms of their approvals and licences, and are applying all existing water, wastewater and aquatic ecosystem policies. Regulated parties are expected to participate in regional monitoring and management activities.

6.3.4.2 Level 2

When monitoring indicates that water quality is shifting away from mean and/or peak historical conditions, Level 2 is triggered. Level 2 conditions are statistically defined to act as early warning triggers and do not necessarily signal additional environmental risk, as they are not based on ecological risk criteria. Therefore, impacts to the aquatic environment are likely negligible to low.

WQTs are set very conservatively at historically observed values at the Old Fort monitoring station, therefore not all trigger exceedances signal real or meaningful change. Significant new changes to contaminant loading to the lower Athabasca River would be needed to trigger real changes in many of the water quality indicators at the Old Fort monitoring site. Exceptions to this rule include indicators that have maximum observed historical values (Tables A1 and A2) that are close to, or exceed, the WQL set out in this framework.

Level 2 management actions may be required when ambient water quality monitoring indicates WQTs have been exceeded and an undesirable trend is developing. Level 2 management actions may involve increased surveillance monitoring (of water, sediment and biota), additional modelling, and trend assessment. Where an undesirable trend in an indicator is predicted to continue rather than stabilize, management options will be reviewed to ensure limits are not used as "pollute up to" numbers.

Level 2 management actions may also be required when water quality modelling indicates WQTs will be exceeded. When Level 2 conditions are triggered in this context (e.g., based on information from environmental impact assessment or in support of an application to release substances to the lower Athabasca River), additional effort such as increased monitoring or toxicity evaluation may be required to reduce uncertainty in model outcomes and/or in assessing the cumulative environmental risk.

6.3.4.3 Level 3

Level 3 conditions occur when an indicator exceeds a WQL at the Old Fort monitoring station and human sources are thought to pose additional, unacceptable risk to ecosystem or human uses. While it is expected that anthropogenic WQL exceedances will be avoided through the use of WQTs and good wasteload management, should an exceedance occur, mandatory management actions will be required.

WQL exceedances will most often require a phase 2 investigation and/or mitigation actions that may, for example, include wastewater loading restrictions and more stringent wastewater treatment or performance standards.

In addition to existing policy guiding regulatory decisions, if modelling through the environmental impact assessment process or in support of an application to release wastewater to the lower Athabasca River indicates that an ambient WQL will be exceeded at the Old Fort monitoring station, the proposed wastewater release will not be permitted without appropriate mitigation.

6.3.5 Evaluation and Communication

Alberta Environment and Sustainable Resource Development will use annual evaluations under this framework and other means to assess, over time, if required management actions are achieving the anticipated results.

In addition, the department will prepare an annual report that will summarize the status of ambient surface water quality conditions relative to both WQTs and WQLs and describe activities initiated as part of the management response. The report may also integrate relevant water quantity and groundwater monitoring results, identify gaps in data, knowledge and monitoring, report on progress in implementing the framework, and provide recommendations for improvements. This report will be posted on the Government of Alberta's website.

Public access to ambient water quality monitoring data is available through the Alberta Environment and Sustainable Resource Development website. The LTRN data is used to determine ambient surface water quality levels within the lower Athabasca River at Old Fort.

7.0 Implementation

Implementation details, including timelines and allocation of resources, will be determined when the *Lower Athabasca Regional Plan* has been approved by Cabinet and this framework is considered final.

Implementation planning will include the following:

- An inventory of tasks that must be done to meet the requirements of the framework for the lower Athabasca River including at a minimum: identification and development of system components such as monitoring, modelling, evaluation and reporting; a protocol for periodic trend assessment; management response expectations; reporting processes and communication plans for ambient water quality and management responses activated by the framework; evaluation and prioritization of management options for historical exceedances; and evaluation and prioritization of limit development for indicators without appropriate limits.
- Confirmation of roles and responsibilities of government and other parties for implementation of the framework and an assessment of resources needed to fulfill the tasks and commitments of the framework, including human resources and any missing data requirements.
- Ongoing evaluation of the framework's alignment with other policies and initiatives (e.g., other Lower Athabasca Region management frameworks, provincial policies) to ensure consistency of management intent and process.
- Ongoing evaluation of progress towards incorporating the Athabasca River upstream of the Firebag River monitoring station into the framework, as well as progress towards developing indicators for NAs and PAHs for both the Old Fort and upstream of the Firebag River monitoring stations.
- A timeline for implementation including key milestones and their target dates for completion.

7.1 Roles and Responsibilities

Alberta Environment and Sustainable Resource Development, environmental and community associations, and regulated parties (i.e., *Environmental Protection and Enhancement Act* and *Water Act* approval holders and licencees) all have responsibilities related to managing wastewater releases and ambient surface water quality. These roles and responsibilities are described only briefly in the context of the framework, so should not be regarded as an exhaustive list.

7.1.1 Alberta Environment and Sustainable Resource Development

Alberta Environment and Sustainable Resource Development is responsible for ensuring the framework is implemented, but engagement of stakeholders remains key to the overall management intent. The department also:

- is responsible for managing the data used in the annual ambient surface water quality assessment
- is responsible for the annual review and assessment of water quality data to determine ambient water quality levels at the Old Fort monitoring station
- is responsible for initiating a management response when required based on the assessment of data and other approaches such as forecasting future development (e.g., spatial, temporal)
- identifies stakeholders, First Nations and Métis peoples roles, and considers their inclusion in management planning and actions. If a multi-stakeholder process is desirable, the use of established multi-stakeholder groups (such as CEMA and WBEA) will be considered
- assesses management actions implemented through other frameworks or initiatives to determine impacts on ambient water quality
- defines timelines and selects or recommends management approaches and tools, if required, to manage ambient water quality
- communicates to stakeholders the implementation status and selected management actions.

7.1.2 Regulated Parties and Proponents

Regulated parties and project proponents include a variety of players including industry, municipalities and communities. As a result, there may be roles for all levels of government and government agencies within surface water quality management. Roles and responsibilities for regulated parties and proponents with respect to the framework include:

- participating in regional water quality and aquatic ecosystem monitoring (e.g., RAMP)
- providing wastewater characterization, storage and release information to the department when requested
- modelling and assessing how current and planned operations influence local and regional ambient water quality
- participating in ambient water quality management action, if identified (e.g., development of plans or implementation of reductions)
- reporting on progress of implementation of management actions, as required.

8.0 Integration

This management framework is part of a series of management frameworks developed by Alberta Environment and Sustainable Resource Development for the Government of Alberta's *Lower Athabasca Regional Plan*. As the regional plan is implemented, all of the outcomes and objectives in it, including those for air, surface water and groundwater, will be considered in planning and decision-making for the region by all provincial government departments and municipal governments. This will help to drive integration across environmental media.

Surface Water Quality and Water Quantity

As noted earlier, comprehensive management of the region's surface water resources will require the careful, integrated management of three linked ecosystem components: water quality, water quantity and the aquatic environment (species and habitat). In time, the intention is for management of all of these components to be integrated for the Lower Athabasca Region. Continuing work in the region will include a renewed surface water quantity management framework for the lower Athabasca River and the development of a management framework for biodiversity, including biodiversity of aquatic ecosystems. There are challenges to making integration happen; however, development of these additional management frameworks and advances in knowledge, understanding and analytical tools will support these efforts moving forward.

Surface Water and Groundwater

A second critical point of integration is between surface water management and groundwater management. Implementation of the *Groundwater Management Framework* and the *Surface Water Quality Management Framework* will support better understanding of these components of our environment and the interaction of impacts on both. Other frameworks will also contribute as they are completed. For this reason, integrating, as much as possible, all monitoring, evaluation and reporting for surface water with groundwater will help to address the challenges of managing the interaction between surface water and groundwater.

9.0 Terminology

9.1 Abbreviations and Acronyms

Abbreviation/Acronym	Description
AESRD	Alberta Environment and Sustainable Resource Development
AENV	Alberta Environment
AEP	Alberta Environmental Protection
ARWQI	Alberta River Water Quality Index
CCME	Canadian Council of Ministers of the Environment
CEMA	Cumulative Environmental Management Association
HC	Health Canada
LTRN	Long-term River Network
NA	Naphthenic Acid
mg/L	Milligrams per Litre
PAH	Polycyclic Aromatic Hydrocarbon
RAMP	Regional Aquatics Monitoring Program
TSS	Total Suspended Solids
µg/L	Micrograms per Litre
U.S. EPA	United States Environmental Protection Agency
WQT	Water Quality Trigger
WQL	Water Quality Limit

9.2 Glossary

Aquatic Ecosystem ..... For the purposes of this framework, "aquatic ecosystem" is synonymous with the definition of "aquatic environment" under the *Water Act*: "the components of the earth related to, living in or located in or on water or the beds or the shores of a water body, including but not limited to: 1. all organic and inorganic matter, and 2. living organisms and their habitat, including fish habitat, and their interacting natural systems". [a]

Contaminant / Pollutant ..... A substance in a concentration or amount that adversely alters the physical, chemical, or biological properties of the natural environment. [b] (adapted from)

Ecosystem Health ..... A healthy aquatic ecosystem is an aquatic environment that sustains its ecological structure, processes, functions, and resilience within its range of natural variability. [c]

Non-point Source Pollutant ..... Pollution that enters a water body from diffuse or undefined sources and is usually carried by runoff. [b] (adapted from)

Point Source Pollutant ..... Pollution that originates from an identifiable cause or location, such as a sewage treatment plant. [d]

Substance ..... For the purposes of this framework, a "substance" is defined as:

(i) any matter that:
(A) is capable of becoming dispersed in the environment, or
(B) is capable of becoming transformed in the environment into matter referred to in (A),
(ii) any sound, vibration, heat, radiation or other form of energy, and
(iii) any combination of things referred to in (i) and (ii).

Toxicity ..... The adverse effect on the growth, reproduction, or survival of an organism.

Wastewater ..... The liquid waste generated through various industrial and municipal processes.

Sources:

a *Water Act* RSA 2000 cW-3.
b AENV (2008). Glossary of Terms Related to Water and Watershed Management in Alberta.
c Alberta Water Council: Healthy Aquatic Ecosystems Working Group.
d AENV (2003). *Water for Life: Alberta's Strategy for Sustainability.*

10.0
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Please note that in May 2012, the Government of Alberta brought together the ministries of Environment and Water and Sustainable Resource Development to create one ministry called Alberta Environment and Sustainable Resource Development.

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11.0
Appendices

Appendix A

Table A1: Summary Statistics for Surface Water Quality Triggers for the Athabasca River at Old Fort – General Indicators

Note: All values are in mg/L; n = sample size, P = percentile, SD = standard deviation.

General Indicator	n	Max	Min	Median	Mean	99.9th P	99th P	95th P	Variance	SD
Calcium (Ca^{2+})	235	54.8	19.1	33.7	34.7	54.8	52.4	48.9	63.2	8.0
Chloride (Cl-)	235	64.2	1.2	17.1	20.2	63.9	61.0	45.0	195.6	14.0
Magnesium (Mg+)	235	15.7	4.59	9.6	9.5	15.6	14.3	13.7	5.7	2.4
Potassium (K+)	235	8.2	0.15	1.3	1.4	7.2	2.9	2.1	0.4	0.6
Sodium (Na+)	235	51.4	4.6	19.4	21.5	51.0	48.2	43.7	138.2	11.8
Sulphate (SO4-)	235	53.9	0.3	25.6	26.7	52.4	47.2	41.4	91.2	9.5
Total Dissolved Phosphorous (TDP)	228	0.096	0.002	0.013	0.016	0.091	0.067	0.032	0.000	0.012
Total Phosphorous (TP)	231	0.370	0.013	0.042	0.074	0.369	0.336	0.261	0.005	0.072
Nitrate (NO3-N)	118	0.630	0.002	0.052	0.092	0.597	0.340	0.264	0.011	0.105
Total Ammonia (NH3+4-N)	229	1.00	0.01	0.03	0.05	0.84	0.20	0.12	0.01	0.08
Total Nitrogen (TN)	231	1.931	0.034	0.568	0.597	1.785	1.207	1.041	0.060	0.246

Table A2: Summary Statistics for Surface Water Quality Triggers for the Athabasca River at Old Fort - Metals

Note: All values are in µg/L.; T = total, D = dissolved; n = sample size, P = percentile, SD = standard deviation.

Metal Indicator	n	Max	Min	Median	Mean	99.9th P	99th P	95th P	Variance	SD
Aluminum D	49	98	2	9	16	97	81	49	312	18
Aluminum T	54	8220	8	586	1533	8196	7976	6454	4507322	2123
Antimony D	34	0.459	0.007	0.092	0.107	0.451	0.376	0.202	0.006	0.078
Antimony T	39	0.725	0.050	0.100	0.148	0.715	0.626	0.388	0.019	0.137
Arsenic D	49	1.1	0.1	0.5	0.5	1.1	0.9	0.7	0	0.2
Arsenic T	52	5.0	0.1	0.8	1.1	4.9	3.8	2.5	0.7	0.9
Barium D	49	268.0	33.1	45.1	52.6	259.3	180.8	73.7	1103.1	33.2
Barium T	52	269.0	43.1	67.1	79.3	264.2	220.6	147.6	1521.4	39.0
Beryllium T	33	0.277	0.002	0.030	0.077	0.277	0.276	0.269	0.008	0.087
Bismuth T	35	0.0628	0.0005	0.0107	0.0172	0.0628	0.0628	0.0564	0.0003	0.0168
Boron D	49	60	5	25	26	59	50	40	93	10
Boron T	52	848	5	30	48	810	472	69	13045	114
Cadmium D	34	1.0200	0.0050	0.0269	0.0997	1.0188	1.0078	0.5150	0.0547	0.2339
Cadmium T	52	2.6	0.0	0.1	0.3	2.6	2.3	1.2	0.2	0.5
Chromium D	34	0.69	0.02	0.40	0.41	0.69	0.68	0.65	0.03	0.17
Chromium T	53	10	0	2	3	10	10	8	7	3
Cobalt D	34	0.11	0.02	0.07	0.07	0.11	0.11	0.11	0.00	0.02
Cobalt T	52	3.1	0.0	0.5	0.8	3.1	2.9	2.2	0.5	0.7
Copper D	48	5.8	0.1	1.3	1.6	5.8	5.6	3.6	1.4	1.2
Copper T	53	11.7	0.1	2.4	3.1	11.5	9.9	7.2	5	2.2
Iron D	120	1600	5	160	185	1500	724	372	30045	173
Iron T	54	9630	13	881	1899	9477	8104	5821	4018346	2005
Lead D	49	18.50	0.00	0.15	0.56	17.67	10.21	0.56	6.88	2.62
Lead T	54	71.0	0.1	1.1	3.3	68.6	47.3	7.0	102.3	10.1

Metal Indicator	n	Max	Min	Median	Mean	99.9th P	99th P	95th P	Variance	SD
Lithium D	49	11	2	6	6	11	10	9	4	2
Lithium T	51	54	2	8	9	53	44	12	59	8
Manganese D	120	59	1	6	12	58	53	36	175	13
Manganese T	54	295	22	47	65	288	225	141	2134	46
Mercury T	34	0.0197	0.0003	0.0030	0.0051	0.0196	0.0191	0.0159	0.0000	0.0054
Molybdenum D	49	2.6	0.1	0.6	0.7	2.5	2.1	1.2	0.1	0.4
Molybdenum T	52	4.6	0.3	0.7	0.9	4.5	3.9	1.6	0.5	0.7
Nickel D	49	9.7	0.0	0.9	1.6	9.7	9.4	4.7	3.7	1.9
Nickel T	52	11.5	0.0	2.2	3.4	11.5	11	8.2	8.5	2.9
Selenium D	34	1.200	0.020	0.199	0.229	1.176	0.963	0.409	0.037	0.194
Selenium T	35	0.9	0.050	0.282	0.333	0.889	0.792	0.581	0.026	0.161
Silver T	35	0.1350	0.0003	0.0136	0.0243	0.1329	0.1136	0.0677	0.0008	0.0286
Strontium D	49	437	103	196	215	434	408	361	5688	75
Strontium T	51	538	110	205	225	533	488	361	6937	83
Thallium D	34	0.2700	0.0002	0.006	0.0238	0.2657	0.2268	0.1137	0.0028	0.0525
Thallium T	35	0.2700	0.0002	0.0297	0.0546	0.2696	0.2656	0.1751	0.0044	0.0662
Thorium D	34	0.1200	0.0015	0.0169	0.0284	0.1193	0.1134	0.0942	0.0008	0.0289
Thorium T	35	1.77	0.01	0.15	0.35	1.76	1.66	1.44	0.22	0.47
Titanium D	49	11	1	1	2	11	11	7	6	2
Titanium T	51	150	1	14	30	149	140	104	1282	36
Uranium D	34	0.455	0.217	0.325	0.313	0.453	0.431	0.381	0.003	0.058
Uranium T	52	0.8	0.2	0.4	0.4	0.8	0.8	0.7	0.0	0.1
Vanadium D	34	0.702	0.230	0.443	0.450	0.702	0.701	0.698	0.018	0.135
Vanadium T	52	18	0	3	4	18	17	16	24	5
Zinc D	47	19.6	0.8	3.0	4.5	19.5	18.3	12.4	16.7	4.1
Zinc T	46	45.6	2.1	9.7	12.3	44.9	38.9	25.6	85.5	9.2

Table A3: Temperature and pH-dependent Values of the CCC (chronic criterion) for Ammonia for Fish Early Life Stages Present

CCC for Ammonia for Fish Early Life Stages Present (mg N/L)

	Temperature (°C)									
pH	0	14	16	18	20	22	24	26	28	30
6.5	6.67	6.67	6.06	5.33	4.68	4.12	3.62	3.18	2.8	2.46
6.6	6.57	6.57	5.97	5.25	4.61	4.05	3.56	3.13	2.75	2.42
6.7	6.44	6.44	5.86	5.15	4.52	3.98	3.5	3.07	2.7	2.37
6.8	6.29	6.29	5.72	5.03	4.42	3.89	3.42	3	2.64	2.32
6.9	6.12	6.12	5.56	4.89	4.3	3.78	3.32	2.92	2.57	2.25
7	5.91	5.91	5.37	4.72	4.15	3.65	3.21	2.82	2.48	2.18
7.1	5.67	5.67	5.15	4.53	3.98	3.5	3.08	2.7	2.38	2.09
7.2	5.39	5.39	4.9	4.31	3.78	3.33	2.92	2.57	2.26	1.99
7.3	5.08	5.08	4.61	4.06	3.57	3.13	2.76	2.42	2.13	1.87
7.4	4.73	4.73	4.3	3.78	3.32	2.92	2.57	2.26	1.98	1.74
7.5	4.36	4.36	3.97	3.49	3.06	2.69	2.37	2.08	1.83	1.61
7.6	3.98	3.98	3.61	3.18	2.79	2.45	2.16	1.9	1.67	1.47
7.7	3.58	3.58	3.25	2.86	2.51	2.21	1.94	1.71	1.5	1.32
7.8	3.18	3.18	2.89	2.54	2.23	1.96	1.73	1.52	1.33	1.17
7.9	2.8	2.8	2.54	2.24	1.96	1.73	1.52	1.33	1.17	1.03
8	2.43	2.43	2.21	1.94	1.71	1.5	1.32	1.16	1.02	0.897
8.1	2.1	2.1	1.91	1.68	1.47	1.29	1.14	1	0.879	0.773
8.2	1.79	1.79	1.63	1.43	1.26	1.11	0.973	0.855	0.752	0.661
8.3	1.52	1.52	1.39	1.22	1.07	0.941	0.827	0.727	0.639	0.562
8.4	1.29	1.29	1.17	1.03	0.906	0.796	0.7	0.615	0.541	0.475
8.5	1.09	1.09	0.99	0.87	0.765	0.672	0.591	0.52	0.457	0.401
8.6	0.92	0.92	0.836	0.735	0.646	0.568	0.499	0.439	0.386	0.339
8.7	0.778	0.778	0.707	0.622	0.547	0.48	0.422	0.371	0.326	0.287
8.8	0.661	0.661	0.601	0.528	0.464	0.408	0.359	0.315	0.277	0.244
8.9	0.565	0.565	0.513	0.451	0.397	0.349	0.306	0.269	0.237	0.208
9	0.486	0.486	0.442	0.389	0.342	0.3	0.264	0.232	0.204	0.179

Source: U.S. EPA 1999 Update of Ambient Water Quality Criteria for Ammonia

Table A4: Summary Statistics for Toxicity Modifying Factors from the Athabasca River at Old Fort Monitoring Station

Note: n = sample size, P = percentile, SD = standard deviation.

Modifying Factor	n	Max	Min	Median	Mean	99.9th P	99th P	95th P	Variance	SD
Alkalinity ($CaCO_3$ mg/L)	235	185.0	65.1	114.0	116.7	184.1	169.3	159.6	708.3	26.6
Field pH (pH units)	131	9.32	6.06	7.80	7.76	9.25	8.76	8.35	0.20	0.45
Water Temperature (°C)	190	23.5	-0.3	1.0	6.9	23.4	22.6	20.5	64.2	8.0

Appendix B

Annual Evaluation of Surface Water Quality Triggers and Limits

The primary purpose of the *Lower Athabasca Region Surface Water Quality Management Framework* is to monitor and manage cumulative, long-term changes in water quality at the Old Fort monitoring station. This type of change is best evaluated through periodic trend assessment, where monitoring data collected over multiple years is examined statistically. Periodic trend assessments will be conducted regularly as part of implementing the *Framework*, yet there is also a need for more frequent, transparent evaluation and reporting on the annual monitoring data collected as part of this *Framework*.

There is considerable value in evaluating the data collected at the Old Fort monitoring station annually, so that changes in water quality are detected early and the source of these changes are understood and acted upon where appropriate. Nevertheless, there are challenges associated with conducting annual evaluations given the limited amount of annual water quality data (i.e., monthly samples) supporting the evaluation, and given that the data are affected by variability in both natural conditions and human activities.

The annual evaluation of water quality data from the Old Fort monitoring station aims to balance the goal of early detection of water quality changes with the desire to avoid unnecessary effort and the costs associated with false positives (i.e., concluding there is a change in a water quality indicator when in fact there is not). For this reason, statistical approaches that reduce the likelihood of false positives and maximize the use of the monitoring data will be used to evaluate changes, where possible. To ensure this balance and to assess a variety of operational and technical considerations, it will be important to review the methodologies used to evaluate changes in water quality indicators regularly.

Surface Water Quality Triggers

The purpose of assessing the surface water quality triggers annually is to evaluate whether changes are occurring that that may be shifting water quality to a less desirable state. The triggers are coarse metrics intended to detect changes in the distribution of the monitoring data including shifts in central tendency (mean triggers) and changes in the frequency of observed extreme values (peak triggers).

How will trigger exceedances be assessed?

Mean triggers are calculated as the arithmetic mean of all historical observations for a given indicator (measured at Old Fort). Annual assessment of changes from historical mean triggers (Tables 2 and 3) will be evaluated by conducting Welch's two sample t-tests when annual means are higher (or in the case of calcium and magnesium are higher or lower) than mean triggers. The intent is to test the null hypothesis that the annual mean is not different from the historical mean for that indicator. A mean trigger will have been exceeded[1] if a statistically significant difference is found to have occurred in a direction of concern.

Because water quality data are often non-normally distributed and have outliers that can affect the outcome of parametric comparisons, nonparametric comparisons such as the Wilcoxin-Mann-Whitney test will also be conducted to cross-check results. Differences in results between these two types of statistical tests will be carefully examined and will provide additional context for the annual evaluation.

Peak triggers (Tables 2 and 3) are calculated as the 95th percentile of all the historical observations measured for a given indicator. Annual assessment of changes from the historical 95th percentile will be evaluated using the Binomial test when one or more samples are higher than a peak trigger. The intent is to test the null hypothesis that the frequency of new, annual observations exceeding the historical 95th percentile does not exceed 5% (the expected frequency given no change). A peak trigger will have been exceeded if the results of the Binomial test are found to be statistically significant.

Surface Water Quality Limits

The purpose of assessing the surface water quality limits annually is to evaluate whether water uses are being protected. The limits are derived from provincially-accepted water quality guidelines and represent conditions where the risk of adverse effects is heightened (Tables 2 and 3). Mandatory management action will be required where an exceedance is found to be the result of human contributions and those contributions are suspected of posing additional, unacceptable risk to human or ecosystem health.

How will limit exceedances be assessed?

A limit will have been exceeded if the annual mean (i.e., average conditions) for a given water quality indicator exceeds the surface water quality limit for that indicator. For water quality indicators where the limit is calculated using toxicity modifying factors (i.e., total ammonia and total nickel), a limit exceedance will have occurred if more than 50% of the monthly samples exceed the limit within a given year. Because Alberta Environment and Sustainable Resource Development is also interested in trends in guideline exceedances that may not result in limit exceedances (for example a recurring guideline exceedance during freshet), annual evaluations and periodic trend assessment will aim to identify these types of emerging patterns as well.

[1] In the case of calcium and magnesium indicators, either statistically significant increases or decreases are a concern.

ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT

Chapter E-12

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consideration under the environmental assessment process, that Director may refer the proponent or the proposed activity to the Director who is designated for the purposes of sections 43 to 56 so that the proposed activity may be dealt with under section 44.

1992 cE-13.3 s39

Definition

42 In sections 43 to 56, "Director" means the Director who is designated for the purposes of those sections.

1992 cE-13.3 s40

Director's power to require environmental assessment

43 Where the Director is of the opinion that the potential environmental impacts of a proposed activity warrant further consideration under the environmental assessment process, the Director may by notice in writing to the proponent advise the proponent that the proposed activity must be dealt with under section 44.

1992 cE-13.3 s41

Initial review by Director

44(1) Where a proponent or a proposed activity is referred to the Director under section 41, where the Director gives a notice under section 43 or where a proponent on the proponent's own initiative consults with the Director in respect of the application of this Division to a proposed activity, the Director shall,

(a) if the proposed activity is a mandatory activity, direct the proponent by order in writing to prepare and submit an environmental impact assessment report in accordance with this Division, or

(b) if the proposed activity is not a mandatory activity,

(i) make a decision that the potential environmental impacts of the proposed activity warrant further consideration under the environmental assessment process and require that further assessment of the proposed activity be undertaken, or

(ii) make a decision that further assessment of the proposed activity is not required and, if it is an activity for which an approval or registration is required, advise the proponent that it may apply for the approval or registration.

(2) The Director may require a proponent to submit a disclosure document in the form and containing the information required by the Director to assist the Director in making a decision under subsection (1)(b).

(3) In making a decision under subsection (1)(b), the Director shall consider the following:

(a) the location, size and nature of the proposed activity;

(b) the complexity of the proposed activity and the technology to be employed in it;

(c) any concerns in respect of the proposed activity that have been expressed by the public of which the Director is aware;

(d) the presence of other similar activities in the same general area;

(e) any other criteria established in the regulations;

(f) any other factors the Director considers to be relevant.

(4) The Director shall notify the proponent

(a) in writing of a decision made under subsection (1)(b)(i), and

(b) orally or in writing of a decision made under subsection (1)(b)(ii).

(5) The proponent shall provide notice of a decision of the Director under subsection (1)(b)(i) in accordance with the regulations.

(6) Any person who is directly affected by a proposed activity that is the subject of a decision of the Director under subsection (1)(b)(i) may, within 30 days after the last notice under subsection (5) or within any longer period allowed by the Director in the notice, submit a written statement of concern to the Director setting out the person's concerns with respect to the proposed activity.

1992 cE-13.3 s42;1994 c15 s19;1996 c17 s55

Whether environmental impact assessment report required

45(1) Where the Director decides under section 44(1)(b)(i) that further assessment of a proposed activity is required, the Director shall, in accordance with the regulations,

(a) prepare a screening report regarding the need for the preparation of an environmental impact assessment report, and

(b) decide whether preparation of an environmental impact assessment report is required.

(2) The Director shall make the screening report available in accordance with the regulations.

(3) Where the Director decides under subsection (1) that preparation of an environmental impact assessment report is not required, the Director

(a) shall advise the proponent of that fact,

(b) if the activity is one for which an approval or registration is required, shall advise the proponent that it may apply for the approval or registration, and

(c) may refer any information on the potential environmental impacts of the proposed activity to the Director responsible for issuing the approval or registration.

(4) Where the Director decides under subsection (1) that preparation of an environmental impact assessment report is required, the Director shall by order in writing direct the proponent to prepare and submit the report in accordance with this Division.

(5) The Director shall provide notice of the Director's decision regarding preparation of an environmental impact assessment report under subsection (1)(b) in accordance with the regulations.

1992 cE-13.3 s43;1994 c15 s20;1996 c17 s55

Effect of statement of concern

46 The Director shall, in accordance with the regulations, give due consideration to all statements of concern that have been submitted and shall not make a decision under section 45(1)(b) until the applicable period referred to in section 44(6) has expired.

1992 cE-13.3 s44

Minister may order environmental impact assessment report

47 If the Minister is of the opinion that an environmental impact assessment report is necessary because of the nature of a proposed activity, the Minister may by order in writing direct the proponent to prepare and submit the report in accordance with this Division, notwithstanding that

(a) the Director has not ordered an environmental impact assessment report, or

(b) the proposed activity is the subject of an exemption under regulations under section 59(b).

1992 cE-13.3 s45

Terms of reference

48(1) Where a proponent is required to prepare an environmental impact assessment report, the proponent shall prepare proposed terms of reference for the preparation of the report in accordance with requirements specified by the Director and shall submit the proposed terms of reference to the Director.

(2) The proponent shall provide notice of the proposed terms of reference and make them available in accordance with the regulations.

(3) After allowing what the Director considers to be a reasonable time for the receipt of comments in respect of the proposed terms of reference, and after giving due consideration to those comments, the Director shall issue final terms of reference for the preparation of the report to the proponent.

(4) The Director shall make the final terms of reference available in accordance with the regulations.

1992 cE-13.3 s46

Contents of environmental impact assessment report

49 An environmental impact assessment report must be prepared in accordance with the final terms of reference issued by the Director under section 48(3) and shall include the following information unless the Director provides otherwise:

(a) a description of the proposed activity and an analysis of the need for the activity;

(b) an analysis of the site selection procedure for the proposed activity, including a statement of the reasons why the proposed site was chosen and a consideration of alternative sites;

(c) an identification of existing baseline environmental conditions and areas of major concern that should be considered;

(d) a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations;

(e) an analysis of the significance of the potential impacts identified under clause (d);

(f) the plans that have been or will be developed to mitigate the potential negative impacts identified under clause (d);

(g) an identification of issues related to human health that should be considered;

(h) a consideration of the alternatives to the proposed activity, including the alternative of not proceeding with the proposed activity;

(i) the plans that have been or will be developed to monitor environmental impacts that are predicted to occur and the plans that have been or will be developed to monitor proposed mitigation measures;

(j) the contingency plans that have been or will be developed in order to respond to unpredicted negative impacts;

(k) the plans that have been or will be developed for waste minimization and recycling;

(l) the manner in which the proponent intends to implement a program of public consultation in respect of the undertaking of the proposed activity and to present the results of that program;

(m) the plans that have been or will be developed to minimize the production or the release into the environment of substances that may have an adverse effect;

(n) the final terms of reference issued by the Director under section 48(3);

(o) any other information that the Director considers necessary to assess the proposed activity.

1992 cE-13.3 s47

Submission of report

50 The proponent shall submit the environmental impact assessment report to the Director for review.

1992 cE-13.3 s48

Provision of further information

51 The Director may, at any time after receipt of an environmental impact assessment report under section 50, require the proponent to submit to the Director any additional information respecting the proposed activity that the Director considers necessary for the review of the proposed activity.

1992 cE-13.3 s49

Publication of environmental impact assessment report

52 The Director shall require the proponent to publish the environmental impact assessment report and otherwise make it available in accordance with the regulations.

1992 cE-13.3 s50

Powers of Director

53 Where in the opinion of the Director an environmental impact assessment report is complete, the Director shall

(a) advise the Alberta Energy Regulator or the Alberta Utilities Commission, as the case may be, that the report is complete, in a case where the proposed activity is one in respect of which the approval of the Alberta Energy Regulator or the Alberta Utilities Commission, as the case may be, is required,

(b) advise the Natural Resources Conservation Board that the report is complete, in a case where the proposed activity is a reviewable project within the meaning of the *Natural Resources Conservation Board Act*, or

(c) in any other case, submit the environmental impact assessment report to the Minister together with any further information and any recommendations that the Director considers appropriate.

RSA 2000 cE-12 s53;2007 cA-37.2 s82(6);2012 cR-17.3 s88

Powers of Minister

54(1) Subject to section 64(1), where the Director submits an environmental assessment report to the Minister and the proposed activity is one in respect of which

(a) an approval or registration, or an amendment to an approval or registration, or

(b) an approval or licence or an amendment to an approval or licence under the *Water Act*

is required, the Minister may advise the proponent that the proponent may apply for the appropriate approval, registration, licence or amendment.

(2) Notwithstanding anything in this Act, the Minister may refer a proposed activity to the Lieutenant Governor in Council with the recommendation that the Lieutenant Governor in Council make an order prescribing the proposed activity as a reviewable project within the meaning of the *Natural Resources Conservation Board Act*.

1992 cE-13.3 s52;1996 cW-3.5 s175;1996 c17 s55

Additional powers of Minister

55 Where the Director submits an environmental impact assessment report to the Minister, the Minister may make any recommendations in respect of the proposed activity that the Minister considers necessary to any person, the Government, a Government agency, a government of another jurisdiction or an agency of that government that may be dealing with the proposed activity.

1992 cE-13.3 s53;1994 c15 s21

(no amdt)

ALBERTA REGULATION 179/2011

Alberta Land Stewardship Act

ALBERTA LAND STEWARDSHIP REGULATION

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bulletins on the interpretation, application, compliance, non-compliance and intended purpose, application or implementation of a regional plan.

(2) An interpretation bulletin must indicate whether it is to be binding or advisory.

(3) An interpretation bulletin that is to be binding must be approved by the Lieutenant Governor in Council.

(4) An interpretation bulletin that is binding has the same effect as if it had been included in a regional plan.

Service of notice of conservation directive

4(1) In this section, "certificate of title" means the record of the title to land that is maintained by the Registrar of Titles.

(2) A notice of a conservation directive may also be served by sending the notice by registered mail or courier,

(a) in the case of Crown land, to the title holder at the last address shown for that person on the records of the department administering the land, or

(b) in the case of land that is neither Crown land nor settlement patented land, to the title holder at the last address shown for that person on the certificate of title.

Part 1
Requests for Review of Regional Plan

Interpretation

5(1) In this Part,

(a) "applicant" means a person who has made a request for a review of a regional plan or an amendment to a regional plan under section 19.2 of the Act;

(b) "application" means a request for review of a regional plan or an amendment to a regional plan;

(c) "directly and adversely affected", in respect of a person with regard to a regional plan, means that there is a reasonable probability that a person's health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan;

(d) "panel" means a panel referred to in section 6(1)(a) or a board or other body referred to in section 6(1)(b) when it is acting as a panel under this Regulation.

(2) A reference in this Part to review of a regional plan includes review of an amendment to a regional plan.

Panel

6(1) On receiving an application, the Stewardship Minister may, for the purpose of the conducting of a review of a regional plan in accordance with section 9,

(a) appoint members to a panel, or

(b) refer the request for review to a board or other body established under another enactment if the Stewardship Minister considers that the board or other body has suitable expertise and resources.

(2) The Stewardship Minister may, with respect to a panel referred to in subsection (1)(a),

(a) prescribe the terms of office of its members,

(b) designate a chair,

(c) authorize, fix or provide for the payment of expenses to its members and remuneration to its members who are not employees of the Government, and

(d) prescribe the number of members of the panel that constitutes a quorum.

(3) Where the Stewardship Minister refers an application to a board or other body referred to in subsection (1)(b), the Stewardship Minister may

(a) authorize, fix or provide for the payment of expenses to its members, and remuneration to those members who are not employees of the Government, when they are acting as a panel under this Regulation, and

(b) require the board or other body to act in accordance with the rules respecting the conduct of a review established by the Stewardship Minister under section 10.

Making an application

7(1) An application must be in a form approved by the Stewardship Minister and must contain the following information:

(a) the name and address of the applicant and, if the applicant is a corporation, society or other body corporate, the name of the chief executive officer of the applicant;

(b) if the applicant is appointing a person to represent the applicant with respect to the application, the name of the person and the contact information of the person;

(c) the address in Alberta to which notices or other communications with respect to the application may be sent;

(d) identification of the specific provision of the regional plan that the applicant believes is directly and adversely affecting the applicant or will directly and adversely affect the applicant;

(e) an explanation of how the specific provision identified in clause (d) is directly and adversely affecting the applicant or will directly and adversely affect the applicant;

(f) an explanation of the adverse effects the applicant is suffering or expects to suffer as a result of the specific provision identified in clause (d);

(g) the relief being requested by the applicant, which may include any amendment to the specific provision of the regional plan identified in clause (d) that the applicant proposes in order to diminish or eliminate the adverse effects identified in clause (f).

(2) If an application includes a technical or professional report or material of a technical or professional nature, the application must set out the qualifications of the person who prepared the technical or professional report or material.

Delivery of application

8(1) Subject to subsection (2), an application must be delivered by personal service, registered mail or courier to the Stewardship Minister at the address designated by the stewardship commissioner.

(2) An application may be delivered by fax or other electronic means, but the application is not considered to be received unless the Stewardship Minister acknowledges receipt of the application.

Forwarding application to panel

9(1) Subject to subsection (2), on receipt of a complete application, the Stewardship Minister shall forward the application

has jurisdiction to determine one or more questions of constitutional law under section 16(b);

(d) "question of constitutional law" means

(i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or

(ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.

2005 c4 s8;2011 c20 s8

Lack of jurisdiction

11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

2005 c4 s8

Notice of question of constitutional law

12(1) Except in circumstances where only the exclusion of evidence is sought under the *Canadian Charter of Rights and Freedoms*, a person who intends to raise a question of constitutional law at a proceeding before a designated decision maker that has jurisdiction to determine such a question

(a) must provide written notice of the person's intention to do so at least 14 days before the date of the proceeding

(i) to the Attorney General of Canada,

(ii) to the Minister of Justice and Solicitor General of Alberta, and

(iii) to the parties to the proceeding,

and

(b) must provide written notice of the person's intention to do so to the designated decision maker.

(2) Until subsection (1) is complied with, the decision maker must not begin the determination of the question of constitutional law.

(3) Nothing in this section affects the power of a decision maker to make any interim order, decision, directive or declaration it

Attorney General of Canada and Minister of Justice and Solicitor General of Alberta

14 In any proceeding relating to the determination of a question of constitutional law before a decision maker or before the court under this Part, or in any subsequent proceeding on appeal or judicial review,

(a) the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta are entitled as of right to be heard, in person or by counsel,

(b) no person other than the Minister of Justice and Solicitor General of Alberta or counsel designated by the Minister of Justice and Solicitor General of Alberta shall, on behalf of Her Majesty in right of Alberta, or on behalf of an agent of Her Majesty in right of Alberta, appear and participate, and

(c) if the Minister of Justice and Solicitor General of Alberta or counsel designated by the Minister of Justice and Solicitor General of Alberta appears, the Minister of Justice and Solicitor General of Alberta is deemed to be a party and has the same rights as any other party.

2005 c4 s8;2013 c10 s34

Transitional

15 Where proceedings to determine a question of constitutional law have commenced but have not been concluded before the coming into force of this Part, the decision maker hearing the question may continue the proceedings as if this Part had not come into force.

2005 c4 s8

Regulations

16 The Lieutenant Governor in Council may make regulations

(a) designating decision makers as having jurisdiction to determine questions of constitutional law;

(b) respecting the questions of constitutional law that decision makers designated under a regulation made under clause (a) have jurisdiction to determine;

(c) respecting the referral of questions of constitutional law to the court;

(d) respecting the form and contents of the notice under section 12(1).

RSA 2000 cA-3 s10;2005 c4 s8

2010 CarswellBC 2867, 2010 SCC 43, J.E. 2010-1926, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8185, [2010] B.C.W.L.D. 8184, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 2 S.C.R. 650, 225 C.R.R. (2d) 75, 194 A.C.W.S. (3d) 691

2010 CarswellBC 2867, 2010 SCC 43, J.E. 2010-1926, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8185, [2010] B.C.W.L.D. 8184, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 2 S.C.R. 650, 225 C.R.R. (2d) 75, 194 A.C.W.S. (3d) 691

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)

Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority (Appellants) and Carrier Sekani Tribal Council (Respondent) and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, British Columbia Utilities Commission, Mikisew Cree First Nation, Moosomin First Nation, Nunavut Tunngavik Incorporated, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Upper Nicola Indian Band, Lakes Division of the Secwepemc Nation, Assembly of First Nations, Standing Buffalo Dakota First Nation, First Nations Summit, Duncan's First Nation, Horse Lake First Nation, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. and TransCanada Keystone Pipeline GP Ltd. (Interveners)

Supreme Court of Canada

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 21, 2010
Judgment: October 28, 2010
Docket: 33132

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Proceedings: reversing *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009), [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228, 76 R.P.R. (4th) 159, 89 B.C.L.R. (4th) 298, [2009] 4 W.W.R. 381, 2009 CarswellBC 340, 2009 BCCA 67 (B.C. C.A.)

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2010 CarswellBC 2867, 2010 SCC 43, J.E. 2010-1926, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8185, [2010] B.C.W.L.D. 8184, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 2 S.C.R. 650, 225 C.R.R. (2d) 75, 194 A.C.W.S. (3d) 691

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Subject: Public; Constitutional; Property

Aboriginal law --- Constitutional issues — Miscellaneous

Major dam project was constructed in 1950s to produce power for aluminium smelting, without consultation with First Nations represented by tribal council, whose historic use of river was affected by altered water flows — Excess power from project was sold to Crown corporation — R Inc. entered into energy purchase agreement with Crown corporation committing to such excess power sales until 2034, which agreement was subject to review by provincial Utilities Commission — After Commission's initial scoping order, tribal council obtained intervener status and unsuccessfully applied for reconsideration of scoping to include consideration of adequacy of Crown consultation — Commission approved agreement — Tribal council's appeals of reconsideration decision and approval of agreement were allowed — R Inc. and Crown corporation appealed — Appeal allowed — Commission correctly accepted it had jurisdiction to consider adequacy of Crown's consultation — Crown had knowledge of potential aboriginal claims and agreement was clearly proposed Crown conduct — Commission was correct in concluding that duty to consult was not triggered by underlying infringement from failure to consult on initial project, as question was whether there was claim or right that could be adversely impacted by current government conduct of agreement — Commission considered organizational implications of agreement and any possible physical changes it might bring about — It was not unreasonable for Commission to find that agreement did not have potential to adversely impact claims or rights of tribal council's First Nations.

Public law --- Public authorities — Provincial boards and commissions — Miscellaneous

Major dam project was constructed in 1950s to produce power for aluminium smelting, without consultation with First Nations represented by tribal council, whose historic use of river was affected by altered water flows — Excess power from project was sold to Crown corporation — R Inc. entered into energy purchase agreement with Crown corporation committing to such excess power sales until 2034, which agreement was subject to review by provincial Utilities Commission — After Commission's initial scoping order, tribal council obtained intervener status and unsuccessfully applied for reconsideration of scoping to include consideration of adequacy of Crown consultation — Commission approved agreement — Tribal council's appeals of reconsideration decision and approval of agreement were allowed — R Inc. and Crown corporation appealed — Appeal allowed — Commission correctly accepted it had jurisdiction to consider adequacy of Crown's consultation — Crown had knowledge of potential aboriginal claims and agreement was clearly proposed Crown conduct — Commission was correct in concluding that duty to consult was not triggered by underlying infringement from failure to consult on initial project, as question was whether there was claim or right that could be adversely impacted by current government conduct of agreement — Commission considered organizational implications of agreement and any possible physical changes it might bring about — It was not unreasonable for Commission to find that agreement did not have potential to adversely impact claims or rights of tribal council's First Nations.

Public law --- Public utilities — Regulatory boards — Practice and procedure — Miscellaneous

Major dam project was constructed in 1950s to produce power for aluminium smelting, without consultation with First

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Nations represented by tribal council, whose historic use of river was affected by altered water flows — Excess power from project was sold to Crown corporation — R Inc. entered into energy purchase agreement with Crown corporation committing to such excess power sales until 2034, which agreement was subject to review by provincial Utilities Commission — After Commission's initial scoping order, tribal council obtained intervener status and unsuccessfully applied for reconsideration of scoping to include consideration of adequacy of Crown consultation — Commission approved agreement — Tribal council's appeals of reconsideration decision and approval of agreement were allowed — R Inc. and Crown corporation appealed — Appeal allowed — Commission correctly accepted it had jurisdiction to consider adequacy of Crown's consultation — Crown had knowledge of potential aboriginal claims and agreement was clearly proposed Crown conduct — Commission was correct in concluding that duty to consult was not triggered by underlying infringement from failure to consult on initial project, as question was whether there was claim or right that could be adversely impacted by current government conduct of agreement — Commission considered organizational implications of agreement and any possible physical changes it might bring about — It was not unreasonable for Commission to find that agreement did not have potential to adversely impact claims or rights of tribal council's First Nations.

Droit autochtone --- Questions d'ordre constitutionnel — Divers

Dans les années 50, un important projet de barrage a été exécuté en vue de la production d'électricité destinée à l'alimentation d'une aluminerie, sans consultation avec le conseil tribal représentant les Premières nations, ce qui a gêné celles-ci dans leur utilisation ancestrale d'une rivière en raison des dérivations subies par les courants d'eau — Surplus d'électricité produits par le barrage ont été vendus à une société d'État — R inc. a signé un contrat d'achat d'électricité avec la société d'État suivant lequel elle s'engageait à vendre l'électricité excédentaire jusqu'en 2034, lequel contrat était assujetti à l'approbation de la commission de services publics provinciale — Après que la commission ait rendu une première ordonnance portant sur le cadre de l'audience, le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné — Commission a ratifié le contrat — Appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis — R inc. et la société d'État ont formé un pourvoi — Pourvoi accueilli — Commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne — Couronne avait connaissance de l'existence possible des revendications autochtones et la participation au contrat proposé était clairement une mesure projetée par la Couronne — Commission a eu raison de conclure que l'obligation de consulter n'était pas déclenchée du fait d'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial, étant donné que la question était de savoir s'il y avait une revendication ou un droit qui risquerait de subir des effets préjudiciables découlant de la mesure du gouvernement en question, soit le contrat — Commission a considéré les répercussions organisationnelles du contrat et les changements physiques qui pouvaient en résulter — Conclusion de la commission à l'effet que le contrat ne risquait pas de compromettre les revendications ou les droits des Premières nations représentées par le conseil tribal n'était pas déraisonnable.

Droit public --- Pouvoirs publics — Commissions et offices provinciaux — Divers

Dans les années 50, un important projet de barrage a été exécuté en vue de la production d'électricité destinée à

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l'alimentation d'une aluminerie, sans consultation avec le conseil tribal représentant les Premières nations, ce qui a gêné celles-ci dans leur utilisation ancestrale d'une rivière en raison des dérivations subies par les courants d'eau — Surplus d'électricité produits par le barrage ont été vendus à une société d'État — R inc. a signé un contrat d'achat d'électricité avec la société d'État suivant lequel elle s'engageait à vendre l'électricité excédentaire jusqu'en 2034, lequel contrat était assujetti à l'approbation de la commission de services publics provinciale — Après que la commission ait rendu une première ordonnance portant sur le cadre de l'audience, le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné — Commission a ratifié le contrat — Appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis — R inc. et la société d'État ont formé un pourvoi — Pourvoi accueilli — Commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne — Couronne avait connaissance de l'existence possible des revendications autochtones et la participation au contrat proposé était clairement une mesure projetée par la Couronne — Commission a eu raison de conclure que l'obligation de consulter n'était pas déclenchée du fait d'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial, étant donné que la question était de savoir s'il y avait une revendication ou un droit qui risquerait de subir des effets préjudiciables découlant de la mesure du gouvernement en question, soit le contrat — Commission a considéré les répercussions organisationnelles du contrat et les changements physiques qui pouvaient en résulter — Conclusion de la commission à l'effet que le contrat ne risquait pas de compromettre les revendications ou les droits des Premières nations représentées par le conseil tribal n'était pas déraisonnable.

Droit public --- Services publics — Organismes de réglementation — Procédure — Divers

Dans les années 50, un important projet de barrage a été exécuté en vue de la production d'électricité destinée à l'alimentation d'une aluminerie, sans consultation avec le conseil tribal représentant les Premières nations, ce qui a gêné celles-ci dans leur utilisation ancestrale d'une rivière en raison des dérivations subies par les courants d'eau — Surplus d'électricité produits par le barrage ont été vendus à une société d'État — R inc. a signé un contrat d'achat d'électricité avec la société d'État suivant lequel elle s'engageait à vendre l'électricité excédentaire jusqu'en 2034, lequel contrat était assujetti à l'approbation de la commission de services publics provinciale — Après que la commission ait rendu une première ordonnance portant sur le cadre de l'audience, le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné — Commission a ratifié le contrat — Appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis — R inc. et la société d'État ont formé un pourvoi — Pourvoi accueilli — Commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne — Couronne avait connaissance de l'existence possible des revendications autochtones et la participation au contrat proposé était clairement une mesure projetée par la Couronne — Commission a eu raison de conclure que l'obligation de consulter n'était pas déclenchée du fait d'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial, étant donné que la question était de savoir s'il y avait une revendication ou un droit qui risquerait de subir des effets préjudiciables découlant de la mesure du gouvernement en question, soit le contrat — Commission a considéré les répercussions organisationnelles du contrat et les changements physiques qui pouvaient en résulter — Conclusion de la commission à l'effet que le contrat ne risquait pas de compromettre les revendications

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ou les droits des Premières nations représentées par le conseil tribal n'était pas déraisonnable.

In the 1950s, A Inc. constructed a major dam project to produce hydro power for aluminium smelting, which altered the water flows to a river used by First Nations represented by the tribal council since time immemorial. No consultation occurred with those First Nations prior to provincial approval of the project. Excess power from the project was sold to a Crown corporation for local and regional use.

In 2007, R Inc., the successor to A Inc., entered into an energy purchase agreement with the Crown corporation committing to such excess power sales until 2034. The provincial Utilities Commission issued an order as to the scope of its hearing to review the agreement. The tribal council obtained intervener status and unsuccessfully applied for reconsideration of the scoping order to include consideration of the adequacy of Crown consultation. The Commission took the view that the agreement could have no potential adverse impact on aboriginal claims or rights so no duty to consult with the First Nations was triggered. The Commission approved the agreement as in the public interest, as required by s. 71 of the Utilities Commission Act.

The tribal council's appeals of the reconsideration decision and the approval of the agreement were allowed. R Inc. and the Crown corporation appealed.

Held: The appeal was allowed.

McLachlin C.J.C. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ. concurring): The Commission correctly accepted that it had the jurisdiction to consider the adequacy of the Crown's consultation, given the breadth of factors it had to consider under s. 71 of the Act and its power to decide questions of law, which implicitly included constitutional issues such as aboriginal consultation.

The Crown had knowledge of the potential aboriginal claims, as the First Nations were lodged in the provincial claims resolution process, and the proposed agreement was clearly proposed Crown conduct given the involvement of a Crown corporation. The third necessary element for triggering the Crown's duty to consult was whether the proposed Crown conduct could have an adverse impact on the aboriginal claims or rights. The Commission was correct in concluding that an underlying infringement from the failure to consult on the initial project did not constitute an adverse impact giving rise to a duty to consult. The question was whether there was an aboriginal claim or right that could be adversely impacted by the current government conduct or decision, which here was the agreement. Consultation required the parties to meet in good faith to accommodate the conflicting interests involved in state-authorized development that might have adverse impacts on aboriginal interests. This was impossible where the resource had long since been altered and the present government conduct did not have any further impact on the resource.

The Commission correctly identified that the main issue was whether the agreement had potential to adversely affect claims and rights of First Nations. The Commission considered the organizational implications of the agreement and any possible physical changes it might bring about. The Commission reasonably found that the agreement did not have

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the potential to adversely impact the claims or rights of the First Nations and so did not err in rejecting the tribal council's application to consider the issue of Crown consultation. As that was the only basis for attacking the Commission's approval of the agreement, such approval was not unreasonable.

Dans les années 50, A inc. a exécuté un important projet de barrage en vue de la production d'électricité destinée à l'alimentation d'une aluminerie, ce qui a modifié les débits d'eau dans une rivière utilisée depuis des temps immémoriaux par les Premières nations représentées par un conseil tribal. Ces Premières nations n'ont pas été consultées avant que le projet ne soit ratifié par la province. Les surplus d'électricité produits par le barrage ont été vendus à une société d'État pour usage local et régional.

En 2007, R inc., la société ayant succédé à A inc., a signé un contrat d'achat d'électricité avec la société d'État suivant lequel elle s'engageait à vendre l'électricité excédentaire jusqu'en 2034. La commission de services publics de la province a émis une ordonnance définissant le cadre de l'audience devant se tenir devant elle concernant le contrat. Le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné. Selon la commission, le contrat n'aurait aucun effet préjudiciable sur les revendications ou les droits des Premières nations, de sorte qu'il n'y avait aucune obligation de consultation avec les Premières nations. La commission a ratifié le contrat, le jugeant dans l'intérêt public, conformément à l'art. 71 de la Utilities Commission Act (la « Loi »).

Les appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis. R inc. et la société d'État ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

McLachlin, J.C.C. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : La commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne, compte tenu de la diversité des facteurs qu'elle devait prendre en considération en vertu de l'art. 71 de la Loi et de son pouvoir de trancher des questions de droit, y compris, de façon implicite, des questions d'ordre constitutionnel tel que le devoir de consulter les Premières nations.

La Couronne avait connaissance de l'existence possible des revendications autochtones, puisque celles-ci étaient formulées dans le cadre du processus mis sur pied par la province pour le règlement des revendications autochtones et que la participation au contrat proposé était clairement une mesure projetée par la Couronne, compte tenu de la présence d'une société d'État. Le troisième élément requis pour que soit déclenché l'obligation de la Couronne de consulter était la question de savoir si la mesure projetée par celle-ci aurait un effet préjudiciable sur les revendications ou les droits des Premières nations. La commission a eu raison de conclure qu'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial ne constituait pas un effet préjudiciable déclenchant l'obligation de consulter. La question était de savoir s'il y avait une revendication ou un droit des Premières nations qui risquerait de subir des effets préjudiciables découlant de la mesure ou de la décision du gouvernement en question, soit, en l'espèce, le contrat. Il était nécessaire, dans le cadre de la consultation, que les parties se rencontrent de bonne foi dans une optique de conciliation des intérêts divergents en jeu dans le projet autorisé par l'État pouvant avoir des effets préju-

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differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

41 The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27, 33.

(2) Crown Conduct or Decision

42 Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

43 This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74 (B.C. S.C.), at paras. 94, 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315 (B.C. S.C.), at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41, emphasis omitted). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110 (B.C. S.C.)); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1 (F.C.), aff'd, 2008 FCA 20, 35 C.E.L.R. (3d) 1 (F.C.A.)); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C. Utilities Comm.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203 (Alta. C.A.), at paras. 37-40.

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

45 The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

46 Again, a generous, purposive approach to this element is in order, given that the doctrine' s purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27, 33).

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Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653 (B.C. C.A.), at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

48 An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

49 The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.

50 Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

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2004 CarswellOnt 936, 184 O.A.C. 84, [2004] 2 C.N.L.R. 355, 43 B.L.R. (3d) 244, 129 A.C.W.S. (3d) 2

Wasauksing First Nation v. Wasausink Lands Inc.

Council of the Wasauksing First Nation a.k.a. Council of Ojibways of Parry Island Band, and John Beaucage and Terry Pegahmagabow, on their own behalf and on behalf of the registered members of the Wasauksing First Nation a.k.a. Ojibways of Parry Island Band, Applicants (Appellants) and Wasausink Lands Inc., Joyce Tabobondung, Wilfred King, Dora Tabobondung, Leslie Tabobondung, and Florence Tabobondung, Respondents (Respondents)

Ontario Court of Appeal

Laskin, Cronk, Armstrong JJ.A.

Heard: April 2-3, 2003
Judgment: March 4, 2004
Docket: CA C37772

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Proceedings: affirming *Wasauksing First Nation v. Wasausink Lands Inc.* (2002), 2002 CarswellOnt 107, [2002] 3 C.N.L.R. 287 (Ont. S.C.J.)

Counsel: Yehuda Levinson, Eugene Meehan, David Stone for Applicants / Appellants

Charles Campbell, Renée Lang for Respondents / Respondents

Subject: Corporate and Commercial; Public; Contracts; Constitutional

Business associations --- Creation and organization of business associations — Corporations — Incorporation — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were

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accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Aboriginal law --- Bands and band government — Band councils — Powers and jurisdiction — General principles

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Business associations --- Specific corporate organization matters — Directors and officers — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by

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virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Business associations --- Creation and organization of business associations — Corporations — Corporate constitution — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Aboriginal law --- Constitutional issues — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to

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management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Cases considered:

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), 26 Admin. L.R. (2d) 1, (sub nom. *Matsqui Indian Band v. Canadian Pacific Ltd.)* [1995] 2 C.N.L.R. 92, 122 D.L.R. (4th) 129, 85 F.T.R. 79 (note), [1995] 1 S.C.R. 3, 177 N.R. 325, 1995 CarswellNat 264, 1995 CarswellNat 700 (S.C.C.) — considered

Casimel v. Insurance Corp. of British Columbia (1993), 82 B.C.L.R. (2d) 387, 30 B.C.A.C. 279, 49 W.A.C. 279, 106 D.L.R. (4th) 720, 18 C.C.L.I. (2d) 161, [1994] 2 C.N.L.R. 22, 1993 CarswellBC 231 (B.C. C.A.) — distinguished

Dynamex Canada Inc. v. Miller (1998), 161 Nfld. & P.E.I.R. 97, 497 A.P.R. 97, 1998 CarswellNfld 88, 37 C.C.E.L. (2d) 41 (Nfld. C.A.) — referred to

Equity Waste Management of Canada Corp. v. Halton Hills (Town) (1997), 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — referred to

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — referred to

Harelkin v. University of Regina (1979), [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 26 N.R. 364, 96 D.L.R. (3d) 14, 1979 CarswellSask 79, 1979 CarswellSask 162 (S.C.C.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

John Austin & Sons Ltd. v. Smith (1982), 35 O.R. (2d) 272, 132 D.L.R. (3d) 311, 1982 CarswellOnt 1342 (Ont. C.A.) — considered

Joscelyne v. Nissen (1969), [1970] 2 Q.B. 86, [1970] 1 All E.R. 1213 (Eng. C.A.) — considered

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requirements of the Act concerning the regulation of a corporation's structure or affairs.

91 Finally, we do not accept the appellants' argument that an expansive interpretation of s. 309(1) of the Act is required in this case because its invocation is sought in an aboriginal context.

92 The appellants rely on *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), a case which concerned the issue of whether income earned by a registered Indian living on a reserve was exempt from taxation under the *Income Tax Act*, 1970-71-72 (Can.), c. 63 by virtue of s. 87 of the *Indian Act*, R.S.C. 1970, c. I-6. In considering this issue, the Supreme Court of Canada stated at 36:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. *It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians*...In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that *Indian treaties "must...be construed*, not according to the technical meaning of [their] words...but *in the sense in which they would naturally be understood by the Indians*
>
> [emphasis added].

As appears from this passage, the principle of statutory construction referenced by the Supreme Court applies to "treaties and statutes relating to Indians". See also, in the tax exemption rights context, *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) at paras. 13-15 and, in the context of band taxation tribunal by-laws, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.), at 67.

93 None of the *Nowegijick*, *Mitchell* or *Matsqui Indian Band* cases suggests that this interpretive principle applies to the construction of statutory provisions of general application, like s. 309(1) of the Act.

94 As well, we do not understand the interpretive principle formulated in *Nowegijick* to mandate the expansive interpretation of laws of general application where such a reading is not otherwise warranted. Were it otherwise, as the trial judge observed, laws of general application concerning corporations could be interpreted so as to create one form of statutory regime for aboriginals and another form of statutory regime, concerned with the same subject matter, for non-aboriginals. *Nowegijick*, *Mitchell* and *Matsqui Indian Band* do not dictate or support such an outcome. To the contrary, as observed by the Supreme Court in *Nowegijick* at p. 36: "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens."

95 The appellants also argue that an expansive interpretation of a statutory provision is warranted in the aboriginal context if it is demonstrated that an established aboriginal practice conflicts with the applicable statutory provision. Support for this proposition may be found in *K's Adoption Petition, Re* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.) and *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (B.C. C.A.). See also, in the context of membership in an unincorporated association, *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 (S.C.C.).

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2007 CarswellAlta 1678, 2007 ABCA 402, 33 C.E.L.R. (3d) 204, [2008] A.W.L.D. 643, [2008] A.W.L.D. 644, [2008] A.W.L.D. 581, [2008] A.W.L.D. 580, 85 Alta. L.R. (4th) 208, 422 A.R. 113, 415 W.A.C. 113, [2008] 2 C.N.L.R. 363, 75 Admin. L.R. (4th) 75

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Siksika First Nation v. Alberta (Director, Southern Region, Environment)

The Siksika First Nation (Appellant / Applicant) and The Director Southern Region (Alberta Environment), the Alberta Environmental Appeals Board and The Town of Strathmore (Respondents / Respondents)

Alberta Court of Appeal

E. McFadyen, K. Ritter, J. Watson JJ.A.

Heard: October 12, 2007
Judgment: December 12, 2007[FN*]
Docket: Calgary Appeal 0601-0319-AC

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Proceedings: reversing *Siksika First Nation v. Alberta (Director, Southern Region, Environment)* (2006), 2006 CarswellAlta 2101 (Alta. Q.B.)

Counsel: L.D. Andrychuk, R.G. Jeerakathil for Appellant

C. Graham, S. Folkins for Respondent, Alberta Environment

A. Sims, Q.C. for Respondent, Alberta Environmental Appeals Board

S. Shawa for Respondent, The Town of Strathmore

Subject: Public; Environmental; Property; Civil Practice and Procedure

Administrative law --- Prerequisites to judicial review — Jurisdiction of court to review — Where issue becoming academic

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2007 CarswellAlta 1678, 2007 ABCA 402, 33 C.E.L.R. (3d) 204, [2008] A.W.L.D. 643, [2008] A.W.L.D. 644, [2008] A.W.L.D. 581, [2008] A.W.L.D. 580, 85 Alta. L.R. (4th) 208, 422 A.R. 113, 415 W.A.C. 113, [2008] 2 C.N.L.R. 363, 75 Admin. L.R. (4th) 75

Director of Environment approved town's application for pipeline that would discharge waste water into river which passed through First Nation's reserve — Chambers judge dismissed First Nation's application for judicial review of Director's decision — Chambers judge found that motion was moot and premature because according to review process under Environmental Protection and Enhancement Act, that decision was subject to further appeal to Alberta Environmental Appeals Board and ultimately subject to decision of Minister of Environment — First Nation appealed — Appeal allowed — Matter returned to Court of Queen's Bench — Chambers judge erred in failing to exercise any discretion he might have had to consider merits of First Nation's challenge to director's decision — First Nation not only sought judicial review of director's decision, but also sought declarations as to extent of duty to consult and whether or not that duty could be met by legislative scheme under Act — Motion for declaratory relief was not rendered premature or otherwise moot by reason of there being internal appeal available from director's decision — It was for chambers judge to consider whether process followed by director, board, or Minister, or remedy issued by any of them, might be relevant to consultation or might meet requisites of consultation — First Nation's motion for declarations was not dependent upon stage of legislative process.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Judicial review — General principles

Where issue becoming academic — Director of Environment approved town's application for pipeline that would discharge waste water into river which passed through First Nation's reserve — Chambers judge dismissed First Nation's application for judicial review of Director's decision — Chambers judge found that motion was moot and premature because according to review process under Environmental Protection and Enhancement Act, that decision was subject to further appeal to Alberta Environmental Appeals Board, and ultimately subject to decision of Minister of Environment — First Nation appealed — Appeal allowed — Matter returned to Court of Queen's Bench — Chambers judge erred in failing to exercise any discretion he might have had to consider merits of First Nation's challenge to director's decision — First Nation not only sought judicial review of director's decision, but also sought declarations as to extent of duty to consult and whether or not that duty could be met by legislative scheme under Act — Motion for declaratory relief was not rendered premature or otherwise moot by reason of there being internal appeal available from director's decision — It was for chambers judge to consider whether process followed by director, board, or Minister, or remedy issued by any of them, might be relevant to consultation or might meet requisites of consultation — First Nation's motion for declarations was not dependent upon stage of legislative process.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Water — General principles

Discharge from pipeline — Director of Environment approved town's application for pipeline that would discharge waste water into river which passed through First Nation's reserve — Chambers judge dismissed First Nation's application for judicial review of Director's decision — Chambers judge found that motion was moot and premature because according to review process under Environmental Protection and Enhancement Act, that decision was subject to further appeal to Alberta Environmental Appeals Board, and ultimately subject to decision of Minister of Environment — First Nation appealed — Appeal allowed — Matter returned to Court of Queen's Bench — Chambers judge erred in failing to exercise any discretion he might have had to consider merits of First Nation's challenge to

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2007 CarswellAlta 1678, 2007 ABCA 402, 33 C.E.L.R. (3d) 204, [2008] A.W.L.D. 643, [2008] A.W.L.D. 644, [2008] A.W.L.D. 581, [2008] A.W.L.D. 580, 85 Alta. L.R. (4th) 208, 422 A.R. 113, 415 W.A.C. 113, [2008] 2 C.N.L.R. 363, 75 Admin. L.R. (4th) 75

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Aboriginal law --- Reserves and real property — Miscellaneous issues

Discharge from pipeline — Director of Environment approved town's application for pipeline that would discharge waste water into river which passed through First Nation's reserve — Chambers judge dismissed First Nation's application for judicial review of Director's decision — Chambers judge found that motion was moot and premature because according to review process under Environmental Protection and Enhancement Act, that decision was subject to further appeal to Alberta Environmental Appeals Board, and ultimately subject to decision of Minister of Environment — First Nation appealed — Appeal allowed — Matter returned to Court of Queen's Bench — Chambers judge erred in failing to exercise any discretion he might have had to consider merits of First Nation's challenge to director's decision — First Nation not only sought judicial review of director's decision, but also sought declarations as to extent of duty to consult and whether or not that duty could be met by legislative scheme under Act — Motion for declaratory relief was not rendered premature or otherwise moot by reason of there being internal appeal available from director's decision — It was for chambers judge to consider whether process followed by director, board, or Minister, or remedy issued by any of them, might be relevant to consultation or might meet requisites of consultation — First Nation's motion for declarations was not dependent upon stage of legislative process.

Cases considered by *J. Watson J.A.*:

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — referred to

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — referred to

Statutes considered:

Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c. A-3

s. 11 — considered

s. 16 — considered

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2007 CarswellAlta 1678, 2007 ABCA 402, 33 C.E.L.R. (3d) 204, [2008] A.W.L.D. 643, [2008] A.W.L.D. 644, [2008] A.W.L.D. 581, [2008] A.W.L.D. 580, 85 Alta. L.R. (4th) 208, 422 A.R. 113, 415 W.A.C. 113, [2008] 2 C.N.L.R. 363, 75 Admin. L.R. (4th) 75

whether any failure, if there was one, to consult, can be cured. (A.B.D., F9/17-F10/2) [Emphasis added]

8 The chambers judge was correct that there was further activity to come in the statutory process. Subsequent to his decision, the EAB heard the appellant's appeal in February, 2007 and issued a Report and Recommendations to the Minister on April 18, 2007. On May 18, 2007, the Minister issued Ministerial Order No. 11/2007, which amended the Director's order largely in accordance with the EAB's Report and Recommendations. The respondent Town of Strathmore then filed an Operational Plan which, according to the appellant, still failed to adequately address its concerns about discharge.

9 Were this case exclusively within the boundary of the Director's original decision, there would be merit in the submission that the present appeal is moot. However, as noted above, the appellant's motion to the chambers judge sought declarations as to the extent of the duty to consult and whether or not that duty could be met by the legislative scheme under the *EPEA*.

10 For the appellant, these questions did not rest solely on the terms of the Director's decision, nor the terms of any decisions by the EAB or the Minister. In light of ss. 11 and 16 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, the Director and the EAB did not have jurisdiction to decide a "question of constitutional law". They could not therefore state constitutional law nor transcend the jurisdiction given to them by the *EPEA*. Moreover, the Minister was unlikely to do more than presuppose the constitutionality of his decision.

11 It was for the chambers judge to consider whether the process followed by the Director, the EAB, or the Minister, or a remedy issued by any of them, might be relevant to consultation or might meet the requisites of consultation. Neither following the process nor granting a remedy amounts to a declaration respecting the scope of the duty to consult, nor a declaration that the duty to consult could or could not be met by following the procedural steps set out in the *EPEA*. The formal order of the chambers judge [F19-F20] sets out that he made no decision on these contentions as to consultation. In addition to addressing the appellant's contentions, it was open to the chambers judge to decide that it was not possible to fairly evaluate the consultative capacity of the statutory process at the stage it had reached. However, had he done so, that would amount to a dismissal of the appellant's argument that such a decision could be made on the face of the statutory structure, not a finding that the appellant's arguments were premature.

12 It follows that the appellant's motion for declarations, as argued, was not dependent upon the stage of the legislative process. The appellant contended that the duty to consult in this context was comparable to the duty to consult recognized in the "taking up" cases of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) at paras. 63 to 69, where the Supreme Court held that "[t]he determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context."

13 In allowing the appeal and returning the matter to the Court of Queen's Bench, we are not ruling on any of the merits of the appellant's position in this regard. We are, however, persuaded that the appellant's contentions raised live and significant issues, independent of the procedural stage governed by the legislation. They were therefore within the chambers judge's jurisdiction to determine one way or another.

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(Consolidated up to 89/2013)

ALBERTA REGULATION 69/2006

Administrative Procedures and Jurisdiction Act

DESIGNATION OF CONSTITUTIONAL DECISION MAKERS REGULATION

Table of Contents

1 Definitions
2 Authorization
3 Form of notice
4 Expiry
5 Coming into force

Schedules

Definitions

1 In this Regulation,

(a) "Charter" means the *Canadian Charter of Rights and Freedoms*;

(b) "labour arbitrator" means

(i) a voluntary arbitration board appointed under Part 2, Division 15 of the *Labour Relations Code*;

(ii) a compulsory arbitration board appointed under Part 2, Division 16 of the *Labour Relations Code*;

(iii) a public emergency tribunal established under Part 2, Division 18 of the *Labour Relations Code*;

(iv) an arbitrator, arbitration board or other body referred to in Part 2, Division 22 of the *Labour Relations Code*;

(v) a construction industry disputes resolution tribunal under Part 3, Division 6 of the *Labour Relations Code*;

(vi) a compulsory arbitration board established under Part 6 of the *Public Service Employee Relations Act*;

(vii) an arbitrator appointed under Part 7 of the *Public Service Employee Relations Act*,

(viii) an interest arbitration board established under Part 3 of the *Police Officers Collective Bargaining Act*;

(ix) an arbitrator, a grievance arbitration board or other body referred to in Part 4 under the *Police Officers Collective Bargaining Act*;

(c) "Law Society entity" means the Benchers or a panel, committee or subcommittee of the Benchers or any other entity established, by or under the *Legal Profession Act*.

Authorization

2 The decision makers listed in column 1 of the Schedule have jurisdiction to determine the questions of constitutional law set out opposite them in column 2.

Form of notice

3 The notice for the purpose of section 12(1) of the Act is set out in Schedule 2.

Expiry

4 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be repassed in its present or an amended form following a review, this Regulation expires on January 31, 2016.

Coming into force

5 This Regulation comes into force on the coming into force of section 8 of the *Administrative Procedures Amendment Act, 2005*.

Schedule 1

Column 1	Column 2
Decision Maker	Jurisdiction
Labour Relations Board	all questions of constitutional law
Alberta Energy and Utilities Board	all questions of constitutional law
Law Society entity	all questions of constitutional law
a human rights panel appointed under the *Human Rights, Citizenship and Multiculturalism Act*	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
labour arbitrators	all questions of constitutional law
Workers' Compensation Board	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
Appeals Commission established under the *Workers' Compensation Act*	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
Law Enforcement Review Board	questions of constitutional law relating to the Charter
Alberta Securities Commission	questions of constitutional law that relate to the Charter or arising from the federal or provincial distribution of powers under the Constitution of Canada
Alberta Utilities Commission	all questions of constitutional law
Alberta Energy Regulator	all questions of constitutional law

AR 69/2006 Sched.1;254/2007;89/2013

Schedule 2

(Administrative Procedures and Jurisdiction Act (section 12))

Notice of Question of Constitutional Law

To: The Minister of Justice and Solicitor General of Alberta:

To: The Attorney General of Canada:

AND

To: (decision-maker before which question will be raised)

From: _____

Address: _____

Phone: _____

Lawyer (if any): _____

Date of hearing: _____

I intend to raise the following question(s) of constitutional law. Attached are the details of my argument:

Question(s): _____

I intend to seek the following relief: _____

_____

Estimated time needed to call evidence and make arguments before the decision-maker: _____

Dated: _____

Signed: _____

Details of Argument

Details are to include:

- The grounds to be argued and reasonable particulars of the proposed argument, including a concise statement of the constitutional principles to be argued, references to any statutory provision or rule on which reliance will be placed and any cases or authorities to be relied upon.
- The law in question, the right or freedom alleged to be infringed or denied or the aboriginal or treaty right to be determined, as the case may be.
- The material and documents that will be filed with the decision-maker.
- List of witnesses intended to be called to give evidence before the decision-maker and the substance of their proposed testimony.

AR 69/2006 Sched. 2;170/2012

2012 CarswellAlta 760, 2012 ABCA 130, [2012] A.W.L.D. 1685, [2012] A.W.L.D. 1647, [2012] A.W.L.D. 1630, [2012] A.W.L.D. 1718, [2012] A.W.L.D. 1717, 33 Admin. L.R. (5th) 321, 57 Alta. L.R. (5th) 249, [2012] 6 W.W.R. 211, 2012 C.L.L.C. 210-025, 522 A.R. 197, 544 W.A.C. 197, 349 D.L.R. (4th) 654, 258 C.R.R. (2d) 110

2012 CarswellAlta 760, 2012 ABCA 130, [2012] A.W.L.D. 1685, [2012] A.W.L.D. 1647, [2012] A.W.L.D. 1630, [2012] A.W.L.D. 1718, [2012] A.W.L.D. 1717, 33 Admin. L.R. (5th) 321, 57 Alta. L.R. (5th) 249, [2012] 6 W.W.R. 211, 2012 C.L.L.C. 210-025, 522 A.R. 197, 544 W.A.C. 197, 349 D.L.R. (4th) 654, 258 C.R.R. (2d) 110

UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)

United Food and Commercial Workers, Local 401 (Respondent/ Applicant) and Information and Privacy Commissioner (Respondent/ Respondent) and Attorney General of Alberta (Appellant/ Respondent)

Alberta Court of Appeal

Frans Slatter, J.D. Bruce McDonald, Donna Read JJ.A.

Heard: January 13, 2012
Judgment: April 30, 2012
Docket: Edmonton Appeal 1103-0211-AC

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Proceedings: varying *U.F.C.W., Local 401 v. Alberta (Information & Privacy Commissioner)* (2011), 2011 ABQB 415, 2011 CarswellAlta 1486, 339 D.L.R. (4th) 279, 2011 C.L.L.C. 210-055, 53 Alta. L.R. (5th) 235, (sub nom. *United Food & Commercial Workers, Local 401 v. Privacy Commissioner (Alta.)*) 509 A.R. 150, [2012] 4 W.W.R. 324, 32 Admin. L.R. (5th) 107 (Alta. Q.B.)

Counsel: R.S. Wiltshire, for Appellant

G.J. Gray, Q.C., V.A. Cosco, for Respondent, United Food and Commercial Workers, Local 401

G.S. Solomon, Q.C., for Respondent, Information and Privacy Commissioner

Subject: Public; Labour; Constitutional

Administrative law --- Standard of review — Correctness

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2012 CarswellAlta 760, 2012 ABCA 130, [2012] A.W.L.D. 1685, [2012] A.W.L.D. 1647, [2012] A.W.L.D. 1630, [2012] A.W.L.D. 1718, [2012] A.W.L.D. 1717, 33 Admin. L.R. (5th) 321, 57 Alta. L.R. (5th) 249, [2012] 6 W.W.R. 211, 2012 C.L.L.C. 210-025, 522 A.R. 197, 544 W.A.C. 197, 349 D.L.R. (4th) 654, 258 C.R.R. (2d) 110
Unionized employees picketed employer, casino — Union videotaped and photographed picket lines — Union advised that images of persons crossing picket line could be placed on its website — Union made posters featuring "mug shot" of vice president of employer, and his image was used in union publications — Complaints were made under Personal Information Protection Act — Adjudicator found statutory exceptions did not apply — Union successfully applied for judicial review, alleging that exceptions infringed s. 2(b) of Canadian Charter of Rights and Freedoms — Chambers judge struck down certain portions of Act — Attorney General of Alberta appealed — Appeal allowed in part — In place of declarations of invalidity, it was declared that application of Act to activities of union was unconstitutional — As adjudicator did not purport to balance Charter with privacy values, there was no truth to decision to review, either for reasonableness, disproportionality, or correctness — Accordingly, standard of review of compliance of decision with Charter was reviewed for correctness — To extent that decision of chambers judge engaged consideration of constitutionality of Act and engaged in review of decision for constitutional compliance, that decision also had to be reviewed for correctness.

Privacy and freedom of information --- Provincial privacy legislation — Constitutional issues

Unionized employees picketed employer, casino — Union videotaped and photographed picket lines — Union advised that images of persons crossing picket line could be placed on its website — Union made posters featuring "mug shot" of vice president of employer, and his image was used in union publications — Complaints were made under Personal Information Protection Act — Adjudicator found statutory exceptions did not apply — Union successfully applied for judicial review, alleging that exceptions infringed s. 2(b) of Canadian Charter of Rights and Freedoms — Chambers judge struck down certain portions of Act — Attorney General of Alberta appealed — Appeal allowed in part — In place of declarations of invalidity, it was declared that application of Act to activities of union was unconstitutional — Chambers judge assessed constitutionality of Act based on inaccurate premise about what Act prohibits, and what adjudicator had ordered — Even though union's purpose was not primarily journalistic, to extent that it did engage in journalistic activities, it was entitled to rely on exemption in Act for that purpose — Further, information could still be used for journalistic purposes or legal proceedings, as those were permitted uses — Information could not, however, be used for educational purposes or leverage in collective bargaining process, as those activities were not exempt.

Privacy and freedom of information --- Provincial privacy legislation — Collection of personal information — Statutory exceptions

Unionized employees picketed employer, casino — Union videotaped and photographed picket lines — Union advised that images of persons crossing picket line could be placed on its website — Union made posters featuring "mug shot" of vice president of employer, and his image was used in union publications — Complaints were made under Personal Information Protection Act — Adjudicator found statutory exceptions did not apply — Union successfully applied for judicial review, alleging that exceptions infringed s. 2(b) of Canadian Charter of Rights and Freedoms — Chambers judge struck down certain portions of Act — Attorney General of Alberta appealed — Appeal allowed in part — In place of declarations of invalidity, it was declared that application of Act to activities of union was unconstitutional — It was not helpful to analyze this situation as "journalism" — With regard to meaning of "journalistic" purposes, it was unreasonable to think that Legislature intended term to be so wide as to encompass everything within phrase "freedom of opinion and expression" — Issue was whether it was justifiable to restrain expression in support of

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2012 CarswellAlta 760, 2012 ABCA 130, [2012] A.W.L.D. 1685, [2012] A.W.L.D. 1647, [2012] A.W.L.D. 1630, [2012] A.W.L.D. 1718, [2012] A.W.L.D. 1717, 33 Admin. L.R. (5th) 321, 57 Alta. L.R. (5th) 249, [2012] 6 W.W.R. 211, 2012 C.L.L.C. 210-025, 522 A.R. 197, 544 W.A.C. 197, 349 D.L.R. (4th) 654, 258 C.R.R. (2d) 110
labour relations and collective bargaining activities such as existed here.

Labour and employment law --- Labour law — Industrial disputes — Picketing — Legality — Effect of Charter of Rights and Freedoms

Unionized employees picketed employer, casino — Union videotaped and photographed picket lines — Union advised that images of persons crossing picket line could be placed on its website — Union made posters featuring "mug shot" of vice president of employer, and his image was used in union publications — Complaints were made under Personal Information Protection Act — Adjudicator found statutory exceptions did not apply — Union successfully applied for judicial review, alleging that exceptions infringed s. 2(b) of Canadian Charter of Rights and Freedoms — Chambers judge struck down certain portions of Act — Attorney General (AG) of Alberta appealed — Appeal allowed in part — In place of declarations of invalidity, it was declared that application of Act to activities of union was unconstitutional — Union had established prima facie breach of its s. 2 Charter rights — AG was not able to justify infringements of free expression — Protection of personal information was no more important than collective bargaining and right of union to communicate its message to public — People did not have right to keep secret everything they did in public, such as crossing picket lines — Adjudicator's order had disproportionate effect on union's Charter rights, rising to level of unreasonableness.

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General principles

Unionized employees picketed employer, casino — Union videotaped and photographed picket lines — Union advised that images of persons crossing picket line could be placed on its website — Union made posters featuring "mug shot" of vice president of employer, and his image was used in union publications — Complaints were made under Personal Information Protection Act — Adjudicator found statutory exceptions did not apply — Union successfully applied for judicial review, alleging that exceptions infringed s. 2(b) of Canadian Charter of Rights and Freedoms — Chambers judge struck down certain portions of Act — Attorney General of Alberta appealed — Appeal allowed in part — In place of declarations of invalidity, it was declared that application of Act to activities of union was unconstitutional — Striking out or reading down portions of Act were not attractive options — Artificially expanding meaning of "journalism" was not helpful solution.

Cases considered by *Frans Slatter J.A.*:

A.T.A. v. Alberta (Information & Privacy Commissioner) (2011), 339 D.L.R. (4th) 428, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 2011 SCC 61, (sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.))* 424 N.R. 70, 52 Alta. L.R. (5th) 1, 28 Admin. L.R. (5th) 177, [2012] 2 W.W.R. 434, (sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association)* [2011] 3 S.C.R. 654 (S.C.C.) — considered

Alliance Pipeline Ltd. v. Smith (2011), 328 D.L.R. (4th) 1, 56 C.E.L.R. (3d) 161, 16 Admin. L.R. (5th) 157, [2011] 1 S.C.R. 160, 2011 SCC 7, 2011 CarswellNat 202, 2011 CarswellNat 203, 102 L.C.R. 1, 412 N.R. 66 (S.C.C.) — followed

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2012 CarswellAlta 760, 2012 ABCA 130, [2012] A.W.L.D. 1685, [2012] A.W.L.D. 1647, [2012] A.W.L.D. 1630, [2012] A.W.L.D. 1718, [2012] A.W.L.D. 1717, 33 Admin. L.R. (5th) 321, 57 Alta. L.R. (5th) 249, [2012] 6 W.W.R. 211, 2012 C.L.L.C. 210-025, 522 A.R. 197, 544 W.A.C. 197, 349 D.L.R. (4th) 654, 258 C.R.R. (2d) 110

stitutionality of the statute calls for an application of the *Oakes* test. On the other hand, it could be argued that the statute is not unconstitutional *per se*, but that the way it was brought to bear in this particular decision was inconsistent with *Charter* values. From that perspective, a *Doré* analysis is called for. Even if the statute is valid, *Doré* confirms that the particular decision must be consistent with *Charter* values: *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44 (S.C.C.) at paras. 116-7, [2011] 3 S.C.R. 134 (S.C.C.). As long as the tribunal's decision correctly interprets the *Charter* text, the decision will not be disturbed unless its assimilation of *Charter* values is disproportional, and therefore unreasonable.

41 The application of *Doré* in Alberta is, however, complicated by the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3, s.11. It provides that certain tribunals, including the Commissioner and therefore his Adjudicators, have no jurisdiction to decide constitutional and *Charter* issues. The operative definition is:

> 10 In this part
>
> . . .
>
> (d) "question of constitutional law" means
>
> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
>
> (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.

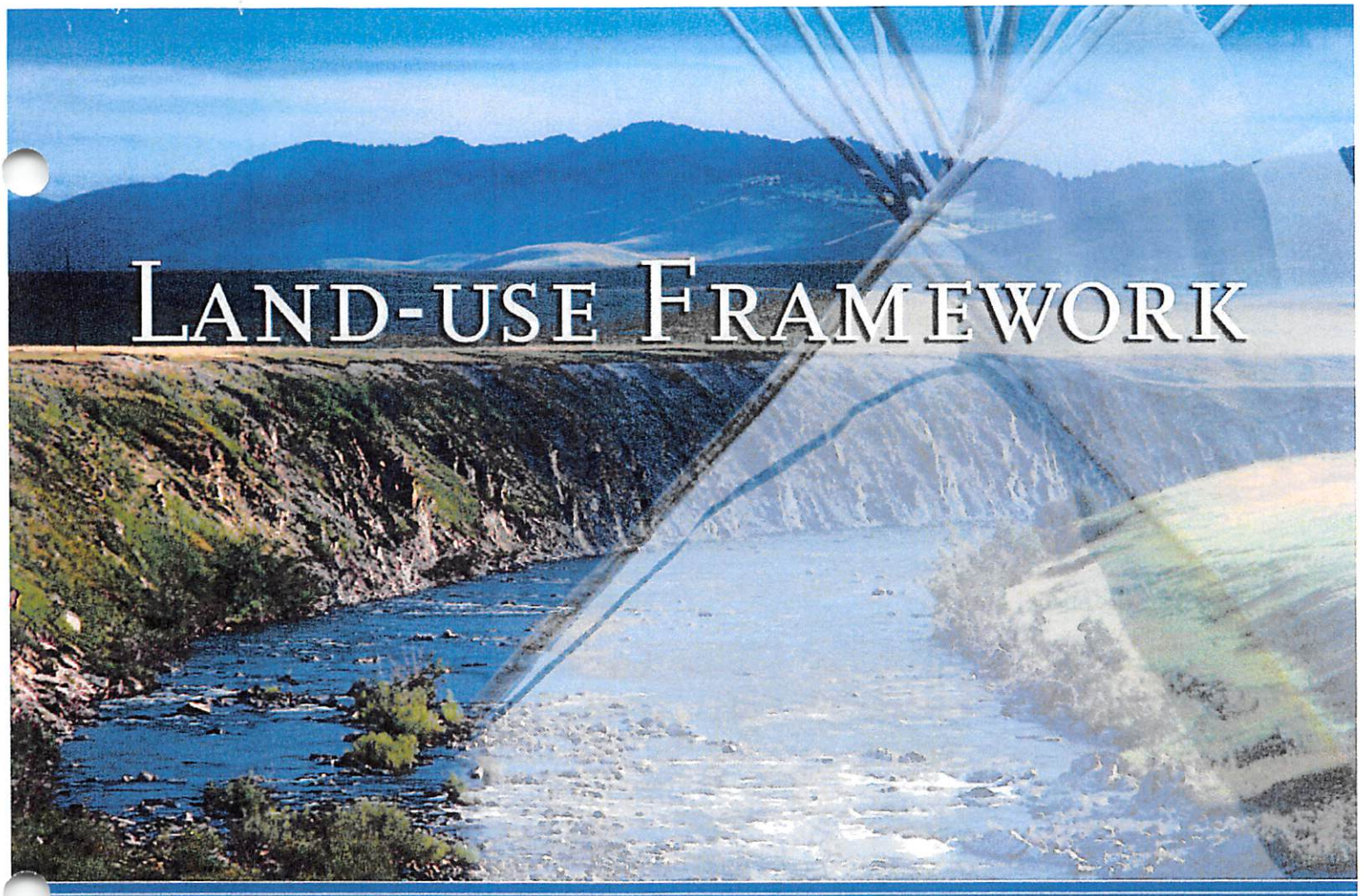
These legislative provisions recognize the limited expertise and resources of some tribunals with respect to constitutional issues. They were passed in response to decisions like *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.).

42 The *Administrative Procedures and Jurisdiction Act* should not be viewed as a direction to Alberta tribunals that they should ignore *Charter* values. As *Doré* states at para. 35 "administrative decisions are *always* required to consider fundamental values". But because the statute limits their power to directly resolve *Charter* issues by limiting their jurisdiction, the statute will necessarily influence the standard of review analysis relating to the tribunal's decisions. As *Doré* points out at para. 30, the rule in *Dunsmuir* is based in part on legislative intent, and the intent of the *Administrative Procedures and Jurisdiction Act* is clearly that the excluded tribunals have a limited role to play in this area.

43 The decision in *Doré* was premised at paras. 29, 35 on a tribunal "both bound by fundamental values and empowered to adjudicate them, and that administrative discretion is exercised in light of institutional guarantees and the values they reflect". That important presumption does not prevail in Alberta, where the Legislature has recognized that many tribunals do not have the internal expertise to decide constitutional issues. Further, the Alberta statute reflects a policy decision that the citizens of Alberta are ultimately entitled to have their constitutional rights determined by a superior court.

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A.



Land-use Framework

Response to Aboriginal Consultation on the Draft Alberta Land-use Framework 2008

Government of Alberta

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Introduction

On May 21, 2008, the Government of Alberta (GoA) released the draft Land-use Framework (LUF) which was developed with input from stakeholder groups, members of First Nations, the Métis Settlements General Council (MSGC), Métis organizations, and the general public. The LUF initiative sets out an approach to manage public and private lands as well as air, water and biodiversity in order to achieve Alberta's long-term economic, environmental and social goals. The LUF provides a blueprint for land management and decision-making that addresses Alberta's growth pressures. From May to October 2008, the Government of Alberta consulted with Aboriginal Communities[1] on the draft LUF.

The final LUF has been approved by Cabinet and was released on December 3, 2008 by the Honourable Ted Morton, Minister of Sustainable Resource Development. According to the overarching direction of the final LUF, legislation will be introduced to support the implementation of regional planning.

During the Aboriginal consultation process, the GoA's efforts have been to respect the constitutionally protected treaty and aboriginal rights of First Nations and Métis peoples. This document provides First Nations, the MSGC and Métis organizations as well as other Albertans with:

1) a summary of the input heard during consultation meetings with Aboriginal Communities,
2) an outline of the input that was incorporated and where it appears in the final LUF,
3) feedback of what input (either through consultation meetings or written submissions) will be used in regional planning, and
4) confirmation of what input has not been incorporated into the final LUF and why.

[1] Aboriginal Communities - communities comprised of First Nations or of Métis. Case law in this area is still developing and the use of this term in this document is not intended as the Government of Alberta's recognition that any particular First Nation or Métis group is, or is not, a community that can or does hold any particular (or any) aboriginal or treaty rights within the meaning of section 35 of the *Constitution Act*, 1982, R.S.C. 1985, App. II, No. 44, Sched. B, Pt. II, s. 35.



Methodology

Following the release of the draft LUF on May 21, 2008, the GoA sent invitation letters (including a copy of the draft LUF) to First Nations, MSGC, and Métis Nation of Alberta (MNA) contacts to engage Aboriginal Communities in the consultation process. The LUF consultation team confirmed that the letters were received by Aboriginal Communities. The purpose of this was to ensure that each Aboriginal Community had access to the draft LUF for internal review before participating in the consultation process.

The LUF consultation team secured consultation and engagement meetings with First Nations through follow-up calls to the contacts as well as through the efforts of staff in Aboriginal Relations and Sustainable Resource Development. A liaison was identified in the initial contact with each First Nation so that a LUF team representative was able to confirm meeting details.

The MSGC organized a consultation process with its Settlement communities in order to respond to the GoA's consultation process on the draft LUF. Consolidated feedback from the Settlements was reviewed by MSGC executives and was presented to the LUF consultation team. During this presentation, MSGC submitted a written report with their input into the draft LUF.

The LUF consultation team secured an initial meeting with the leadership of the MNA. At the request of the MNA, the GoA gave an introductory meeting on the LUF to MNA members at the MNA Annual General Meeting. In addition to this, the LUF consultation team secured two meetings with MNA Locals.

The chart on the next page indicates the number of Aboriginal Communities that participated in the consultation process on the draft LUF.



Participation in Draft LUF Consultation and Engagement

	Number of: First Nations, Métis Settlements or Organizations
Treaty 6	7
Treaty 7	7
Treaty 8	15
Non - Status First Nations	1
Métis Nation of Alberta (MNA)	3
Métis Settlement General Council (MSGC)	1

The Aboriginal consultation process for the draft LUF was scheduled to run from June to September 2008, however, in response to requests from various First Nations, the MSGC and Métis organizations, the GoA extended the time for input until the end of October 2008. During the Aboriginal consultation process, the LUF consultation team facilitated and documented the discussion between the GoA and each First Nation, Métis Settlement or Métis organization.

The summary reports generated for each of the consultation meetings had two goals. First, they aimed to capture the intent of both parties regarding LUF consultation. Second, they served to document the discussion in order to meet applicable provincial policies and guidelines and to promote a continued dialogue on land-use issues.

The summary reports provide a record of the main issues and feedback provided by each Aboriginal Community. These reports have been circulated to participants from the GoA and members of each Aboriginal Community to verify that the summaries accurately reflect the content of each meeting. In addition to input provided during consultation meetings, several Aboriginal Communities submitted written responses to the draft LUF. Most written responses contained details more relevant to regional planning, but the apparent intents of the written responses are considered as part of the Aboriginal consultation process on the draft LUF.

At the end of the consultation process, it was clear that First Nations, Métis Settlements and Métis organizations place importance on similar issues. This summary of the Aboriginal consultation follows five themes that emerged from the consultation meetings and the written submissions. The input from First Nations, Métis Settlements and Métis organizations is the basis of the themes. The supporting statements are not direct quotes from individuals, but paraphrase the feedback received from Aboriginal Communities that share similar perspectives.



Themes

First Nations, Métis Settlements and Métis organizations that participated in the consultation process for the draft LUF offered similar perspectives and themes on not only the draft LUF itself but also the processes adopted for the LUF initiative. The issues presented below represent input given at consultation meetings as well as through subsequent written submissions. The following summary consolidates the consultation and engagement feedback into five common themes.

1. Participation in Land-use Planning
2. Consultation, Rights and Legal Considerations
3. Land-use Planning and Traditional Use
4. Emphasis on Environmental and Social Outcomes
5. Development of Cumulative Effects Management Thresholds

Following a summary of each of these themes, the analysis addresses the following areas:

- how the feedback was incorporated into the final version of the LUF,
- how the feedback may be considered in the regional planning process, and
- why some input has not been developed further and was not incorporated into the final LUF.

Participation in Land-use Planning

What was heard from Aboriginal Communities

There is strong interest in the structure and process of regional land-use planning for the province. First Nations, Métis Settlements and Métis organizations have indicated that they will look to maximize their influence in the regional planning process through the proposed governance structure. The majority of



Aboriginal Communities see the Regional Advisory Council (RAC) as a governance body that will have significant influence in regional planning and feel that their interests must be represented appropriately at this forum. Many also emphasized that representation on the RAC by parties other than the individual First Nations, Métis Settlement or Métis organization is problematic.

The primary issues which Aboriginal Communities identified in relation to the Participation in Land-use Planning theme are:

- Aboriginal Communities feel it is imperative to be engaged in the LUF process because of their intimate connection and stewardship responsibilities to the land. First Nations, Métis Settlements and Métis organizations expressed a desire for each respective First Nation, Métis Settlement or Métis organization to reach internal consensus on how they could best approach the LUF so that their needs are addressed. It was also stated that there is a significant gap between the high-level nature of the LUF and the reality of the Aboriginal Communities with respect to implementation of solutions to land-use issues.
- Aboriginal Communities expressed concerns over the intention of the government to involve Aboriginal Communities in a meaningful way. In their view, the proposed RAC governance structure does not allow for meaningful representation of Aboriginal Communities. There is a desire for the Aboriginal perspective to be afforded a higher, and more comprehensive, consideration than the perspective of other stakeholders. As such, there is a desire for inclusion and engagement in a process with influence comparable to the RAC as well as representation on each of the proposed governance structures (Cabinet Committee and Land-use Secretariat). There is a desire for Aboriginal Communities to represent and speak for themselves at the RAC and otherwise.
- Aboriginal Communities expressed concern that the feedback they provided prior to May 2008 had not been incorporated in the draft LUF document. There is the resultant concern that Aboriginal input will not be incorporated at the regional planning level either.
- The involvement of industry in the LUF process to date and the strength of their influence on the process in the future is a concern to Aboriginal Communities.
- Aboriginal Communities expressed a need for province-wide education and awareness programs about Aboriginal culture, rights and history.

The Government of Alberta's Response

The GoA has consulted First Nations in good faith and engaged the MSGC and Métis organizations in a thorough process to gain input on how Aboriginal Communities wish to participate in land-use planning. The GoA has addressed the "Inclusion of Aboriginal peoples in Regional Planning" through Strategy 7 in the Final LUF 2008 (page 4)[2] which states that "Aboriginal peoples will be encouraged to participate in the development of land-use plans."

The GoA also intends to involve and engage First Nations communities, Métis Settlements and Métis organizations in the regional planning process by conducting additional consultations (page 8) on regional plans (including plans for land, air, water, and biodiversity). Furthermore, page 49 of the final LUF indicates that in developing regional plans, the GoA will "continue to work with First Nations to better understand and consider their traditional land uses."

In response to concerns raised over the type of involvement afforded to Aboriginal Communities on the RACs, the final LUF indicates that Aboriginal Community representatives will be included (page 29). First Nations, Métis Settlements and Métis organizations indicated their belief that the LUF is purposefully vague to limit their

[2] This and subsequent references to page numbers are to the final LUF document, as released in December 2008.



participation in regional planning; however, the GoA has addressed this concern by utilizing the Aboriginal Consultation Final Report (page 45) as a tool to help guide regional planning. By consulting with a wide variety of stakeholders, members of First Nations, Métis Settlements, Métis organizations, and the general public, the GoA has ensured that it has gained diverse input in order to effectively balance the needs of all Albertans (page 8).

Although not all stakeholder, Aboriginal, and public input was expressly incorporated into the final LUF, the GoA will highlight where detailed input will be reflected in the subsequent components of the LUF initiative. Regional planning will address the following concerns:

- aligning the high-level strategic direction of the LUF with on-the-ground realities,
- providing Aboriginal Community members with a voice,
- developing regional plans at a local level to better understand the needs of the community, and
- encouraging Aboriginal Communities to participate in the regional planning process.

The GoA encourages Aboriginal Communities to participate in land-use planning through increased consultations on the regional plans (page 8). Most First Nations communities, Métis Settlements and Métis organizations felt that they should participate in land-use planning and did not feel that this was appropriately addressed in the LUF; however, the GoA aims to use previous input from First Nations, Métis Settlements and Métis organizations as stated on page 45 of the final LUF. Furthermore, the GoA has included Aboriginal Communities in the timelines to develop regional plans (page 49).

Consultation, Rights and Legal Consideration

What was heard from Aboriginal Communities

First Nations, Métis Settlements and Métis organizations have several concerns about *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (2005). In their opinion, most Aboriginal Communities have not agreed to the provincial consultation guidelines. They stated that they were not appropriately consulted or engaged during the development phase. They feel that the current guidelines do not appropriately address the interests of Aboriginal peoples nor do these guidelines appropriately respect their rights.

There has been consistent support for an advisory process in addition to the RAC. Aboriginal Communities feel the need for a separate process preferably in addition to consultations with individual Aboriginal Communities.

The primary issues which Aboriginal Communities identified in relation to the Consultation, Rights and Legal Consideration theme are:

- Some Aboriginal Communities did not consider the initial LUF meeting undertaken during the draft LUF review process to be consultation since they felt they had not been given enough time to review the document and discuss it at the Council level with either their Chiefs or their Chairmen, and in some cases, with their community.
- First Nations noted that their rights are constitutionally protected and must be respected throughout the LUF process. They felt that these rights occupy a status that is higher than other stakeholder groups and should be afforded greater influence in the LUF process. Some Aboriginal Communities felt that engagement with them should be more comprehensive than for other stakeholders and that consultation should occur on a government-to-government (elected official to elected official) basis.



- Some Aboriginal Communities stated that the LUF does not meaningfully address how regional plans will support the continued exercise of aboriginal and treaty rights. Aboriginal Communities are open to meaningful consultation that upholds and respects treaty and aboriginal rights, and which meaningfully incorporates the feedback that they have provided. Given historical relationships between Aboriginal peoples and the GoA, some Aboriginal Communities are hesitant to believe that the GoA is meeting with them in good faith.
- Concerns were raised that the GoA would not conduct a thorough consultation process and not fulfill its "legal duty to accommodate." Some First Nations were concerned about having to abide by the province's consultation guidelines particularly since First Nations have not approved them, and in some cases, have adopted their own guidelines. Some felt that this lack of agreement in developing the province's consultation process is inconsistent with the government-to-government process alluded to in the LUF document.
- Métis Settlements were concerned that there are no formal consultation guidelines in place for the GoA to work with them on land management plans and were concerned about what the impacts of this would be for the Métis Settlements. The MSGC felt strongly that the Métis Settlements should be differentiated from First Nations.
- Aboriginal Communities identified that the continued pace of development on, and near, what they consider to be traditional lands will further limit their ability to exercise their aboriginal and treaty rights. Further, the lack of an accepted consultation protocol has made it a challenge to motivate industry to engage in consultations in what some Aboriginal Communities consider to be their traditional territories.
- Aboriginal Communities stated that the LUF should be legislated in order to enforce implementation of each regional plan. Many Aboriginal Communities indicated that although it is not their desire, they will seek legal remedies if they feel that they have not been adequately consulted or adequately included in regional planning.
- Concerns were raised over the limited capacity (human resources, technology, funding, etc.) in Aboriginal Communities to become involved in meaningful consultation processes in the short time frame available.

The Government of Alberta's Response

The GoA has been committed to engaging Aboriginal Communities, trying to understand the perspective of Aboriginal Communities and in developing meaningful relationships with Aboriginal Communities. The GoA believes that many of the concerns raised during the consultation process have been addressed in the final LUF document. The GoA feels that the nature of commitment is clearly evident on page 49 in the "Timeframe for Implementation" section of the LUF. In this section, the GoA has identified the initiatives that are critical to the success of the LUF and the timeframe of implementation for each initiative. The GoA has identified that we need to continue to work with First Nations to better understand and consider their traditional land uses (page 49). This has been identified as an ongoing commitment in the LUF process.

With respect to the extent of our consultation efforts with Aboriginal Communities, the efforts have been summarized in the final LUF (page 8). The GoA has demonstrated understanding of Aboriginal Communities' connection to the land and has shown commitment to respecting the relevant feedback in the statement "they (First Nations and Métis community organizations) provided their views on the future of land use in the province in conjunction with their concerns on upholding their



traditional and cultural values" (page 8). Further, with respect to improvements in the LUF consultation process, the final LUF also acknowledges that Albertans identified a requirement for increased consultation with "First Nations and Métis communities, stakeholders and the public in order to ensure a fair opportunity to influence new policies and decisions" (page 8).

With respect to a meaningful consultation process, the GoA is committed to *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (2005). The LUF consultation team demonstrated this during consultation meetings. As indicated on page 41, the GoA is also committed to the "ongoing review and monitoring of the policy with the intent of changing and improving it." Such a review is currently underway, and when queried during LUF consultation meetings, GoA staff (including Aboriginal Relations staff) noted accordingly. While some First Nations question the benefits of the policy, it does provide a starting point for consultation with a commitment to improvement.

The GoA understands the significance of the constitutionally protected rights of Aboriginal Communities. In several locations throughout the final LUF document, the GoA describes our intention to be respectful of these rights which is addressed through the inclusion of this principle as one of the Guiding Principles of the LUF (page 16 and 17). The final LUF states that the GoA "will continue to work with aboriginal communities' governments, while respecting the special role and relationship of the federal government regarding the aboriginal peoples. The GoA recognizes that consultation should take place on matters that impact treaty or constitutionally protected rights of First Nations and Métis peoples" (page 16-17). Respect for the constitutionally protected rights of Aboriginal Communities is also the primary tenet of *Strategy 7: Inclusion of aboriginal peoples in land-use planning*, which recognizes the GoA's commitment to continued consultation of those communities that hold such rights.

The GoA intends to uphold its legal duty to consult First Nations by conducting consultation meetings during the regional planning process, and by otherwise communicating with First Nations, as appropriate. Furthermore, if First Nations collectively feel it is beneficial to meet in a larger forum to discuss applicable regional plans, the GoA will attend and participate in these sessions, if invited.

A tool for addressing many of the concerns raised during the Aboriginal engagement process is included in the Priority Actions of the LUF in *Section B: Addressing provincial policy gaps and areas of interest* (page 45). In this section there are a number of specific areas of provincial interest where clear provincial policy does not exist. The GoA is committed to addressing the provincial policy gaps in the following areas:

- managing subsurface and surface activities within the province,
- reducing fragmentation and conversion of agricultural lands,
- developing a transportation and utility corridors strategy,
- managing recreational use of public lands,
- conserving and protecting the diversity of Alberta's ecological regions, and
- managing flood risk.

The GoA recognizes and respects the differences between First Nations, the MSGC and the MNA. The GoA has respected these differences throughout the consultation process and has acknowledged and responded to these differences in the final LUF document.

There is one notable concern in this theme that was not directly addressed in the final LUF, but which will be addressed at the regional planning process level. This relates to the concerns raised over the continued pace of development further limiting the ability of Aboriginal Communities to exercise their constitutionally protected rights.



The GoA "will continue to meet Alberta's legal duty to consult aboriginal communities whose constitutionally protected rights under section 35 of the *Constitution Act*, 1982 are potentially adversely impacted by development" (page 41).

The GoA also heard that it was important to Aboriginal Communities that consultation be consistent with "government-to-government" relations. On page 16 and 17, the final LUF indicates that Alberta will "continue to work with aboriginal communities' governments."

Land-use Planning and Traditional Use

What was heard from Aboriginal Communities

First Nations and Métis Settlements have serious concerns about the GoA's intent for land-use planning in areas considered to be traditional territories by First Nations and Métis Settlements. Many First Nations and Métis Settlements favour preserved and protected areas to ensure the future exercise of their Treaty rights or traditional land uses.

First Nations reserves and Métis Settlement land have defined areas. Traditional land use often extends much further and sometimes straddles the province's proposed regional planning regions. Many members of these communities believe that they should contribute to, and be consulted on, regional plans in regions where their traditional land use occurs; not just where their reserve or settlement land is found.

The primary issues which Aboriginal Communities identified in relation to the *Land-use Planning and Traditional Use* theme are:

- Traditionally, many Aboriginal Communities have been nomadic and as such the areas where traditional land use occurred were extensive. In the view of some groups, these traditional territories should be recognized throughout the LUF process and Aboriginal Communities should have a real voice in the planning process.
- There is concern that the LUF process will further erode the types of traditional use activities in which Aboriginal Communities can engage on what they consider to be their traditional territories. First Nations and Métis Settlements recommended that they should be compensated for any losses to, or harvesting in, what they see as their traditional lands.
- It was felt that the draft LUF document did not go far enough in its commitment to preserving traditional aspects of Aboriginal Communities. The draft LUF was not clear on the continuance of provincial funding for Traditional Use Studies (TUS). Also the phrase "strive to protect and preserve" was insufficient in demonstrating provincial commitment to protecting and preserving identified sacred and cultural sites (including buffer zones) over time.

The Government of Alberta's Response

The GoA appreciates the importance of traditional land use to Aboriginal Communities and recognizes that the extent of traditional land use does not necessarily coincide with the boundaries of the regional planning areas. The GoA believes that it will provide Aboriginal Communities with the ability to address this concern through their involvement in the regional planning processes of those regional plans where traditional land use continues. As discussed in the previous section, this level of involvement in the LUF process will provide Aboriginal Communities with an opportunity and a forum to work with the provincial government to address concerns related to traditional land use.

Strategy 7 encourages Aboriginal peoples to participate in the development of land-use plans. The information contained on page 41 further explains this in the recognition of the unique, historic connection of Aboriginal peoples to the land and the statement that "those First Nations and

Métis communities that hold constitutionally protected rights are uniquely positioned to inform land-use planning" (page 41). As well, in *Strategy 6* the GoA has committed to incorporating "scientific and traditional ecological knowledge to inform land and natural resource planning and decision-making" (page 38) in the Integrated Information Management System that will be developed. On page 39 it is further identified that in facilitating the establishment of a network that connects researchers, practitioners, institutions and programs, opportunities for using traditional knowledge along with scientific data will be explored.

As discussed in the previous section, the GoA has demonstrated the nature of our commitment to Aboriginal involvement in land-use planning on page 49, in the Timeframe for Implementation section of the LUF. The GoA has identified the need to encourage Aboriginal Communities to participate in the development of land-use plans as an ongoing commitment to the LUF process.

Emphasis on Environmental and Social Outcomes

What was heard from Aboriginal Communities

Aboriginal Communities maintain that they were the first stewards of the land. As such, they not only have an interest in the preservation of the land, but see land as a major factor that defines their culture. In general, Aboriginal Communities did not feel that there was an appropriate balance among the three desired outcomes in the draft LUF. They believe that environmental and social outcomes must carry more weight than economic outcomes in order to create balance.

The primary issues which Aboriginal Communities identified in relation to the Emphasis on Environmental and Social Outcomes are:

- That above all else, most Aboriginal Communities want to protect, conserve and sustain their traditional ways of life while ensuring that there are economic opportunities for community members. Aboriginal Communities are concerned that the LUF focuses too much attention on economic development and insufficient levels of attention of traditional lifestyles and culture.
- The need to change references to "protecting and preserving identified sacred cultural sites" to be more comprehensive and include both sacred and cultural sites as well as non-identified, burial, ceremonial, medicinal, hunting and gathering sites.

The Government of Alberta's Response

Throughout the final LUF, several references have been made to the importance of environmental, social, historical, and cultural dimensions; inter-generational responsibilities and environmental stewardship. The vision for the LUF, as stated on page 15, is rooted in several of these principles. The vision identifies that Albertans' well-being is rooted in more than just jobs and economic development but also includes "significant environmental, social and cultural dimensions." This vision also confirms "the principles of sustainability and inter-generational responsibilities."

Cultural opportunities are discussed specifically in the Desired Outcomes of the LUF. The GoA has identified the creation of people-friendly communities with ample recreational and cultural opportunities among the Desired Outcomes (page 15 and 23). Further, it is noted on page 24 that the identification and protection of significant historical resources and the effective management of potential impacts is included in this outcome.

The concept of stewardship is discussed extensively in the Conservation and Stewardship section of the LUF. The GoA has identified that it has a responsibility to partner with Albertans, including

other levels of government (which includes the governments of Aboriginal Communities), to facilitate new stewardship opportunities. It is anticipated that both economic tools and other approaches will be employed to achieve this.

The GoA also believes that involvement in the development of the regional plans (page 41) will assist Aboriginal Communities in addressing these concerns. Through these processes, Aboriginal representatives will have the opportunity to become involved in decisions that affect both environmental preservation and economic development for Aboriginal Communities.

The GoA understands the importance of protecting and preserving cultural and historical sites to Aboriginal Communities. In addition to the protection of cultural and historical sites afforded under Alberta's *Historical Resources Act*, the intent to conserve and protect cultural sites has remained in the final LUF. Direct reference to cultural preservation is included in the Glossary (page 51) under the definitions for Conservation and Historical resources. With those definitions in mind, the GoA will develop a strategy for conservation and stewardship of land (pages 3, 33, 34). As identified above, page 24 also discusses the importance of the identification and protection of significant historical resources and the effective management of potential impacts. Finally, the GoA intends to accommodate population growth and improve quality of life opportunities through development of a plan for provincial parks (pages 46, 50). This may assist in protecting and preserving significant cultural and historical sites for future generations.

Development of Cumulative Effects Management Thresholds

What was heard from Aboriginal Communities

There was considerable concern expressed that the rapid pace of development will increase the GoA's tolerance for environmental disturbance and pollution. The belief is that environmental analysis completed at this point in time would demonstrate significant environmental impacts as compared to earlier, baseline measurements.

Aboriginal Communities believe that thresholds or limits for land use must include traditional knowledge and experience as well as scientific measures. However, they are hesitant to share TUS data for fear that it will be used inappropriately.

The primary issues which Aboriginal Communities identified in relation to the development of Cumulative Effects Management (CEM) thresholds are:

- Many Aboriginal Communities indicated they are willing to work with the GoA to establish regional and local CEM thresholds. They indicated that the thresholds should be developed through both scientific measures and traditional knowledge and experience from local Aboriginal Communities and should cross regional boundaries when appropriate. This is especially important when traditional land-use areas cross regional boundaries.
- Some Aboriginal Communities questioned the timelines set out in the LUF. With respect to development of the regional plans, they suggested that the established timelines are too long. There is a fear that industrial development will outpace plan development, rendering the process ineffective. With respect to the development of CEM thresholds, there is concern that not enough time is being allotted to the process. Similarly, not enough time has been allocated for the development of the appropriate databases and tracking mechanisms.
- The receipt of funding for TUS is critical to meaningful participation in the development of CEM thresholds.



The Government of Alberta's Response

An entire section of the final LUF has been devoted to the topic of cumulative effects. The GoA is committed to developing a process that identifies appropriate thresholds, measurable management objectives, indicators and targets for the environment at regional levels and, where appropriate, at local levels (page 31). The GoA understands that watersheds, airsheds and landscapes have a finite carrying capacity and, as such, CEM studies cannot be confined to the boundaries of regional planning areas. The GoA intends to develop the CEM thresholds on the basis of the principles that define CEM. With respect to timelines, GoA sees the implementation of CEM as an iterative process that will evolve over the course of the LUF planning thresholds.



Next Steps

The approval of the LUF has enabled the formal commencement of the development of the regional land-use plans. These plans will be based on local information, knowledge and experience. Aboriginal input will be sought and valued in the process. There are a number of ways that Aboriginal Communities will be able to provide input during the development of a regional plan.

Regional Advisory Councils

The RACs are appointed by Cabinet and provide advice to, and receive direction from, the Cabinet and provide advice to the Land-use Secretariat on the development of the regional plan. Representatives of Aboriginal (First Nation and Métis) perspectives will be invited to sit on the RACs. Treaty organizations have been requested to facilitate the nomination of First Nations members as these representatives.

Consultation on the Regional Plan

The GoA is committed to consultation as required by law and under *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (2005). In keeping with this commitment, the GoA recognizes that the Aboriginal consultation process on the regional plans is not a single event but a part of an overall process.

Public Consultation

The RAC will advise the GoA on the best ways to consult with the public. In addition to increased consultations during the regional planning process, the GoA will encourage Albertans from Aboriginal Communities to participate in public information and consultations in whatever forms these may take.



Other Initiatives

Concurrently with the regional planning process, there will be other ongoing and anticipated GoA initiatives that are mentioned in the LUF, where First Nations may wish to discuss some of the consultation-related issues raised during the consultation on the draft LUF. These include the ongoing review of Alberta's First Nations consultation policy and guidelines, and the trilateral process.

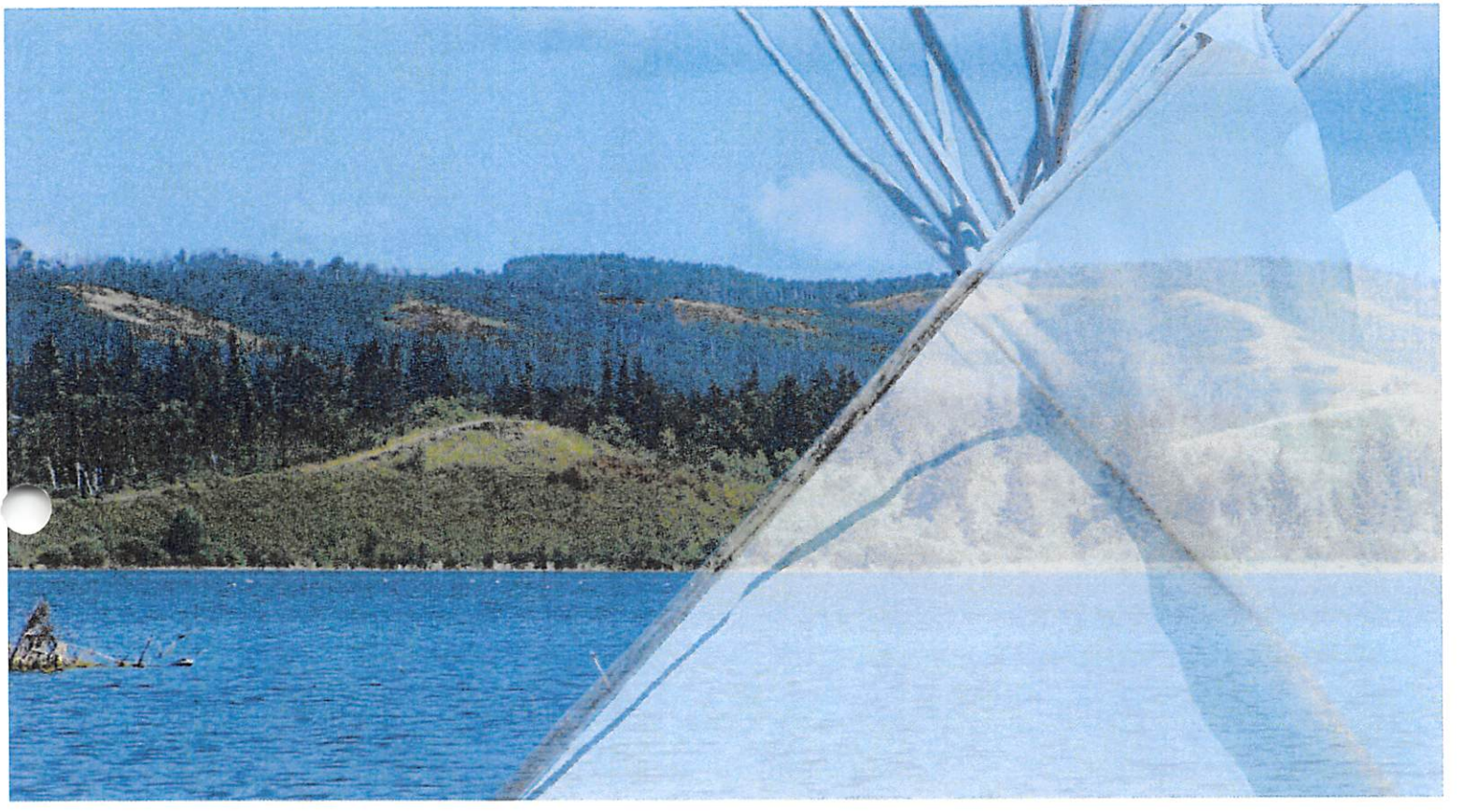
Alberta's First Nations Consultation Policy and Guidelines Review

During 2009, the GoA will be conducting a review of the *Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (2005) (page 41). During this process, the GoA will seek input from First Nations, industry, and GoA decision-makers and staff on how best to improve on the 2005 policy, as well as the current guidelines.



B.

Response to Aboriginal Consultation on the Lower Athabasca Regional Plan



environmental • social • economic

Land-use Framework

Alberta Government

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Introduction

Alberta's Land-use Framework (LUF), released in December 2008, set out a new approach to managing our province's land and natural resources to achieve Alberta's long-term economic, environmental and social goals. The LUF was developed with input from stakeholder groups, members of First Nations, the Métis Settlements General Council (MSGC), Métis organizations and the general public. The LUF also identified seven land-use regions and called for the development of a regional plan for each.

The Lower Athabasca Regional Plan (LARP) establishes seven desired regional outcomes. The regional outcomes are consistent with and support the provincewide outcomes set out in the Land-use Framework, namely:

- Healthy economy supported by our land and natural resources;
- Healthy ecosystems and environment; and
- People-friendly communities with ample recreation and cultural opportunities.

Successfully achieving the regional outcomes requires new and improved approaches and tools for managing our lands and natural resources.

The LARP also identifies strategic directions that will improve our ability to balance economic, environmental and social outcomes in the region.

These include:

- Improving the integration of industrial activities on the landscape;
- Encouraging timely and progressive reclamation of disturbed lands;
- Managing air, water and biodiversity through management frameworks that take proactive approaches and set limits and triggers and by minimizing land disturbance in the region;
- Creating new conservation areas that are large, interconnected and maintain intact habitat to support biodiversity;
- Strengthening infrastructure planning to support future growth of the region;
- Designating new recreation and tourism areas to provide diverse recreation opportunities to local residents and tourism products for visitors to the region; and
- Inclusion of aboriginal peoples in land-use planning.

Various governments, ministries and agencies will work together in an integrated manner as they develop the required system and tools to support implementation of the regional plan. While the strategies above each fall primarily into the mandate of one or more ministries, it is important to note that a government-wide approach will be taken to implement the strategies. This is part of the shift to a cumulative effects management system as envisioned by the Land-use Framework.

The Lower Athabasca Regional Plan was the first of the seven plans developed under the Land-use Framework. It was approved by Cabinet on August 22, 2012 and becomes effective September 1, 2012. All input—including aboriginal— was considered in developing the regional plan. Some of this input will also be used by the Government of Alberta (GOA) during implementation of the plan. During development of the LARP, every effort was made to balance all input received while recognizing aboriginal peoples' constitutionally protected rights, including treaty rights.

This response document provides First Nations and Métis organizations with:

1. a summary of the input heard,
2. information on how the GOA incorporated the input into the regional plan, and
3. the input that was not included in the final regional plan and why.







Methodology

Timeline

- December 20, 2008: The Lower Athabasca regional planning process started with the announcement and establishment of the Lower Athabasca Regional Advisory Council (RAC). A representative from the Métis Settlements was a RAC member.
- June 1, 2009: Representatives from Treaty 6 and Treaty 8 join the RAC.
- July 2009: The Land Use Secretariat (LUS) sent invitation letters to the following to participate in the consultation/engagement process:
  - all First Nations in the province,
  - Métis Settlement General Council (MSGC),
  - eight Métis Settlements,
  - Métis Nation of Alberta (MNA), and
  - six Métis Nation of Alberta Regions contacts.

    These letters were intended to ensure each First Nation and Métis organization was aware the consultation/engagement process for the Lower Athabasca Regional Plan had started. The LUS followed up to confirm the letters were received by the First Nations and Métis organizations.
  - The First Nation Consultation Plan – Lower Athabasca Region was provided to each First Nation in the region.
- September 2009: The Métis Engagement Plan – Lower Athabasca Region was provided to each Métis organization in the region.

Consultation/Engagement Details

The Government of Alberta (GOA) consulted with 21 First Nations and engaged with nine Métis organizations on the Lower Athabasca Regional Plan. Specifically, the GOA consulted or engaged with:

- First Nations:
  - Athabasca Chipewyan, Beaver, Beaver Lake Cree, Bigstone Cree, Chipewyan Prairie, Cold Lake, Fort McKay, Fort McMurray #468, Frog Lake, Heart Lake, Kehewin Cree, Little Red River Cree, Mikisew Cree, Onion Lake, Peerless Trout, Saddle Lake Cree, Sawridge, Smith's Landing, Sunchild, Tallcree and Whitefish(Goodfish) Lake.
- Métis Organizations:
  - Métis Settlements Board, Buffalo Lake Métis Settlement, Elizabeth Métis Settlement, Fishing Lake Métis Settlement and Kikino Métis Settlement.

- Métis Nation of Alberta: Provincial, Region 1, Region 2, and the Conklin Métis Local. (Note: Other Métis Locals attended Métis Nation of Alberta Region 1 and Region 2 meetings. In addition, the Fort McKay Métis Local made submissions together with Fort McKay First Nation.)

The consultation and engagement plans described the process the GOA would be using to consult or engage with First Nations and Métis organizations throughout development of the Lower Athabasca Regional Plan. The Land Use Secretariat worked with the GOA's Aboriginal Consultation Coordination Group to ensure the First Nation Consultation Plan was consistent with The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development.

The GOA wanted to hear and consider the views of Métis people during regional planning, which is why the Métis Engagement Plan was developed. This plan was not intended to limit the range of options available for the GOA in developing a wider Métis consultation policy in the future. The engagement plan stated that—to date—the Government of Alberta has not recognized assertions of Métis aboriginal rights in the province as being credible.

The LUS set up meetings with First Nations and Métis organizations through phone calls, with follow-up confirmation emails sent to the contact names provided. A member from the LUS attended these meetings, as well as staff from a number of government departments. These departments included: Sustainable Resource Development; Environment and Water; Energy; Intergovernmental, International and Aboriginal Relations; and Tourism, Parks and Recreation.

A consulting firm was contracted to take summary notes at each meeting to document the main issues and feedback heard. These notes were circulated to participants from the GOA and attendees to verify the summaries accurately reflected the content of each meeting. In addition, several First Nations and Métis organizations submitted written responses to the GOA on the Lower Athabasca Regional Advisory Council's Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region and the draft Lower Athabasca Regional Plan.



A total of 107 meetings were held with the above, some of which were joint meetings with more than one group. Most of the input received was on the RAC's advice document (released August 26, 2010) and the draft regional plan (released April 5, 2011).

Public, stakeholder, municipal and aboriginal consultation on the draft plan officially ended on June 6, 2011. Each participating First Nation and Métis organization received a summary of the GOA's understanding of their specific comments by June 13, 2011.





Themes

These theme areas are not mutually exclusive. The input received and the GOA's response under a specific theme may overlap with other theme areas.

First Nations and Métis organizations that participated in the consultation/engagement process for the Lower Athabasca Regional Plan offered a number of perspectives and themes, many of which were similar. This document summarizes the input received at consultation/engagement meetings as well as through written submissions. The consultation/engagement input and feedback was consolidated into six common themes:

- Participation in land-use planning;
- Consultation, rights and legal considerations;
- Land-use planning and traditional use;
- Emphasis on environmental and social outcomes;
- Development of cumulative effects management thresholds; and
- Economic development opportunities.

Participation in Land-use Planning

What we heard:

- First Nations felt a formal role must be created that would allow them to more effectively influence land-use planning, environmental assessment and protection of wildlife habitat; they stated this is fundamental to ensuring their constitutionally protected rights can be meaningfully exercised within proximity to their communities. This role should include co-management regimes with the First Nations, guided by principles of shared decision-making and joint stewardship of lands and resources.
- Aboriginal peoples believed they must be afforded a higher and more comprehensive consideration than is given to other stakeholders in land-use planning.
- Input said there must be consultation, capacity, accommodation and full participation in resource management and decision-making for aboriginal communities in recognition of their intimate connection and stewardship responsibilities with the land. Existing land and resource planning and regulatory processes need to be reviewed to ensure a fair and equitable participation.
- Some provincial parks were established that have a legacy of sacred sites and burial grounds within them. Some felt the GOA should include First Nations involvement in the management of these areas, and recognize there is opportunity for sustainable traditional uses within provincial park borders.

The Government of Alberta's Response in the LARP

The Lower Athabasca Regional Plan reflects an ongoing commitment to engage aboriginal peoples in land-use planning. The GOA recognizes that those First Nations and Métis communities which hold constitutionally protected rights are uniquely positioned to inform land-use planning.

The GOA will provide opportunities for aboriginal peoples in land-use planning, as well as opportunities to provide input into decision-making in recognition of the cultural and economic importance of land use to those aboriginal communities with constitutionally protected rights. This will provide both aboriginal communities and the GOA with a basis for better addressing current and potential land-use conflict in a manner supportive of aboriginal traditional uses, such as the exercise of treaty rights.

The Lower Athabasca Regional Plan's Outcome 7 describes an objective, strategies and indicators for inclusion of aboriginal peoples in land-use planning.

Objective:

To encourage aboriginal peoples' participation in land-use planning and input to decision-making in recognition of the cultural and economic importance of land use to those aboriginal communities with constitutionally protected rights. This will provide both aboriginal communities and the Government of Alberta with a basis for better addressing current and potential land-use conflicts, in a manner supportive of aboriginal traditional uses, such as the exercise of treaty rights.

Strategies:

a) In accordance with applicable government policy as it may be from time to time, the Government of Alberta will continue to consult with aboriginal peoples in a meaningful way when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the input from such consultations continues to be considered prior to the decision.

b) Engage aboriginal communities in the development of the Lower Athabasca Regional Trail System Plan.



c) Engage aboriginal communities in the development of a surface water quantity management framework for the Lower Athabasca River.

d) Engage aboriginal communities on initiatives to support tourism development including:

- Tourism opportunity assessments for the Quarry of the Ancestors, Bitumount and Fort Chipewyan.;





- The promotion of cross-cultural awareness and sharing cultural experience through visitor-based activities;
- Opportunities to align and enhance partnerships at the provincial, regional and local levels to enhance Alberta's range of authentic products while promoting and protecting natural and cultural resources and heritage lifestyles;
- Opportunities to balance tourism product expansion with the needs of communities through business opportunities (e.g., potential opportunity to focus on revenue generation by promoting small and medium-sized businesses, and developing careers and education thereby increasing employment opportunities); and
- The development of partnerships based on the sensitive provision of authentic traditional tourism products, experiences, stories and imaginative product diversification.

e) Invite First Nations expressing an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations-Richardson Backcountry Stewardship Initiative (Richardson Initiative). Within the Richardson area, this initiative will consider:
   - Impact to treaty rights to hunt, fish and trap for food;
   - Fish and wildlife management, access management and economic/ business opportunities; and
   - Management of new wildland provincial parks and public land areas for recreation and tourism.

f) In developing a biodiversity management framework and a landscape management plan, the Government of Alberta will work with First Nations to consider:
   - How First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centres; and
   - How to minimize land disturbance in the Athabasca River corridor north of Fort McMurray.

Indicators:

- Participation rate of First Nations in the Richardson Initiative; and
- Aboriginal peoples continue to be consulted when Government of Alberta decisions may adversely affect their continued exercise of their constitutionally protected rights, and the input from such consultations continues to be reviewed prior to the decision.

The GOA will look for opportunities to engage these communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning in this region. For example, the regional parks plan for the Lower Athabasca Region will explore and present potential new approaches to draw on the rich cultural, ecological and historical knowledge and stewardship practices of these communities into planning for new and existing parks within the provincial parks system.

Métis Settlements will maintain their responsibility and authority for local land-use planning and development on Settlement patented land.

Consultation, Rights and Legal Consideration

What we heard:

- Aboriginal peoples felt the LARP must explicitly recognize the constitutional protection afforded to aboriginal peoples' rights, the legal duty to consult with First Nations about potential adverse impacts to treaty rights and the desire for the LARP to accommodate these rights in land-use planning and resource and land allocation.
- First Nations believed these rights mean they are of a higher status than other stakeholder groups and therefore First Nations should be afforded greater influence in the LARP process.
- Some First Nations and Métis organizations felt that engagement with them should be more comprehensive than for other stakeholders, and consultation should occur on a government-to-government (elected official to elected official) basis.
- Some thought infringement of treaty and aboriginal rights already exists, and felt this infringement would grow with the potential increase in resource development within the region. They added that the GOA must recognize that any infringement of aboriginal and treaty rights must meet the standard of justified infringement, including priority allocation of resources.
- Input suggested the GOA must ensure a priority allocation of resources to aboriginal peoples, and the accommodation of aboriginal and treaty rights is done when balancing resource and land allocation.
- It was stated that there is a lack of recognition of Métis rights. Métis want to be recognized and have the same hunting, fishing and trapping rights as First Nations. Some said there needs to be a formal GOA consultation policy for Métis. Most Métis Settlements would like to have a 25-kilometre buffer around their Settlement that requires them to be consulted on anything that occurs or is proposed inside that buffer. They added that currently there is no consultation and no compensation for activity impacting the Settlement.







- First Nations have concerns about the Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development (2005). They felt the GOA did not provide adequate feedback on input provided by the First Nations during the process, nor did the GOA provide sufficient funding to provide input. Some said that Alberta needs to enter into a more collaborative and mutually agreeable process.
- Some advised that the GOA should negotiate a consultation and accommodation agreement with those aboriginal communities most affected to address the trade-offs being made that affect their rights and interests.

The Government of Alberta's Response in the LARP

The Lower Athabasca Regional Plan states, "Alberta recognizes that those First Nations and Métis communities that hold constitutionally protected rights are uniquely positioned to inform land-use planning. Consulting aboriginal communities on regional planning, particularly those aspects that have the potential to adversely impact their constitutionally protected rights, and reconciling interests are essential to achieving the regional vision. In accordance with applicable government policy as it may be from time to time, the Government of Alberta will continue to consult with aboriginal peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the input from such consultations continues to be considered prior to the decision."

The GOA has consulted with the participating First Nations and engaged the participating Métis organizations in good faith. The provincial government understands the significance of the constitutionally protected rights of aboriginal communities. The GOA continues to be committed to engaging aboriginal communities to better understand their perspectives and develop meaningful relationships with them.

While input regarding the GOA's First Nations Consultation Policy and its development process is valuable, government felt it was more appropriately addressed through Alberta's current policy review process. As set out in the LARP terms of reference, modifications to the GOA's aboriginal consultation policies are out of scope. The government is reviewing its First Nations Consultation Policy under a separate process.

Land-use Planning and Traditional Use

What we heard:

- First Nations said that access management regimes must be developed with them, and must ensure access to the areas where rights are exercised and any restrictions on access are developed in consultation with First Nations. They added that restrictions must not impair the rights of the First Nations to access their preferred hunting, fishing, trapping and gathering areas.
- Some believe a sub-region should be established in and around the surface minable area because of the unique impacts this area has on traditional use.
- The input stated the LARP must require the inclusion of traditional ecological knowledge in land use, monitoring, planning and decisions.
- The conditions that traditional lands are in and the health concerns associated with the environmental impacts are of great concern to aboriginal community members. They said there has been a high loss of medicinal plants such as blueberries and rat root. Some stated that the GOA must understand people still use the land in traditional ways.
- It was felt that very little of some aboriginal communities' traditional territory will be protected, and there will be no protected conservation areas close to those communities. Some said this severely limits practical and meaningful traditional-use opportunities for community members in these conservations areas, and does not meet the requirement for conservation areas to "support aboriginal traditional land uses" as stated in the LARP. They added that a priority land-use classification needs be established for aboriginal use.
- Most aboriginal communities felt they should be compensated for any losses to—or harvesting in—what they see as their traditional lands.
- Aboriginal peoples said traditional trail areas should be preserved to provide access through leases. Areas around the reserves should be protected to provide more opportunity for traditional land uses.
- It was stated that the population of some aboriginal communities is growing, so they will need to increase their use of the land and its traditional resources.
- Many aboriginal communities favour preserved and protected areas to ensure the future exercise of what they consider their treaty rights, aboriginal rights or traditional land uses.
- Some felt there should be areas in each region set aside exclusively for traditional uses and not accessed by other land users.







The Government of Alberta's Response in the LARP

The Alberta government will continue to collaborate with aboriginal communities toward protecting traditional-use locations of cultural and spiritual significance. These places can be determined to be historic resources and be subject to protection under the *Historical Resources Act*. The GOA appreciates the importance of traditional land use to aboriginal communities and recognizes that the extent of traditional land use does not necessarily coincide with the boundaries of the regional planning areas. The GOA believes aboriginal communities were provided with opportunities to address this concern through their involvement in the LARP, where traditional land use continues.

The Alberta government will look for opportunities to engage aboriginal communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning.

In developing a biodiversity management framework and a landscape management plan, all aboriginal communities, stakeholders and public will have the opportunity to participate. The Government of Alberta will work specifically with First Nations to consider how First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centres.

The biodiversity management framework will include indicators, targets and thresholds. Measures of biodiversity will follow International Union of Conservation of Nature (IUCN) conventions for legally designated species. For non-designed species, a risk-based approach informed by IUCN protocols will be used.

The landscape management plans will include landscape assessment, scenario modeling, and landscape planning. These will build on the success of voluntary integrated land management approaches by industrial and commercial operators as a means of reducing the extent and duration of land disturbance and development footprint.

A progressive reclamation strategy will be implemented which will provide mechanisms to define, measure and report on the return of equivalent capability—including the return of a suite of acceptable land uses such as commercial forestry, wetlands, wildlife and biodiversity, traditional use and recreation.

In collaboration with aboriginal and other communities, stakeholders and partners, co-ordinate the development of the Lower Athabasca Regional Trail System Plan to designate trails, routes and areas. This will link communities, destinations and other jurisdictions with the region's parks, recreation features

and open spaces. The development of the regional trail system plan will include the gathering and analysis of environmental, resource, land-use, aboriginal and other social data and land-use commitments.

In addition, the Government of Alberta is committed to achieving naturally sustaining woodland caribou populations. Stabilizing, recovering and sustaining woodland caribou populations is an investment in maintaining Alberta's diverse natural environment. Successfully achieving this result will require the identification, maintenance and restoration of sufficient caribou habitat.

Within the context of sustaining Alberta's caribou populations, planning and implementation will consider:

- provincial and federal legislative requirements;
- First Nation rights and traditional uses;
- social/economic impacts; and
- stakeholder interests.

In accordance with applicable government policy, as it may be from time to time, the GOA will continue to consult with aboriginal peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and ensure the input from such consultations continues to be considered prior to the decision.

Emphasis on Environmental and Social Outcomes

What we heard:

- Aboriginal peoples felt the Government of Alberta must slow the pace of extraction in areas of intensive development until knowledge of the current state of affairs becomes clearer. They added that this precautionary approach to development should be a statutory requirement, as it is the social responsibility of the government to protect its citizens.
- In general, First Nations and Métis organizations did not feel there was an appropriate balance among the three outcomes (social, environmental and economic) in the LARP. They said environmental and social outcomes must carry more weight than economic outcomes in order to create balance.
- Protection of the surface water quality and quantity in the Athabasca River and its tributaries and other water bodies in the region is necessary, according to those who provided input. Water withdrawals should be limited or stopped during low flow periods as this impacts treaty rights.







- Many said air quality must be protected and that air quality should include all parameters, not just nitrogen oxide (NO_x) and sulfur dioxide (SO_2).
- Some people said frameworks must set thresholds and triggers that relate to the meaningful practice of aboriginal and treaty rights.
- It was felt that social aspects need to be part of the plan.
- Several wanted to see environmental regulations better enforced.
- Input suggested environmental monitoring is essential, (e.g., groundwater monitoring) because some aboriginal communities are subject to heavy industrial activity in northern Alberta.
- Environmental assessment and monitoring data collected by aboriginal peoples was felt to be important, and must be used to revise and update frameworks.
- Many wanted to see environmental standards and systems and management options, as well as a formal system for ensuring buffers between development and the community lands established. They felt this would protect the health and well being of community members and the ecology of the lands.
- Respondents believed management frameworks must have clearly defined thresholds and precautionary triggers established in a way that allows proactive actions and that are protective of human and ecological health. Frameworks must set thresholds and triggers that relate to the meaningful practice of aboriginal and treaty rights.

The Government of Alberta's Response in the LARP

There is significant investment in environmental monitoring, evaluation and reporting systems in the Lower Athabasca Region, including systems for air, surface water, groundwater, land and biodiversity. Recognizing the limitations in environmental monitoring, evaluation and reporting, the GOA is currently undertaking a review of these systems. In 2009, government started building the foundation for a new integrated environmental monitoring system to support Alberta's transition to a cumulative effects management approach.

Following extensive discussions in 2011 between the Governments of Canada and Alberta, a *Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring* ("Joint Implementation Plan") has been developed. The Joint Implementation Plan builds on a foundation of existing monitoring, and is intended to enhance existing monitoring activities. The Joint Implementation Plan describes a phased implementation with monitoring activities over the next three years.

The purpose of the Joint Implementation Plan is to describe how the Governments of Alberta and Canada will put in place a world-class monitoring program for the oil sands to provide assurance of environmentally responsible development of the resource.

Specifically, the GOA wishes to engage aboriginal communities in the development of a surface water quantity management framework for the Lower Athabasca River. In addition, as the provincial government develops a biodiversity management framework and a landscape management plan, the GOA will work with First Nations to consider:

- How First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centres; and
- How to minimize land disturbance in the Athabasca River corridor north of Fort McMurray.

The Alberta government is also committed to working with Alberta residents to better understand and assess their health concerns. A Letter of Intent was signed between the Fort McKay community and the Government of Alberta on September 26, 2011. The Letter of Intent serves as a symbol of joint commitment to work collaboratively to design and implement a community health assessment in Fort McKay. Community residents will identify their health priorities and be actively engaged in identifying appropriate actions to address those priorities. The process will be led by the community with the support of government.

Monitoring, evaluation and reporting are key activities for the success of the LARP. To respond effectively to changing circumstances and new information, the GOA must have a way to assess regional planning progress on objectives and outcomes, and initiate corrective action where required. A system of monitoring, evaluation, reporting and improvement is needed to determine the effectiveness of the regional plan (i.e., to determine if land-use strategies and actions will fulfill the regional plan's objectives and outcomes).

On an ongoing basis, the GOA will systematically collect and store data for indicators about the progress of achievement of the LARP outcomes. The GOA will be responsible for collecting data for these indicators over the span of the regional plan and for monitoring the data trends showing changes occurring in the region. The monitoring data will undergo rigorous evaluation, analysis and interpretation of results within the context of government policies and strategies designed to achieve the regional objectives and assure management actions are appropriate. This includes evaluation of monitoring data against the limits and triggers established for the region. Wherever possible, the contributions of subject matter experts within the community will be encouraged as input into this process.







The Government of Alberta is committed to the following:

- Complete and implement a surface water quantity management framework for the Lower Athabasca River, ensuring aboriginal communities are engaged in its development.
- Complete an update of the phase 1 Water Management Framework for the Lower Athabasca River. The current framework provides guidance for managing water withdrawals by the oil sands mining industry. The phase 1 management framework was approved by Alberta Environment and Water and the federal department of Fisheries and Oceans in 2007. Work is continuing to update this surface water quantity management framework.
- Implement the Surface Water Quality Management Framework for the Lower Athabasca River.
- Implement the Air Quality Management Framework for the Lower Athabasca Region. The ambient air quality limits and triggers in the Air Quality Management Framework for the Lower Athabasca Region are based on accepted Alberta ambient air quality objectives. If monitoring indicates that a trigger or limit has been exceeded, there will be a regional management response. The kinds of management actions that may be required include the preparation of management plans (individual or collective), further modeling and/or monitoring, development and application of new performance standards and the use of best management practices. Taking action to manage air quality in the region will involve the provincial government and a number of parties, including industry, municipalities and others. The framework establishes a commitment to ongoing monitoring, evaluation and reporting of ambient air quality conditions and verification if triggers or limits are exceeded.
- Complete and implement the Groundwater Management Framework for the Lower Athabasca Region. The Groundwater Management Framework for the Lower Athabasca Region encompasses three areas: the north Athabasca oil sands, the south Athabasca oil sands and the Cold Lake-Beaver River areas. A set of indicators has been chosen based on the nature of the aquifers and potential impacts of both mining and in situ operations. The framework includes interim triggers and provides for the future establishment of final triggers and limits. The information required to finalize triggers and limits will be collected through the establishment of a regional groundwater monitoring network and development of regional groundwater models. Industry operators are required to prepare facility groundwater management plans to describe how site-specific management will contribute to the achievement of regional groundwater outcomes.

Development of Cumulative Effects Management Thresholds

What we heard:

- It was felt that the "cumulative effects management approach" and frameworks must guide decision-makers so that land-use decisions are made in a way that respects and accommodates aboriginal knowledge and constitutionally protected rights.
- Some stated a need to complete a regional cumulative environmental, cultural and socio-economic assessment to ensure that frameworks meet the objectives of protecting air, water and biodiversity, and traditional resources and land use.
- Regular community-based monitoring of cumulative effects is believed to be needed on the health of aboriginal community members and environment.
- Input reflected that the Government of Alberta, together with aboriginal peoples, must develop criteria, methods and thresholds for assessing the direct and cumulative impacts of existing, planned and reasonably foreseeable development on the meaningful exercise of section 35 constitutional rights.
- Some said a holistic understanding of the effects of development is needed. They felt the LARP should describe how the enhanced understanding of cumulative effects will be used in the planning process, and should make provisions for further research into the health effects of development in the LARP area.
- Many First Nations and Métis organizations indicated they are willing to work with the GOA to establish regional and local cumulative effects management (CEM) thresholds. The thresholds should be developed through both scientific measures and traditional knowledge and experience from local aboriginal communities, and should cross regional boundaries when appropriate.
- The receipt of funding/capacity for traditional knowledge was believed to be critical to meaningful participation in the development of CEM thresholds.







The Government of Alberta's Response in the LARP

The cumulative effects of population growth and economic development in the region are increasing pressures on the region's air, water, land and biodiversity. The Alberta Government is committed to responsible development. Alberta's current environmental management system is intended to reduce and minimize the impacts of development on the environment. This system is supported by provincial policy and legislation which are implemented using a full range of both regulatory and non-regulatory tools.

Through regional planning, as well as other initiatives, Alberta is shifting to a more effective and efficient management system that considers the cumulative effects of all activities and improves integration across the economic, environmental and social pillars. This system must adapt to place-based challenges and opportunities as well as allow decision-makers to see the bigger picture.

This direction is a foundation of the Land-use Framework, where the Alberta government committed to manage the cumulative effects of development on air, water, land and biodiversity at the regional level. Cumulative effects management focuses on achievement of outcomes, understanding the effects of multiple development pressures (existing and new), assessment of risk, collaborative work with shared responsibility for action and improved integration of economic, environmental and social considerations.

Outcomes and objectives are established, along with the strategies and actions that will be used to achieve them. Integrated monitoring, evaluation and reporting systems are essential as they are used to assess achievement of outcomes and objectives. The elements of a cumulative effects management system are outcomes-based, place-based, knowledge-based, adaptive and shared stewardship.

It is recognized that managing cumulative effects on air, water, land and biodiversity is important to the needs of aboriginal communities in the region that hold constitutionally protected rights. Accordingly, engagement with these communities is desired as air, water, land and biodiversity strategies and plans are developed, for example:

- Enhancing the regional network of conservation areas to support biodiversity and ecosystem function by increasing conservation areas in the region; and
- Developing a sub-regional plan, using a strategic environmental assessment approach, for the south Athabasca oil sands area. Undertaking this assessment at a sub-regional scale will contribute to the management of cumulative effects and support efficiencies in the regulatory review process for in-situ oil sands operations.

Economic Development Opportunities

What we heard:

- First Nations and Métis organizations want to protect, conserve and sustain traditional ways of life while ensuring that there are economic opportunities for community members.
- First Nations and Métis organizations want a formal process created for the selection of targeted recreation areas that do not adversely impact aboriginal and treaty rights, and which also offer opportunities for the communities to be involved in economic opportunities arising from recreation and tourism.
- First Nations and Métis organizations want to have an active role in the stewardship and area facility management to promote economics within the community.
- Some First Nations and Métis organizations want to explore innovative ways to develop a sustainable economic development model with their various assets (including timber quota).
- Feedback stated that traditional trails were the economic historical backbone of the province, and these trails could be a huge draw and economic boon for aboriginal communities.

The Government of Alberta's Response in the LARP

Abundant opportunities exist for local residents, including aboriginal people, to participate in economic activities, and there are already more than 100 aboriginal-owned businesses in the region.

The Alberta government will work with aboriginal people to identify tourism and cultural experiences which could provide economic opportunities for aboriginal communities. Specifically, the LARP will engage aboriginal communities on initiatives to support tourism development, including:

- Developing and implementing the Lakeland Country Destination Development Strategy and Tourism Opportunity Plan in collaboration with aboriginal peoples, municipalities and local stakeholders.
- Working collaboratively with local aboriginal communities, the private sector and local governments to enhance and expand the supply of tourism products and infrastructure – including attractions, activities, amenities and accommodations.
- Identifying, designating and marketing tourism development nodes in consultation with aboriginal peoples, municipalities and stakeholders.







- The completion of tourism opportunity assessments beginning with Quarry of the Ancestors, Bitumount and Fort Chipewyan. The assessments will help identify a range of potential aboriginal tourism opportunities, including guided tours, education programs, attractions, exhibits or interpretive sites.
- The promotion of cross-cultural awareness and sharing cultural experience through visitor-based activities;
- The development of partnerships based on the sensitive provision of authentic traditional tourism products, experiences, stories and imaginative product diversification.

The GOA will implement key recommendations in Connecting the Dots: Aboriginal Workforce and Economic Development in Alberta to increase labour force participation and economic development opportunities for aboriginal people.

The GOA will continue implementation of the Building and Educating Tomorrow's Workforce strategy to develop the knowledge and skills of Albertans, attract and retain workers in Alberta's labour market and to improve workplace productivity; and facilitate implementation of the Workforce Strategy for Alberta's Energy Sector, an initiative led by industry stakeholders.

Final Statements

With respect to balance, the Lower Athabasca Regional Plan is intended to have a positive impact on the region. When taking into account and balancing the economic, environmental, and social needs of all residents of the region and all Albertans, it is not possible to address or accommodate all concerns in the manner proposed by a First Nation or Métis organization. Balancing and reconciling objectives has been achieved to the extent possible, while keeping in mind the economic, environmental and social needs of the region as a whole.

Some incoming proposals raised issues that were outside the scope of the LARP and its terms of reference. These issues are:

- Request for land to be set aside for First Nations' exclusive use; and
- Requests for a new or modified consultation policy.

The first issue is outside the scope of the LARP because the creation of Indian reserves is the responsibility of the federal government. With respect to the second issue, there exists a separate Government of Alberta review of its First Nations consultation policy, which has engaged First Nations communities and treaty organizations.

The Lower Athabasca Regional Plan increases the amount of land protected from development that may be incompatible with hunting, fishing and trapping for food. In many cases, the protected land will include areas where a particular First Nation most often exercises treaty rights. Management of a protected area could impact a First Nation's member's access; however, the First Nation would continue to be consulted as management details for new conservation areas are worked out

In some cases, the social and economic benefits of potential development outweigh the social and environmental benefits of a protected area at that location. Non-inclusion of a protected area does not mean that any and all industrial activities will be allowed to occur. The usual regulatory approval processes would continue to apply to proposed industrial activities in the non-included area and consultation would occur. The LARP anticipates the status quo will be maintained on some matters.



Setting measurable targets and objectives that aim to protect water quality, air quality and biodiversity, where there were no such targets previously, helps support continued hunting, fishing and trapping for food, as does effective reclamation of disturbed land and the creation of conservation areas. While traditional activities might not be expressly mentioned in a particular portion of the LARP, that does not mean they cannot occur to the extent permitted by law, depending on the nature of the activity.











1994 CarswellNat 8, 14 C.E.L.R. (N.S.) 1, [1994] 1 S.C.R. 159, 20 Admin. L.R. (2d) 79, 112 D.L.R. (4th) 129, [1994] 3 C.N.L.R. 49, 163 N.R. 241, J.E. 94-363, EYB 1994-67299

1994 CarswellNat 8, 14 C.E.L.R. (N.S.) 1, [1994] 1 S.C.R. 159, 20 Admin. L.R. (2d) 79, 112 D.L.R. (4th) 129, [1994] 3 C.N.L.R. 49, 163 N.R. 241, J.E. 94-363, EYB 1994-67299

Quebec (Attorney General) v. Canada (National Energy Board)

GRAND COUNCIL OF CREES (OF QUEBEC) and CREE REGIONAL AUTHORITY v. ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, HYDRO-QUÉBEC and NATIONAL ENERGY BOARD

SIERRA LEGAL DEFENCE FUND, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, CULTURAL SURVIVAL (CANADA), FRIENDS OF THE EARTH and SIERRA CLUB OF CANADA (intervenors)

Supreme Court of Canada

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: October 13, 1993
Judgment: February 24, 1994
Docket: Doc. 22705

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Subject: Environmental; Public

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Public Utilities --- Regulatory boards — Licensing (public convenience and necessity)

Native law — Constitutional issues — National Energy Board considering applicationspotentially affecting aboriginal rights — Function of board being quasi-judicial — No fiduciary duty on board to change hearing procedures or make decisions in best interest of aboriginal peoples.

Approvals, licences and orders — Licences to export electricity — National Energy Board being subject to Environmental Assessment and Review Process Guidelines Order — Environmental effects of new generating facilities unknown — Board required to ensure further study and re-screening or public review of proposal — Appropriate for board to impose conditions requiring further environmental assessment documentation — No duplication or improper delegation — Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Public utilities — Regulatory boards — Licensing — National Energy Board granting export licences to Hydro-Québec — Board imposing conditions requiring application of federal environmental assessment procedures for new generation facilities — Proper for board to consider overall environmental impacts of new facilities related to export — Conditions upheld.

In 1989, Hydro-Québec entered into two agreements to supply 1,450 megawatts of electricity to New York and Vermont over contract periods from 5 to 25 years for $25 billion. The power would be supplied by Hydro's grid network, but required Hydro-Québec to advance construction of the James Bay II project to cover all customers over the life of the agreements. Hydro-Québec applied to the National Energy Board for licences to export the electricity.

In its decision, the board applied 1990 amendments to the *National Energy Board Act* and granted the licences, but imposed conditions respecting the federal *Environmental Assessment and Review Process Guidelines Order*. The conditions required Hydro-Québec to ensure that the new production facilities required to supply exports had been subjected to appropriate federal environmental assessment procedures and federal environmental standards and guidelines. Hydro-Québec was also required to file the environmental assessment documents and recommendations, government authorizations, and a statement of measures that Hydro-Québec would take to minimize negative environmental effects. An additional condition stipulated that the generation of exported thermal energy shall not contravene federal environmental standards or guidelines.

Hydro-Québec and the Attorney General of Québec appealed the board's conditions, while the Grand Council of the Crees of Québec and the Cree Regional Authority appealed the board's granting of the licences. The Federal Court of Appeal granted the appeals of Hydro-Québec and the Attorney General of Québec, but dismissed the appeal of the Grand Council of the Crees and the Cree Regional Authority, who further appealed to the Supreme Court of Canada.

Held:

The appeal was allowed and board's order was restored.

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The board acted within its jurisdiction in granting the export licences. In considering the social costs and benefits of the exports, the board had evidence from Hydro-Québec upon which it could reasonably conclude that the export price would recover an appropriate share of costs incurred in Canada. In considering this matter, it was not a jurisdictional error for the board to take into account the fact that the export contracts had received provincial approval. Because the appellants had access to all material before the board, the board did not breach the requirements of procedural fairness respecting the issue of cost recoverability.

Because the appellants were aboriginal peoples, there was a fiduciary relationship between the Crown and the appellants. However, this relationship did not impose a fiduciary duty on the board to make its decision in the best interests of the appellants, or to change the hearing process so as to impose superadded disclosure requirements. The board exercised quasi-judicial decision-making authority, and it would be inconsistent to impose a relationship of utmost good faith between the board and a party appearing before the board.

The board must exercise its decision-making authority in accordance with the Constitution, including s. 35(1) of the *Constitution Act, 1982*. However, it was not possible to determine the impact of the board's decision on the appellants' aboriginal rights without referring to the James Bay and Northern Quebec Agreement, on which the appellants disavowed reliance. In any event, assuming that the board's decision had prima facie effects on the appellants' aboriginal rights, and assuming that the board must conduct a rigorous cost-benefit review to justify interference with aboriginal rights, the review carried out by the board was not wanting in this respect.

The board did not exceed its jurisdiction in considering the environmental effects of the construction of future generating facilities which are related to the proposed export. Under the application review process of the *National Energy Board Act*, the board has the power to consider all factors which appear to be relevant, including the environmental effects of generating the power for export. The Court of Appeal erred in limiting the scope of the board's inquiry to the environmental effects of transmitting the power by wire across the border. To limit the inquiry to the effects resulting from the physical act of transmission is an unduly narrow interpretation of the board's role under the elaborate regulatory review process.

It is proper for the board to consider the overall environmental costs of granting the proposed licences, even where licence approval means accelerating the construction of facilities which would have been built in any event to meet domestic needs. If the new facilities are required to serve, among other needs, the demands of an export contract, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it is appropriate for the board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power. While the board's authority should be limited to matters of federal concern, the scope of the board's inquiry should not be narrowed to such a degree as to render the board's function meaningless or ineffective.

The *Environmental Assessment and Review Process Guidelines Order* applied to the board's decision whether to grant the export licences. Because Hydro-Québec declined to provide information on the overall impact of the construction and operation of the planned facilities, the board concluded that the environmental effects of such facilities were unknown. Accordingly, the board was required by s. 12(*d*) of the Guidelines Order to ensure that the project was subject to further study and subsequent re-screening, or that it was submitted to a public review. The conditions im-

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posed by the board satisfied this obligation, and did not amount to an improper delegation of the board's responsibility under the Guidelines Order. Rather, the conditions attempted to avoid duplication while continuing the jurisdiction of the board over the matter.

Cases considered:

Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission), [1989] 1 S.C.R. 1722, 38 Admin. L.R. 1, 60 D.L.R. (4th) 682, 97 N.R. 15 — *referred to*

Canada (Canadian Radio-Television & Telecommunications Commission) v. London Cable TV Ltd., [1976] 2 F.C. 621, (sub nom. *Re Canada (Canadian Radio-Television Commission))* 13 N.R. 292, (sub nom *London Cable TV Ltd. v. Canada (Canadian Radio-Television & Telecommunications Commission))* 29 C.P.R. (2d) 268, 67 D.L.R. (3d) 267 (Ont. C.A.) [leave to appeal refused (sub nom. *Canada Cablesystems (Ont.) Ltd. v. Consumers' Assn. (Canada))* [1977] 2 S.C.R. 740, 77 D.L.R. (3d) 641, 15 N.R. 111, 30 C.P.R. (2d) 76] — *referred to*

Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment) (1989), 4 C.E.L.R. (N.S.) 201, 31 F.T.R. 1, affirmed (1990), [1991] 1 F.C. 641, 6 C.E.L.R. (N.S.) 89, 121 N.R. 385 (C.A.) — *referred to*

Cardinal v. Kent Institution, [1985] 2 S.C.R. 643, 16 Admin. L.R. 233, [1989] 1 W.W.R. 577, 69 B.C.L.R. 255, 49 C.R. (3d) 35, 63 N.R. 353, 23 C.C.C. (3d) 118, 24 D.L.R. (4th) 44 — *referred to*

Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716 — *referred to*

Friends of the Island Inc. v. Canada (Minister of Public Works), [1993] 2 F.C. 229, 10 C.E.L.R. (N.S.) 204, 61 F.T.R. 4, 102 D.L.R. (4th) 696 (T.D.) — *applied*

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, 7 C.E.L.R. (N.S.) 1, [1992] 2 W.W.R. 193, 84 Alta. L.R. (2d) 129, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1 — *considered*

Gitludahl v. British Columbia (Minister of Forests) (August 13, 1992), Doc. Vancouver A922935, Newbury J. (B.C. S.C.) — *referred to*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 20 E.T.R. 6, (sub nom. *Guerin v. Canada)* 36 R.P.R. 1, 55 N.R. 161, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120 — *referred to*

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *referred to*

Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 S.C.R. 165, [1993] 1 W.W.R. 113, 142 N.R. 241, 97 D.L.R. (4th) 17, 81 Man. R. (2d) 1, 30 W.A.C. 1 — *referred to*

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riginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in *Sparrow*.

44 It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a prima facie infringement of s. 35(1).

45 The respondents in this appeal argue that it cannot. They assert that, with the signing by the appellants of the James Bay and Northern Quebec Agreement, incorporated in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 ("the *James Bay Act*"), the appellants ceded and renounced all aboriginal rights except as set out in the Agreement. Since the act of granting a licence neither requires nor permits the construction of the new production facilities which the appellants claim will interfere with their rights, and since the Agreement itself provides for a participatory review process to authorize the construction of such facilities, Hydro-Québec and the Attorney General of Quebec argue that no prima facie infringement results from the decision of the Board.

46 The evaluation of these competing arguments requires an examination and interpretation of the Agreement as embodied in the *James Bay Act*. The appellants, however, requested that this question be determined without reference to the Agreement or to the Act, since its interpretation and application form the subject of other legal proceedings involving the parties to this appeal. The appellants accordingly placed no reliance on this document in their assertion of a breach of aboriginal rights.

47 In my view, it is not possible to evaluate realistically the impact of the decision of the Board on the rights of the appellants without reference to the *James Bay Act*. The respondents assert that the rights of the appellants are limited to those set out in this document. The validity of this assertion cannot be tested without construing the provisions of the Agreement.

48 Moreover, even assuming that the decision of the Board is one that has, prima facie, an impact on the aboriginal rights of the appellants, and that the appellants are correct in arguing that, for the Board to justify its interference, it must, at a minimum, conduct a rigorous, thorough, and proper cost-benefit review, I find, for the reasons expressed above, that the review carried out in this case was not wanting in this respect.

E. Environmental Impact Assessment

49 Given that the social cost-benefit analysis appears to have been reasonable, the sole remaining ground on which the decision of the Board can be impugned relates to the environmental impact assessment carried out by the Board. It must be determined both whether the Board followed the procedures for such an assessment set out in the *National Energy Board Act* and in the EARP Guidelines Order, and whether the imposition of conditions 10 and 11 was a valid mechanism for fulfilling these requirements. If it is found that the conditions imposed by the Board caused it to exceed, or alternately to fail to exercise, its jurisdiction, it must also be determined whether the conditions are

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2010 CarswellAlta 804, 2010 ABCA 137, [2010] 2 C.N.L.R. 316, [2010] A.W.L.D. 2783, [2010] A.W.L.D. 2784, [2010] A.W.L.D. 2785, [2010] A.W.L.D. 2705, [2010] A.W.L.D. 2706, [2010] A.W.L.D. 2707, [2010] A.W.L.D. 2733, [2010] A.W.L.D. 2734, [2010] A.W.L.D. 2735, 50 C.E.L.R. (3d) 38, 23 Alta. L.R. (5th) 1, [2010] 10 W.W.R. 627, 482 A.R. 198, 490 W.A.C. 198, 189 A.C.W.S. (3d) 1

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2010 CarswellAlta 804, 2010 ABCA 137, [2010] 2 C.N.L.R. 316, [2010] A.W.L.D. 2783, [2010] A.W.L.D. 2784, [2010] A.W.L.D. 2785, [2010] A.W.L.D. 2705, [2010] A.W.L.D. 2706, [2010] A.W.L.D. 2707, [2010] A.W.L.D. 2733, [2010] A.W.L.D. 2734, [2010] A.W.L.D. 2735, 50 C.E.L.R. (3d) 38, 23 Alta. L.R. (5th) 1, [2010] 10 W.W.R. 627, 482 A.R. 198, 490 W.A.C. 198, 189 A.C.W.S. (3d) 1

Tsuu T'ina Nation v. Alberta (Minister of Environment)

The Tsuu T'ina Nation and Chief Sandford Big Plume on behalf of himself and all other members of the Tsuu T'ina Nation (Appellant / Applicant) and Her Majesty the Queen In Right of Alberta, as Represented by the Minister of Environment, the Lieutenant Governor In Council and the Attorney General of Alberta (Respondents / Respondents)

The Samson Cree Nation and Chief Victor Buffalo, on behalf of himself and all other members of the Samson Cree Nation (Appellant / Applicant) and Her Majesty the Queen In Right of Alberta, as Represented by the Minister of Environment, the Lieutenant Governor In Council and the Attorney General of Alberta (Respondents / Respondents)

Alberta Court of Appeal

Ellen Picard, Clifton O'Brien, Patricia Rowbotham JJ.A.

Heard: November 3, 2009
Judgment: April 28, 2010[FN*]
Docket: Calgary Appeal 0801-0272-AC

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Proceedings: affirming *Tsuu T'ina Nation v. Alberta (Minister of the Environment)* (2008), 39 C.E.L.R. (3d) 28, [2009] 2 W.W.R. 735, 2008 ABQB 547, 2008 CarswellAlta 1182, 96 Alta. L.R. (4th) 65, (sub nom. *Tsuu T'ina Nation v. Alberta (Environment))* [2008] 4 C.N.L.R. 259, 453 A.R. 114 (Alta. Q.B.)

Counsel: L.D. Andrychuk, Q.C., C.D. Leonard for Appellants

S.M.C. Folkins, A.L. Edgington, W. Gierulski for Respondents

Subject: Public; Civil Practice and Procedure; Constitutional; Environmental; Natural Resources; Property

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Public law --- Crown — Practice and procedure involving Crown in right of province — Miscellaneous

Application to strike evidence in context of duty to consult analysis — Demand for non-irrigation water was expected to increase 52 to 136 per cent over next 50 years in area where population was likely to triple, so committees were struck to study issue — Resulting water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of approval of plan, declarations regarding duty to consult and accommodate, and order setting aside order and enjoining Crown from implementing plan — Crown brought application to strike portions of some of First Nations' affidavits and exhibits — Application to strike was dismissed — First Nations appealed — Appeal dismissed — Declaratory relief was discretionary, and there was no good reason to grant declaration in circumstances where chambers judge, exercising his judicial discretion, declined to do so — Moreover, it was relevant to exercise of discretion to note that these same issues and claims for relief were presently before Court of Queen's Bench in existing litigation commenced by appellant First Nations — It seems reasonable that these issues, including determination of appropriate relief, should be left to be dealt with in context of broader litigation.

Aboriginal law --- Practice and procedure — Evidence — Admissibility

Demand for non-irrigation water was expected to increase 52 to 136 per cent over next 50 years in area where population was likely to triple, so committees were struck to study issue — Resulting water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of approval of plan, declarations regarding duty to consult and accommodate, and order setting aside order and enjoining Crown from implementing plan — Crown brought application to strike portions of some of First Nations' affidavits and exhibits — Application to strike was dismissed — First Nations appealed — Appeal dismissed — Declaratory relief was discretionary, and there was no good reason to grant declaration in circumstances where chambers judge, exercising his judicial discretion, declined to do so — Moreover, it was relevant to exercise of discretion to note that these same issues and claims for relief were presently before Court of Queen's Bench in existing litigation commenced by appellant First Nations — It seems reasonable that these issues, including determination of appropriate relief, should be left to be dealt with in context of broader litigation.

Aboriginal law --- Constitutional issues — Treaty rights

Demand for water was expected to increase 52 to 136 per cent over next 50 years in area where population could triple, so committees struck to study issue devised water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, and plan was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of plan's approval, declarations regarding duty to consult and accommodate, and order setting aside order and enjoining Crown from implementing plan — Applications dismissed — First Nations appealed — Appeal dismissed — Declaratory relief was discretionary, and there was no good reason to grant declaration in circumstances where chambers judge, exercising

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2010 CarswellAlta 804, 2010 ABCA 137, [2010] 2 C.N.L.R. 316, [2010] A.W.L.D. 2783, [2010] A.W.L.D. 2784, [2010] A.W.L.D. 2785, [2010] A.W.L.D. 2705, [2010] A.W.L.D. 2706, [2010] A.W.L.D. 2707, [2010] A.W.L.D. 2733, [2010] A.W.L.D. 2734, [2010] A.W.L.D. 2735, 50 C.E.L.R. (3d) 38, 23 Alta. L.R. (5th) 1, [2010] 10 W.W.R. 627, 482 A.R. 198, 490 W.A.C. 198, 189 A.C.W.S. (3d) 1

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Aboriginal law --- Aboriginal rights to natural resources — Miscellaneous

Demand for water was expected to increase 52 to 136 per cent over next 50 years in area where population could triple, so committees struck to study issue devised water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, and plan was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of plan's approval, declarations regarding duty to consult and accommodate, and order setting aside order and enjoining Crown from implementing plan — Applications dismissed — First Nations appealed — Appeal dismissed — Declaratory relief was discretionary, and there was no good reason to grant declaration in circumstances where chambers judge, exercising his judicial discretion, declined to do so — Moreover, it was relevant to exercise of discretion to note that these same issues and claims for relief were presently before Court of Queen's Bench in existing litigation commenced by appellant First Nations — It seems reasonable that these issues, including determination of appropriate relief, should be left to be dealt with in context of broader litigation.

Environmental law --- Constitutional issues — Jurisdiction to enact environmental legislation — Scope of enabling statute

Demand for water was expected to increase 52 to 136 per cent over next 50 years in area where population could triple, so committees struck to study issue devised water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, and plan was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of plan's approval, declarations regarding duty to consult and accommodate, and order setting aside order and enjoining Crown from implementing plan — Applications dismissed — First Nations appealed — Appeal dismissed — Declaratory relief was discretionary, and there was no good reason to grant declaration in circumstances where chambers judge, exercising his judicial discretion, declined to do so — Moreover, it was relevant to exercise of discretion to note that these same issues and claims for relief were presently before Court of Queen's Bench in existing litigation commenced by appellant First Nations — It seems reasonable that these issues, including determination of appropriate relief, should be left to be dealt with in context of broader litigation.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Water — Public water supply

Demand for water was expected to increase 52 to 136 per cent over next 50 years in area where population could triple, so committees struck to study issue devised water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, and plan was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of plan's approval, declara-

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Natural resources --- Waters and watercourses — Miscellaneous

Demand for water was expected to increase 52 to 136 per cent over next 50 years in area where population could triple, so committees struck to study issue devised water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, and plan was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of plan's approval, declarations regarding duty to consult and accommodate, and order setting aside order and enjoining Crown from implementing plan — Applications dismissed — First Nations appealed — Appeal dismissed — Declaratory relief was discretionary, and there was no good reason to grant declaration in circumstances where chambers judge, exercising his judicial discretion, declined to do so — Moreover, it was relevant to exercise of discretion to note that these same issues and claims for relief were presently before Court of Queen's Bench in existing litigation commenced by appellant First Nations — It seems reasonable that these issues, including determination of appropriate relief, should be left to be dealt with in context of broader litigation.

Environmental law --- Statutory protection of environment — Environmental assessment — Aboriginal interests

Demand for water was expected to increase 52 to 136 per cent over next 50 years in area where population could triple, so committees struck to study issue devised water management plan (plan) recommending closure of river basins to new allocations except for limited purposes, including those of Treaty Seven First Nations, and plan was approved by Cabinet and affirmed in council — First Nations brought applications for judicial review of plan's approval, declarations regarding duty to consult and accommodate, and order setting aside order and enjoining Crown from implementing plan — Applications dismissed — First Nations appealed — Appeal dismissed — Declaratory relief was discretionary, and there was no good reason to grant declaration in circumstances where chambers judge, exercising his judicial discretion, declined to do so — Moreover, it was relevant to exercise of discretion to note that these same issues and claims for relief were presently before Court of Queen's Bench in existing litigation commenced by appellant First Nations — It seems reasonable that these issues, including determination of appropriate relief, should be left to be dealt with in context of broader litigation.

Public law --- Crown — Crown property — Grants of Crown lands — Interpretation of grants — Grants of rights regarding streams and rivers

Demand for water was expected to increase 52 to 136 per cent over next 50 years in area where population could triple, so committees struck to study issue devised water management plan (plan) recommending closure of river basins to

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Cases considered by *Clifton O'Brien J.A.*:

Authorson (Litigation Guardian of) v. Canada (Attorney General) (2003), (sub nom. *Authorson v. Canada (Attorney General))* 2003 C.E.B. & P.G.R. 8051, (sub nom. *Authorson v. Canada (Attorney General))* 227 D.L.R. (4th) 385, (sub nom. *Authorson v. Canada (Attorney General))* 109 C.R.R. (2d) 220, (sub nom. *Authorson v. Canada (Attorney General))* 306 N.R. 335, (sub nom. *Authorson v. Canada (Attorney General))* 66 O.R. (3d) 734 (note), (sub nom. *Authorson v. Canada (Attorney General))* [2003] 2 S.C.R. 40, 2003 CarswellOnt 2773, 2003 CarswellOnt 2774, 2003 SCC 39, 36 C.C.P.B. 29, (sub nom. *Authorson v. Canada (Attorney General))* 175 O.A.C. 363, 4 Admin. L.R. (4th) 167 (S.C.C.) — considered

Brokenhead Ojibway Nation v. Canada (Attorney General) (2009), 44 C.E.L.R. (3d) 1, [2009] 3 C.N.L.R. 36, 2009 CarswellNat 4884, 2009 CF 484, 345 F.T.R. 119 (Eng.), 2009 CarswellNat 1339, 2009 FC 484 (F.C.) — considered

Delgamuukw v. British Columbia (1997), 220 N.R. 161, 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010, 99 B.C.A.C. 161, 162 W.A.C. 161, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — considered

R. v. Lefthand (2007), 2007 CarswellAlta 850, 2007 ABCA 206, [2007] 4 C.N.L.R. 281, 222 C.C.C. (3d) 129, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203 (Alta. C.A.) — considered

R. v. Lefthand (2008), 2008 CarswellAlta 195, 2008 CarswellAlta 196, (sub nom. *R. v. Eagle Child)* 454 A.R. 176

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2010 CarswellAlta 804, 2010 ABCA 137, [2010] 2 C.N.L.R. 316, [2010] A.W.L.D. 2783, [2010] A.W.L.D. 2784, [2010] A.W.L.D. 2785, [2010] A.W.L.D. 2705, [2010] A.W.L.D. 2706, [2010] A.W.L.D. 2707, [2010] A.W.L.D. 2733, [2010] A.W.L.D. 2734, [2010] A.W.L.D. 2735, 50 C.E.L.R. (3d) 38, 23 Alta. L.R. (5th) 1, [2010] 10 W.W.R. 627, 482 A.R. 198, 490 W.A.C. 198, 189 A.C.W.S. (3d) 1

> fish. If there is presently any adverse impact on the water use of the Application, (either directly or as an adjunct their other rights) it is a result of the priority system as set out in the *Water Act* and the licences already granted. These are historical facts and not the result of the decisions under review or the SSRB Plan.

83 The appellants intimate that the chambers judge, in assessing potential adverse impacts (at para. 138) overlooked his observation that, as a result of transfers by existing licence holders of under-utilized allocations, it is likely "that more water will be consumed, exacerbating the water shortage". The appellants point to the expected reduced flows as seriously impacting on the fish population, and thereby adversely affecting their right to fish.

84 As already noted, the provisions for transferring licences were part of the existing Water Plan approved in 2002 (prior to the Phase II planning), and consequently were not part of the proposed government action during the relevant time frame. In any event, the transfers are subject to holdbacks by the Director, which the chambers judge commented may "partially offset" any negative impact of transfers that are approved (para. 138). In that event, the holdbacks may provide a future source of water to the First Nations.

85 Finally, with respect to the transfer of water licences, the Plan, incorporating both Phases I and II, contemplates public review and requires an applicant for a transfer to give public notice. A further requirement was added to the Plan - that the concerns of the First Nations must be considered as part of the review. It should not be supposed that every transfer of a water licence is adverse to the interests of the First Nations. However, with respect to transfers which the First Nations may consider adverse, they will have opportunity to have their concerns considered. In my view, the chambers judge was correct in refusing to "speculate" as to "the scope of any duty to consult which may or may not arise in those transfer approval applications" (para. 140). Such will depend upon the particular circumstances surrounding an application.

86 The appellant First Nations submit that the Plan further adversely affected their rights, by recommending that the 1991 Crown reservation be repealed and replaced. It is argued that the 1991 Crown reservation was an instrument used to address First Nation water needs that would provide them with a 1991 priority. In result, it is said that the First Nations will thereby be lower in priority than thousands of other licences for approximately 4 to 4.5 million acre feet granted between 1991 and 1999.

87 This submission with respect to the repeal of the *SSRB Water Allocation Regulation*, A.R. 307/91, was not commented upon by the chambers judge and, in any event, appears to be misconceived. The *1991 Regulation* reserved all water in the SSRB to the Crown under section 12 of the *Water Resources Act*, R.S.A. 1980, c. W-5. All licences issued thereafter come out of the water reserved under that *Regulation*.

88 Priorities under the *Water Resources Act* were assigned according to the date of the completed application for a licence. Accordingly, any priorities obtained under the *Regulation* were based upon application date, and not the date of the *1991 Regulation*. The new *Water Act* made no change affecting priorities under the *1991 Regulation*.

89 In short, the overall effect of Phase II that constituted the proposed government action is to enhance conser-

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vation and to improve aquatic environment. The adverse impacts alleged by the appellants are not attributable to the Plan. The focus of their concerns originates with the regime, as existing at the time that Phase II was put forward by Alberta Environment. At worst, the Plan did not change the *status quo* relative to those concerns, although these concerns were beyond the scope of the mandate of Phase II. In any event, it is difficult to construe the maintenance of the *status quo* with respect to the concerns of the appellants as constituting an adverse impact arising from the proposed government action.

90 Finally, with respect to adverse impact, it is useful to consider the object of the consultation. In *Haida*, the duty to consult was aimed at finding an "interim" solution (para. 44) in order "to preserve" the Haida interest pending resolution of the claim to aboriginal rights, including title (para. 77). It was clear, in that case, that if the forests were logged out pending determination of their claim, they would "find themselves deprived of forests that are vital to their economy and their culture", which could never be replaced (para. 7).

91 The situation in this case is very different. The rivers and water bodies are not likely to disappear pending the resolution of the claims of the appellant First Nations, even if the time frame for determination is many years. In fact, if the Plan is successful, the environment and aquatic health will be improved, and the exercise of the treaty hunting rights will be enhanced rather than impaired. This is to be contrasted with the situation in *Mikisew Cree*, where the court found that the impacts of the road in that case "were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question", (para. 55). Even then, it was held that the Crown's duty to consult lay "at the lower end of the spectrum" (para. 64).

92 At the heart of the concern of the appellant First Nations is that other water users will gain priorities to water and thereby deprive the appellants of the control of the management of the waters, which they claim to own, and to have priority for their uses. However, if the appellants should succeed in their litigation presently before the courts and they are found to possess aboriginal rights to water, and it is further found that the *Water Act* and all predecessor legislation enacted by the Province of Alberta since 1930 constitutes an unjustified infringement of their treaty and aboriginal rights, then the priorities under the existing regime will be in issue and required to be re-addressed. In other words, the government and third parties may bear the risks. In any event, the appellants are not facing a peril similar to that faced in *Haida*. The degree of irreparable harm, if any, to the First Nations, pending resolution of their claims, is an appropriate consideration in determining the scope and level of consultation that should take place for the purpose of preserving rights in the interim.

93 While the above analysis of potential adverse impacts of the SSRB Plan applies to both the Tsuu T'ina and the Samson Cree, it applies to the rights and claims of the Samson Cree with even greater force. The Red Deer River was identified as being hydrologically the healthiest of the SSRB Rivers. The Plan recommends that a cap be placed when allocations reach a certain level, and for further review at that time. In the meantime, the Plan recommends a water conservation objective that will leave more water in the river than the in-stream objective that existed before the Plan.

94 The Samson Cree seek to protect a claimed right to take and transport water from the Red Deer River, to meet their future needs where they reside. To the extent that the Samson Cree have hunting and fishing rights in the Red Deer River Sub-basin (and may ultimately be able to establish water and water management rights relative to the

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C
Canada Federal Statutes
Constitution Act, 1867
VI. — Distribution of Legislative Powers
Powers of the Parliament
s 91. Legislative Authority of Parliament of Canada

Federal English Statutes reflect amendments current to May 7, 2014

Federal English Regulations are current to Gazette Vol. 148:10 (May 7, 2014)

91. Legislative Authority of Parliament of Canada
It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.

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17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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C

Canada Federal Statutes

Constitution Act, 1867

VI. — Distribution of Legislative Powers

Exclusive Powers of Provincial Legislatures

s 92. Subjects of exclusive Provincial Legislation

Federal English Statutes reflect amendments current to May 7, 2014

Federal English Regulations are current to Gazette Vol. 148:10 (May 7, 2014)

92. Subjects of exclusive Provincial Legislation

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    (b) Lines of Steam Ships between the Province and any British or Foreign Country:
    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of

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Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

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R. v. Sutherland

R. v. SUTHERLAND, WILSON and ATTORNEY GENERAL OF CANADA

Supreme Court of Canada

Martland, Ritchie, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.

Heard: March 24, 1980
Judgment: June 27, 1980

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Counsel: *A.G. Bowering* and *M.J. Conklin*, for the Crown.

M.B. Nepon, H.I. Pollock, Q.C., and *B. Keyser*, for respondents.

J. Mabbutt and *B.A. MacFarlane*, for intervenant Attorney General of Canada.

Subject: Criminal; Public; Constitutional

Native Law --- Constitutional issues — Hunting and fishing — Hunting offences — Application of provincial statutes

Constitutional law — Indians and lands reserved for Indians — Provincial legislation deeming land to be occupied Crown land to which Indians have no right of access — Ultra vires.

Indians and Eskimos — Constitutional issues — Applicability of provincial legislation — Provincial legislation deeming land to be occupied Crown land to which Indians have no right of access — Ultra vires.

Indians and Eskimos — Constitutional issues — Civil rights — Provincial legislation granting limited hunting rights on certain land — Indians having "right of access" — Indians' right to hunt for food unlimited.

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1980 CarswellMan 112, [1980] 5 W.W.R. 456, [1980] 2 S.C.R. 451, 7 Man. R. (2d) 359, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, 35 N.R. 361, [1980] 3 C.N.L.R. 71, J.E. 80-671

Fish and game — Indian and Eskimo rights — Provincial legislation granting limited hunting rights on certain land — Indians having "right of access" — Indians' right to hunt for food unlimited.

The accused, treaty Indians, were charged under s. 19(1) of the Wildlife Act with unlawfully hunting deer. The offence took place in a wildlife management area, and while provincial regulations allowed hunting for some game in the area, deer hunting was, at the time, prohibited. The accused were acquitted by the Manitoba Court of Appeal on the ground that s. 49 of the Wildlife Act, which deemed wildlife management areas to be occupied Crown lands so as to deny Indians access for the purposes of exercising their rights to hunt for food on unoccupied Crown lands, was ultra vires. The Crown appealed.

Held:

The appeal was dismissed.

Section 49 was ultra vires as it was in relation to only one class of citizens, Indians, in object and purpose, and was in derogation of the right of the federal power to legislate for Indians. Further, the memorandum of agreement between the federal Parliament and Manitoba, approved by the Manitoba Natural Resources Act, which gave Indians the right to hunt for food on unoccupied Crown lands or lands to which they had a right of access, also provided that the agreement could be varied only by further agreement confirmed by both provincial and federal Parliaments.

The wildlife management area was found to be occupied Crown lands. However, as the provincial government had given citizens at large the right to hunt for certain game from time to time in the area, it was land to which Indians had access, and therefore para. 13 of the agreement gave Indians the unlimited right to hunt for food.

Cases considered:

C.P.R. v. Notre Dame de Bonsecours, [1899] A.C. 367*referred to*

Cardinal v. A.G. Alta., [1974] S.C.R. 695, [1973] 6 W.W.R. 205, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553 — *referred to*

Four B Mfg. Ltd. v. United Garment Wkrs. (1979), 102 D.L.R. (3d) 385, 30 N.R. 421 (Can.) — *referred to*

Frank v. R., [1978] 1 S.C.R. 95, [1977] 4 W.W.R. 294, 34 C.C.C. (2d) 209, 75 D.L.R. (3d) 481, 4 A.R. 271, 15 N.R. 487 — *considered*

Kruger v. R., [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, 14 N.R. 495 — *referred to*

Myran v. R., [1976] 2 S.C.R. 137, [1976] 1 W.W.R. 196, 23 C.C.C. (2d) 73, 58 D.L.R. (3d) 1, 5 N.R. 551 — *referred to*

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1980 CarswellMan 112, [1980] 5 W.W.R. 456, [1980] 2 S.C.R. 451, 7 Man. R. (2d) 359, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, 35 N.R. 361, [1980] 3 C.N.L.R. 71, J.E. 80-671

> and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

4 By para. 13 the province assures to the Indians the right to hunt game for food at all seasons of the year on (i) all unoccupied Crown lands, and (ii) any other lands to which the Indians may have a right of access. It is readily apparent that the effect of s. 49 of the Wildlife Act, if valid, is thus to proclaim conclusively great tracts of Crown land within the province to be: (i) occupied Crown lands, excluded thereby from the "unoccupied Crown lands" referred to in para. 13; and (ii) lands to which the Indians do not have a right of access, excluded thereby from the "other lands", referred to in para. 13.

5 I do not think there is any doubt that s. 49 of the Wildlife Act is beyond the constitutional competence of the province of Manitoba and is ultra vires in entirety. The provision cannot purport to be a law of general application. Section 49 has effect only against Indians and its sole purpose is to limit or obliterate a right Indians would otherwise enjoy. Indians are singled out for special treatment. While provincial law may apply to Indians, it can do so only "as long as such laws do not single out Indians nor purport to regulate them *qua* Indians": *Four B. Mfg. Ltd. v. United Garment Wkrs.* (1979), 102 D.L.R. (3d) 385, 30 N.R. 421 (Can.). This legislation is clearly "in relation to" one class of citizens in object and purpose and is, therefore, in constitutional derogation of the right of the federal power to legislate in respect of Indians and lands reserved for the Indians under s. 91(24) of the B.N.A. Act, 1867: see *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367; *Kruger v. R.*, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, 14 N.R. 495. As Hall J., speaking for a majority of the Manitoba Court of Appeal in the present case observed [p. 557]: "It is one thing to deem certain lands to be occupied Crown lands to which the public, including Indians, have no right of access; it is quite another thing to deem the same lands to be occupied Crown lands to which Indians have no right of access.

6 The purpose of any "deeming" clause is to impose a meaning; to cause something to be taken to be different from that which it might have been in the absence of the clause. In the present instance, the patent purpose of s. 49 is to cause certain provincial forests, wildlife management areas, and the like to be regarded as occupied whether or not, on the facts, they can properly be said to be occupied. The unoccupied is conclusively deemed to be occupied. Section 49 seeks to affect the status of Indians in respect of their constitutionally entrenched right to hunt for food. It is a blatant attempt to un-entrench the concluding words of para. 13 and, by taking lands out of the operation of para. 13, to derogate from rights granted to the Indians by the agreement.

7 There is a second, equally valid, reason for declaring s. 49 of the Wildlife Act to be ultra vires. The province cannot arrogate to itself the right to amend, unilaterally, para. 13 of the memorandum of agreement of 14th December 1929 by giving words a particular interpretation. Paragraph 24 of that agreement makes provision for amendment in these words:

> 24 The foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province.

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(Consolidated up to 130/2013)

ALBERTA REGULATION 115/93

Environmental Protection and Enhancement Act

CONSERVATION AND RECLAMATION REGULATION

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Definitions

1 In this Regulation, and, in the case of clause (t), for the purposes of Part 6 of the Act,

(a) "Act" means the *Environmental Protection and Enhancement Act*;

(b) "battery" means a system or arrangement of tanks or other surface equipment, together with associated infrastructure, for receiving or holding the effluent of one or more wells;

(b.1) "borrow excavation" means an excavation in the surface made solely for the purpose of removing borrow material for

(i) the construction of the sub-base for a specific roadway project, or

(ii) the construction of a dam, canal, dike, structure or erosion protection works associated with a provincial water management infrastructure project

and includes any associated infrastructure connected with the borrow excavation;

(c) "coal" in addition to its ordinary meaning, includes manufactured chars, cokes and any manufactured solid coal product that is used or useful as a reductant or energy source or for conversion into a reductant or energy source;

(d) "Director" means the person designated by Ministerial Order as Director for the purposes of this Regulation;

(e) "equivalent land capability" means that the ability of the land to support various land uses after conservation and reclamation is similar to the ability that existed prior to an

activity being conducted on the land, but that the individual land uses will not necessarily be identical;

(f) "exploration operation" means any investigation, work or act to determine the presence of coal or oil sands by test drilling, excavation or other means that results in surface disturbance or that may cause an adverse effect, but excludes any exploration operation that is the subject of a permit, licence or approval under the *Exploration Regulation* (AR 214/98);

(g) "Green Area" means that part of Alberta shown outlined and coloured green on the map annexed to

(i) a Ministerial Order dated May 7, 1985 and made pursuant to the *Public Lands Act*, as that Order is amended from time to time, or

(ii) any order made in substitution for that order, as amended from time to time;

(g.1) "industrial pipeline" means a pipeline other than a municipal pipeline;

(h) "information document" means any document issued by the Director that provides direction and guidance on matters respecting conservation and reclamation;

(h.1) "infrastructure" means any works, buildings, structures, facilities, equipment, apparatus, mechanism, instrument or machinery belonging to or used in connection with a mine, oil production site, well, battery, pipeline, quarry, pit, borrow excavation, peat operation, coal processing plant, plant or transmission line, and includes any storage site or facility, disposal site or facility, access road, haul road, railway or telecommunication line;

(i) "inspector" means a person who is an inspector by reason of the operation of section 25(3)(a) or (c) of the Act;

(j) "land" means terrestrial, semi-aquatic and aquatic landscapes when the term is used in the definitions of "land capability" and "equivalent land capability";

(k) "land capability" means the ability of land to support a given land use, based on an evaluation of the physical, chemical and biological characteristics of the land, including topography, drainage, hydrology, soils and vegetation;

(k.1) "municipal pipeline" means a pipeline that forms part of

Division 1
Conservation and Reclamation

Objective

2 The objective of conservation and reclamation of specified land is to return the specified land to an equivalent land capability.

AR 115/93 s2;167/93

Standards, criteria and guidelines

3(1) The Director may establish standards, criteria and guidelines for conservation or reclamation of specified land and may develop and release information documents respecting those standards, criteria and guidelines.

(2) An operator must

(a) conserve specified land, and

(b) reclaim specified land

in accordance with the applicable standards, criteria and guidelines that are established by the Director.

AR 115/93 s3;167/96;247/2003

Codes of practice

3.1(1) The following codes of practice are adopted pursuant to section 38 of the Act and form part of this Regulation:

(a) the *Code of Practice for Exploration Operations*, published by the Department, as amended or replaced from time to time;

(b) the *Code of Practice for Pits*, published by the Department, as amended or replaced from time to time.

(2) A person who, pursuant to a registration or notice, as applicable, carries on an activity referred to in Column A of the Schedule shall comply with the corresponding Code of Practice in Column B of the Schedule in the carrying on of that activity.

(3) Notwithstanding subsection (2), where the Director issues an approval in respect of the activity pursuant to section 6(3) of the *Activities Designation Regulation* (AR 276/2003), the approval holder

(a) is not required to comply with the Code of Practice in the Schedule, and

(Consolidated up to 62/2013)

ALBERTA REGULATION 187/2011

Public Lands Act

PUBLIC LANDS ADMINISTRATION REGULATION

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the director may order the holder to carry out the work specified in the order in the manner and within the time specified in the order.

(3) Where the holder fails to comply with an order under subsection (2) to the director's satisfaction, the Department may

(a) do the work or cause it to be done, and

(b) order the forfeiture of all or part of the security deposit, if any, paid by the holder, in an amount equal to the reasonable costs of doing the work, as determined by the director.

(4) If there is no security deposit or if the amount of the security deposit is insufficient to cover the costs, the Department may recover the costs or the excess amount, as the case may be, from the holder as a debt owing to the Crown.

Reclamation of land

23(1) The director may, on application by the holder of a disposition or on the director's own initiative, issue an approval to a person for the restoration and reclamation of the subject land.

(2) An approval issued under this section may

(a) require or permit the holder to restore the land to

(i) an equivalent land capability, or

(ii) a condition that complies with the Act, this Regulation and any applicable ALSA regional plan,

(b) waive the requirements of section 21(1)(f) or (2)(e),

(c) waive any requirements of the disposition relating to reclamation of the subject land, or

(d) require or permit the holder to do anything that the director reasonably believes is necessary for the proper reclamation of the lands.

(3) A person to whom an approval is issued under this section is bound by the terms and conditions of the disposition in respect of which the approval is issued, whether or not that person is the holder of the disposition.

(4) If the holder contravenes section 21(1)(f) or (2)(e) or causes or allows a contravention of an approval issued under this section, the director may issue an order directing the reclamation of the land.

(5) This section applies in addition to any applicable requirements respecting conservation and reclamation under the *Environmental Protection and Enhancement Act* and in addition to the requirements of any applicable ALSA regional plan.

AR 187/2011 s23;62/2013

Indemnification

24 The holder of a disposition must keep the Minister indemnified against all actions, claims and demands brought or made against the Minister by reason of anything done by the holder in the exercising a right, power or privilege or carrying out a duty under the disposition.

Waiver of condition

25 A waiver by a duly authorized official of the Department of the strict performance or observance by the holder or a person of a condition to which a disposition is subject is not binding on the Crown unless it is in writing, and the waiver does not abrogate any condition or operate to waive any subsequent breach of the same or any other condition.

Retrospective disposition

26 If a disposition is issued to replace an authorization granted under section 20 of the Act in relation to the same land, the disposition must be given the same effective date as was given to the authorization being replaced.

Fences

27 The holder of a disposition must, at the holder's sole expense, comply with any written direction of the director respecting the construction, maintenance and repair of any fences, gates and cattle guards bounding or within the subject land.

Monthly billing

28(1) In this section, "charge" means

(a) any rent, fee or penalty payable under the Act;

(b) interest on late payment of all or a part of an amount referred to in clause (a) that is payable under section 29.

(2) Despite any regulation under the Act and despite any term or condition of a disposition or an agreement under the Act, but subject to subsection (3), where the Minister issues monthly invoices to a person responsible for paying a charge, the person must pay the charge

Division 1
Public Use of Vacant Public Land

General licence respecting recreational purposes

32(1) Subject to this Part, any person may enter on and occupy vacant public land for a recreational purpose.

(2) Subject to section 34, a person wishing to enter on and occupy vacant public land, other than a trail, for a recreational purpose must apply for and obtain an access permit before entering on the land if

(a) the person intends to undertake a use or activity on the vacant public land that could reasonably be expected to occur for a period longer than 14 days,

(b) a closure imposed by a competent authority under any law in force in Alberta is in effect for all or part of the vacant public land,

(c) the entry on and occupation of the vacant public land has been prohibited under Division 3 of this Part,

(d) the use or activity is likely to cause unreasonable loss or damage to the vacant public land, or

(e) the use or activity is likely to contravene a disturbance standard applicable to the vacant public land.

General licence respecting trails

33(1) Subject to this Part, any person may enter on and occupy a trail on vacant public land for a recreational or commercial purpose.

(2) Subject to section 34, a person wishing to enter on and occupy a trail on vacant public land must apply for and obtain an access permit before entering on the land if

(a) the person intends to undertake a use or activity on the vacant public land that could reasonably be expected to occur for a period longer than 14 days,

(b) a closure imposed by a competent authority under any law in force in Alberta is in effect for vacant public land comprising all or part of the trail or adjoining the trail,

(c) the entry on and occupation of the vacant public land has been prohibited under Division 3 of this Part,

Professional outfitters

42 An outfitter-guide as defined in the *Wildlife Regulation* (AR 143/97) may, while acting in that capacity, enter on vacant public land without an access permit.

Division 3
Trespass to Vacant Public Land

Prohibition

43 No person, other than an employee, agent or contractor of the Government of Alberta who is carrying out the person's duties, shall enter on or occupy vacant public land that is a bed or shore of a permanent and naturally occurring body of water or a naturally occurring river, stream, watercourse or lake except

(a) where the entry and occupation is for a recreational purpose that

(i) involves boating,

(ii) involves travel on frozen ground or on ice capable of holding the weight of the conveyance without making a depression on the ground or ice or breaking the ice, or

(iii) does not involve the use of a wheeled or tracked conveyance,

(b) in accordance with a disposition issued or a consent given to the person under the Act, or

(c) where the person has a lawful right to be on the land or the entry or occupation is expressly permitted in an applicable disturbance standard or in a disposition issued to the person.

Prohibition – secured area

44 No person other than an employee, agent or contractor of the Government of Alberta who is carrying out the person's duties shall enter on or occupy vacant public land

(a) that is surrounded by, or in the circumstances apparently is intended to be surrounded by, a fence, a natural boundary or a cordon referred to in section 48 or any combination of these, or

(b) that is enclosed in a manner that indicates the Department's intention to keep persons off the vacant

Restricted use of conveyances

185(1) Subject to subsections (2) and (3), and except as expressly authorized for a particular public land use zone in Schedule 4, no person shall, within any public land use zone, operate

(a) an on-highway vehicle, except on a highway, or

(b) an off-highway vehicle or snow vehicle.

(2) The operation of a motor vehicle on land within any public land use zone is permitted

(a) to transport an employee of the Government in the course of the employee's work,

(b) where the vehicle is being used to conduct or transport any person or equipment to be employed or used in work or activity within the public land use zone that has been authorized by the director,

(c) to remove a sick, injured or deceased person from the public land use zone, and

(d) in connection with registered trapping at places within the limits of a registered trapping area within the public land use zone where the use of the vehicle is authorized by an officer.

(3) The operation of a motor vehicle within a public land use zone is permitted only in areas or on trails that have been designated for that purpose by signs or notices posted by an officer in the zone pursuant to this Regulation.

(4) No person shall

(a) take an off-highway vehicle or motorcycle described in subsection (3),

(b) camp overnight, or

(c) permit the person's horse or a horse under the person's control to graze or be tethered

within 100 meters of a lakeshore in any public land use zone except where authorized by a notice posted in the zone or without first obtaining an access permit for doing so.

(5) No person shall land a helicopter on a lake, or within 200 meters of the shore of a lake, in a public land use zone without first obtaining an access permit for doing so.

(6) No person shall operate a motorized boat within a public land use zone except

(a) in areas designated for that purpose by signs or notices posted in the area, or

(b) in accordance with an access permit.

(7) No person shall

(a) camp, or

(b) start or maintain an open fire

within one kilometre of a public land recreation area or in a provincial recreation area located within the public land use zone.

Instructions of officer

186(1) An officer may post written instructions in a public land use zone regarding the operation of conveyances and the use of camping accommodation units within the zone.

(2) A person operating a conveyance or camping accommodation unit within the zone shall comply with any written instructions posted by or at the request of an officer under subsection (1).

(3) If an officer posts written instructions in a public land use zone, the officer must as soon as practicable make publicly available through the Department the written instructions, including the name of the public land use zone and the specific area of public land in the zone to which the written instructions relate.

Open fires prohibited in public land recreation areas

187(1) Subject to subsection (2), no person shall start or maintain an open fire in a public land recreation area.

(2) Fires started, controlled and extinguished in accordance with the *Forest and Prairie Protection Act* and fires confined to facilities provided for the containing of fire are permitted within public land recreation areas.

Use of firearms in public land recreation areas and trails

188(1) No person, except an officer engaged in the control of wildlife or a person authorized by an officer to assist in that activity, shall set a trap, use an explosive or discharge a firearm within a public land recreation area or on a public land recreation trail.

2006 CarswellBC 3120, 2006 SCC 59, J.E. 2007-52, [2007] 3 W.W.R. 34, [2007] 1 C.N.L.R. 303, 215 C.C.C. (3d) 289, 274 D.L.R. (4th) 193, 62 B.C.L.R. (4th) 1, 355 N.R. 86, [2007] B.C.W.L.D. 531, [2007] B.C.W.L.D. 638, 234 B.C.A.C. 1, 387 W.A.C. 1, [2006] 2 S.C.R. 915

2006 CarswellBC 3120, 2006 SCC 59, J.E. 2007-52, [2007] 3 W.W.R. 34, [2007] 1 C.N.L.R. 303, 215 C.C.C. (3d) 289, 274 D.L.R. (4th) 193, 62 B.C.L.R. (4th) 1, 355 N.R. 86, [2007] B.C.W.L.D. 531, [2007] B.C.W.L.D. 638, 234 B.C.A.C. 1, 387 W.A.C. 1, [2006] 2 S.C.R. 915

R. v. Morris

Ivan Morris and Carl Olsen, Appellants and Her Majesty the Queen, Respondent and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General for Saskatchewan, Attorney General of Alberta, Eagle Village First Nation (Migizy Odenaw), Red Rock Indian Band, Conseil de la Nation huronne-wendat, Te'mexw Treaty Association, Chief Allan Claxton and Chief Roger William, Interveners

Supreme Court of Canada

McLachlin C.J.C., Bastarache, Binnie, Deschamps, Fish, Abella, Charron JJ.

Judgment: December 21, 2006[FN*]
Docket: 30328

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Proceedings: reversing *R. v. Morris* (2004), 2004 CarswellBC 433, 2004 BCCA 121, 25 B.C.L.R. (4th) 45, [2004] 2 C.N.L.R. 219, 237 D.L.R. (4th) 693, [2004] 5 W.W.R. 403, 194 B.C.A.C. 107, 317 W.A.C. 107 (B.C. C.A.); affirmed *R. v. Morris* (2002), 2002 CarswellBC 1334, 2002 BCSC 780, [2002] 4 C.N.L.R. 222 (B.C. S.C.); affirmed *R. v. Morris* (1999), 1999 CarswellBC 3317 (B.C. Prov. Ct.)

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2006 CarswellBC 3120, 2006 SCC 59, J.E. 2007-52, [2007] 3 W.W.R. 34, [2007] 1 C.N.L.R. 303, 215 C.C.C. (3d) 289, 274 D.L.R. (4th) 193, 62 B.C.L.R. (4th) 1, 355 N.R. 86, [2007] B.C.W.L.D. 531, [2007] B.C.W.L.D. 638, 234 B.C.A.C. 1, 387 W.A.C. 1, [2006] 2 S.C.R. 915

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Jack Woodward, David M. Robbins (written) for Intervener, Chief Allan Claxton

David M. Rosenberg, Patricia Hutchings, Jay Nelson (written) for Intervener, Chief Roger William

Subject: Criminal; Public; Constitutional; Natural Resources

Aboriginal law --- Constitutional issues — Aboriginal rights to natural resources — Hunting offences — Treaty rights

Two accused were caught hunting at night by provincial conservation officers who had set up trap for offenders — Accused were Indians within meaning of Indian Act and had ancestral ties to Tsartlip Indian Band, who were signatories to treaty signed in 1852 which provided that beneficiaries of treaty had right to hunt over unoccupied lands, and carry on fisheries as they had before — Accused were found guilty at trial — Appeal to summary conviction appeal court affirmed trial judgment, and appeal to Court of Appeal was dismissed — Accused appealed — Appeal allowed — Changes in hunting methods did not diminish rights conferred upon accused by treaty — Common intention of treaty which best reconciled interests of parties involved right to hunt as Tsartlip always had, within ambit of treaty — Common intention could not have been to grant right to hunt dangerously, since no treaty could confer right to endanger human lives — Safety limitation should not have been so broad as to exclude all night hunting — Provincial laws whose "pith and substance" related to Parliament's exclusive power to make laws in relation to "Indians, and Lands reserved for the Indians" were ultra vires and invalid, pursuant to s. 88 of Indian Act — Insignificant interference with treaty right did not engage protection afforded by s. 88 of Indian Act, and prima facie infringement required "meaningful diminution" of treaty right — Impugned provisions of Wildlife Act were overbroad, were inconsistent with common intention of parties to treaty, and eliminated method chosen by Tsartlip of exercising treaty right — Categorical prohibition constituted more than insignificant interference with treaty right — Convictions set aside and acquittals entered.

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Natural resources --- Fish and wildlife — Offences — Illegal methods of fishing and hunting — Hunting with lights at night — Intention

Two accused were caught hunting at night by provincial conservation officers who had set up trap for offenders — Accused were Indians within meaning of Indian Act and had ancestral ties to Tsartlip Indian Band, who were signatories to treaty signed in 1852 which provided that beneficiaries of treaty had right to hunt over unoccupied lands, and carry on fisheries as they had before — Accused were found guilty at trial — Appeal to summary conviction appeal court affirmed trial judgment, and appeal to Court of Appeal was dismissed — Accused appealed — Appeal allowed — Changes in hunting methods did not diminish rights conferred upon accused by treaty — Common intention of treaty which best reconciled interests of parties involved right to hunt as Tsartlip always had, within ambit of treaty — Common intention could not have been to grant right to hunt dangerously, since no treaty could confer right to endanger human lives — Safety limitation should not have been so broad as to exclude all night hunting — Provincial laws whose "pith and substance" related to Parliament's exclusive power to make laws in relation to "Indians, and Lands reserved for the Indians" were ultra vires and invalid, pursuant to s. 88 of Indian Act — Insignificant interference with treaty right did not engage protection afforded by s. 88 of Indian Act, and prima facie infringement required "meaningful diminution" of treaty right — Impugned provisions of Wildlife Act were overbroad, were inconsistent with common intention of parties to treaty, and eliminated method chosen by Tsartlip of exercising treaty right — Categorical prohibition constituted more than insignificant interference with treaty right — Convictions set aside and acquittals entered.

Droit autochtone --- Questions constitutionnelles — Droits des autochtones aux ressources naturelles — Infractions de chasse — Droits issus de traités

Deux accusés qui chassaient la nuit ont été arrêtés par des agents provinciaux de la conservation après avoir déclenché un piège installé par les agents pour attraper les braconniers — Accusés étaient des Indiens au sens de la Loi sur les Indiens et ils étaient membres de la bande indienne Tsartlip, qui était signataire d'un traité de 1852 octroyant aux signataires le droit de chasser sur les terres inoccupées et de pêcher comme autrefois — Accusés ont été déclarés coupables au procès — En appel, la cour d'appel des poursuites sommaires a confirmé le jugement de première instance; le pourvoi à la Cour d'appel a été rejeté — Accusés ont interjeté appel — Pourvoi accueilli — Changements apportés aux méthodes de chasse ne diminuaient pas les droits conférés aux accusés par le traité — Intention commune qui conciliait le mieux les intérêts des parties était celle qui faisait entrer dans le champ d'application du traité le droit de chasse que les Tsartlip avaient toujours eu — Intention commune ne pouvait pas être d'accorder le droit de chasser dangereusement, puisqu'aucun traité ne confère à ses bénéficiaires le droit de mettre en danger des vies humaines — Limitation en matière de sécurité ne devrait pas être interprétée de façon tellement large au point d'exclure totalement la chasse nocturne — Lois provinciales qui, de par leur caractère véritable, relèvent du chef de compétence exclusif du Parlement fédéral de légiférer sur les questions concernant « les Indiens et les terres réservées aux Indiens » constituaient un excès de pouvoir et étaient invalides, conformément à l'art. 88 de la Loi sur les Indiens — Ingérence négligeable dans l'exercice d'un droit issu d'un traité ne déclenchait pas la protection prévue par l'art. 88 de la Loi sur les Indiens; une atteinte prima facie implique une « diminution appréciable » d'un droit issu d'un traité — Dispositions attaquées de la Wildlife Act avaient une portée trop large, qui était incompatible avec l'intention commune des parties au traité, et elles écartaient complètement le moyen choisi par les Tsartlip pour exercer leur droit issu d'un traité —

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2006 CarswellBC 3120, 2006 SCC 59, J.E. 2007-52, [2007] 3 W.W.R. 34, [2007] 1 C.N.L.R. 303, 215 C.C.C. (3d) 289, 274 D.L.R. (4th) 193, 62 B.C.L.R. (4th) 1, 355 N.R. 86, [2007] B.C.W.L.D. 531, [2007] B.C.W.L.D. 638, 234 B.C.A.C. 1, 387 W.A.C. 1, [2006] 2 S.C.R. 915

Interdiction absolue constituait plus qu'une ingérence négligeable dans l'exercice du droit issu d'un traité — Déclarations de culpabilité étaient annulées et des acquittements y étaient substitués.

Ressources naturelles --- Poissons et faune — Infractions — Méthodes de pêche et de chasse illégales — Chasse nocturne avec une source lumineuse — Intention

Deux accusés qui chassaient la nuit ont été arrêtés par des agents provinciaux de la conservation après avoir déclenché un piège installé par les agents pour attraper les braconniers — Accusés étaient des Indiens au sens de la Loi sur les Indiens et ils étaient membres de la bande indienne Tsartlip, qui était signataire d'un traité de 1852 octroyant aux signataires le droit de chasser sur les terres inoccupées et de pêcher comme autrefois — Accusés ont été déclarés coupables au procès — En appel, la cour d'appel des poursuites sommaires a confirmé le jugement de première instance; le pourvoi à la Cour d'appel a été rejeté — Accusés ont interjeté appel — Pourvoi accueilli — Changements apportés aux méthodes de chasse ne diminuaient pas les droits conférés aux accusés par le traité — Intention commune qui conciliait le mieux les intérêts des parties était celle qui faisait entrer dans le champ d'application du traité le droit de chasse que les Tsartlip avaient toujours eu — Intention commune ne pouvait pas être d'accorder le droit de chasser dangereusement, puisqu'aucun traité ne confère à ses bénéficiaires le droit de mettre en danger des vies humaines — Limitation en matière de sécurité ne devrait pas être interprétée de façon tellement large au point d'exclure totalement la chasse nocturne — Lois provinciales qui, de par leur caractère véritable, relèvent du chef de compétence exclusif du Parlement fédéral de légiférer sur les questions concernant « les Indiens et les terres réservées aux Indiens » constituaient un excès de pouvoir et étaient invalides, conformément à l'art. 88 de la Loi sur les Indiens — Ingérence négligeable dans l'exercice d'un droit issu d'un traité ne déclenchait pas la protection prévue par l'art. 88 de la Loi sur les Indiens; une atteinte prima facie implique une « diminution appréciable » d'un droit issu d'un traité — Dispositions attaquées de la Wildlife Act avaient une portée trop large, qui était incompatible avec l'intention commune des parties au traité, et elles écartaient complètement le moyen choisi par les Tsartlip pour exercer leur droit issu d'un traité — Interdiction absolue constituait plus qu'une ingérence négligeable dans l'exercice du droit issu d'un traité — Déclarations de culpabilité étaient annulées et des acquittements y étaient substitués.

On November 28, 1996, provincial conservation officers acting under the Wildlife Act rigged a trap consisting of a mechanical deer with reflective eyeballs a short way off a road, to catch hunters hunting at night. The accused drove past the mechanical deer, and stopped. The co-accused fired three shots out of the car window at the decoy. The co-accused then passed the rifle to the accused, who got out of the car and fired three shots at the decoy. The conservation officers then arrested the accused and co-accused for offences under the Wildlife Act.

The accused and co-accused were Indians within the meaning of the Indian Act and had ancestral ties to the Tsartlip Indian Band located near Saanichton, British Columbia. The ancestors of the Tsartlip Band were signatories to the North Saanich Treaty, signed in or about the year 1852. The treaty provided that beneficiaries of the treaty were "at liberty to hunt over the unoccupied lands, and carry on our fisheries as formerly".

The trial judge found both accused guilty of hunting deer at night, contrary to the Wildlife Act. The accused appealed to the summary conviction appeal court, which affirmed the trial judgment. The accused's appeal to the Court of Appeal was dismissed on the basis that the provisions of the Wildlife Act did not infringe on the core of Indianness. The accused appealed.

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Held: The appeal was allowed.

Per Deschamps and Abella JJ. (Binnie and Charron JJ. concurring): The changes in hunting methods did not diminish the rights conferred upon the accused by the treaty. The rights of the Tsartlip to hunt at night with illuminating devices had, of necessity, evolved from its pre-treaty tools of sticks with pitch and canoes to its current implements of spotlights and trucks. The common intention of the treaty which best reconciled the interests of the parties involved a right to hunt as the Tsartlip always had within the ambit of the treaty, including the right to hunt at night with illumination. The common intention could not have been to grant a right to hunt dangerously, since no treaty can confer a right to put human lives in danger. The safety limitation should not be drawn so broadly as to exclude all night hunting, as this was a long-accepted method of hunting for food. Protected methods of hunting could not be wholly prohibited simply because they could be dangerous in some circumstances, as all hunting, regardless of time of day, had the potential to be dangerous.

Parliament has exclusive power to make laws in relation to "Indians, and Lands reserved for the Indians", and provincial laws whose "pith and substance" relates to this head of power are ultra vires and invalid, pursuant to s. 88 of the Indian Act. Provincial laws of general application that affect Indians only incidentally and are enacted under a provincial head of power are intra vires and valid. Insignificant interference with a treaty right does not engage the protection afforded by s. 88 of the Indian Act, and a prima facie infringement requires a "meaningful diminution" of a treaty right.

The impugned provisions of the Wildlife Act were overbroad, were inconsistent with the common intention of the parties to the treaties, and eliminated a method chosen by the Tsartlip of exercising their treaty right. It would be possible to identify uninhabited areas where hunting at night would not jeopardize safety. The facts demonstrated that something less than an absolute prohibition on night hunting could address the concerns over safety. The categorical prohibition constituted more than an insignificant interference with a treaty right. The convictions were set aside and acquittals entered.

Per McLachlin C.J.C. and Fish J. (Bastarache J. concurring) (dissenting): The relevant provisions of the Wildlife Act were within the legislative authority of the provinces, and did not conflict with federal legislation; therefore the doctrine of paramountcy had no application. The right to hunt under the treaty was subject to an internal limit, as it did not include the right to hunt in an inherently dangerous manner. Since the regulation of dangerous hunting fell outside the treaty, no treaty right was engaged, and as there was no right asserted and the law did not otherwise go to Indianness, the law applied ex proprio vigore.

Since the signing of the treaty in 1852, the dangers of hunting at night have been amplified with the development of modern weapons, and only the logical evolution of a pre-treaty practice can attract treaty protection. Because hunting in a dangerous manner fell outside the scope of the protected treaty right, the province was able to regulate in this area. The Wildlife Act prohibition on night hunting with a firearm was a valid provincial law applicable to the accused without recourse to s. 88 of the Indian Act.

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Le 28 novembre 1996, des agents provinciaux de la conservation, qui agissaient en vertu de la Wildlife Act, ont installé non loin de la route un piège constitué d'un cerf mécanique avec des globes oculaires réfléchissant, et ce, dans le but d'attraper les chasseurs nocturnes. Les accusés sont passés à côté du cerf en auto et se sont arrêtés. L'un d'entre eux a tiré, par la fenêtre de l'auto, trois coups de feu en direction du leurre. Il a ensuite donné le fusil à l'autre accusé, qui est sorti de l'auto et a tiré trois coups de feu en direction du leurre. Les agents de la conservation ont alors arrêté les accusés pour des infractions en vertu de la Wildlife Act.

Les accusés étaient des Indiens au sens de la Loi sur les Indiens et ils étaient membres de la bande indienne Tsartlip située non loin de Saanichton en Colombie-Britannique. Les ancêtres de la bande Tsartlip étaient signataires du Traité de Saanich nord, qui avait été signé dans les alentours de 1852. Le traité prévoyait que ses bénéficiaires avaient « toute liberté pour chasser sur les terres inoccupées et pêcher comme autrefois ».

Le juge du procès a déclaré les deux accusés coupables d'avoir chassé le cerf la nuit en violation de la Wildlife Act. Les accusés ont interjeté appel à la cour d'appel des poursuites sommaires, laquelle a confirmé le jugement de première instance. Le pourvoi des accusés à la Cour d'appel a été rejeté au motif que les dispositions de la Wildlife Act ne portaient pas atteinte à l'essentiel de l'indianité. Les accusés ont interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Deschamps et Abella, JJ. (Binnie et Charron, JJ., souscrivant à leur opinion): Les changements apportés aux méthodes de chasse ne diminuaient pas les droits conférés aux accusés par le traité. Les droits des Tsartlip de chasser la nuit à l'aide d'une source lumineuse a évolué; ils sont passés des bâtons enduits de résine et des canots aux projecteurs et aux camions. L'intention commune du traité qui conciliait le mieux les intérêts des parties était celle qui faisait entrer dans le champ d'application du traité le droit de chasse que les Tsartlip avaient toujours eu, dont le droit de chasser la nuit avec une source lumineuse. L'intention commune ne pouvait pas être d'accorder le droit de chasser dangereusement, puisqu'aucun traité ne confère à ses bénéficiaires le droit de mettre en danger des vies humaines. La limitation en matière de sécurité ne devrait pas être interprétée de façon tellement large au point d'exclure totalement la chasse nocturne, une méthode de chasse de subsistance reconnue depuis longtemps. Les méthodes de chasse protégées ne pouvaient être totalement interdites au seul motif qu'elles pouvaient être dangereuses dans certaines circonstances, étant donné que n'importe quel type de chasse pouvait être dangereux peu importe le moment de la journée.

Le Parlement a le pouvoir exclusif de légiférer sur les questions concernant « les Indiens et les terres réservées aux Indiens », et les lois provinciales qui, de par leur caractère véritable, relèvent de ce chef de compétence constituent un excès de pouvoir et sont invalides, conformément à l'art. 88 de la Loi sur les Indiens. Les lois provinciales d'application générale adoptées selon un chef de compétence provincial et dont les effets à l'égard des Indiens ne sont qu'accessoires sont dans les limites de ce pouvoir et sont valides. Une ingérence négligeable dans l'exercice d'un droit issu d'un traité ne fait pas intervenir la protection accordée par l'art. 88 de la Loi sur les Indiens, et une atteinte prima facie implique une « diminution appréciable » d'un droit issu d'un traité.

Les dispositions attaquées de la Wildlife Act avaient une portée trop large, qui était incompatible avec l'intention commune des parties aux traités, et elles écartaient complètement le moyen choisi par les Tsartlip pour exercer leur droit issu d'un traité. Il serait possible de recenser les secteurs inhabités où la chasse nocture ne compromettrait pas la

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sécurité. Les faits établissaient que l'on pouvait répondre aux préoccupations en matière de sécurité sans aller jusqu'à l'interdiction absolue. L'interdiction absolue constituait plus qu'une ingérence négligeable dans l'exercice d'un droit issu d'un traité. Les déclarations de culpabilité étaient annulées et des acquittements leur étaient substitués.

McLachlin, J.C.C., et Fish, J. (Bastarache, J., souscrivant à leur opinion) (dissidents): Les dispositions pertinentes de la Wildlife Act relevaient du pouvoir législatif des provinces et n'étaient pas incompatibles avec la loi fédérale. La règle de la prépondérance n'était donc pas applicable. Le droit de chasser en vertu du traité comportait une limite: il n'incluait pas le droit de chasser d'une façon dangereuse en soi. Étant donné que la règlementation des pratiques de chasse dangereuses ne relevait pas du traité, aucun droit issu d'un traité n'était en jeu. Comme aucun droit ancestral n'était invoqué et que la mesure législative ne touchait pas autrement à l'indianité, la loi s'appliquait d'elle-même.

Depuis la signature du traité en 1852, les dangers de la chasse nocturne ont été amplifiés par le développement d'armes modernes, et seule l'évolution logique d'une pratique antérieure au traité peut bénéficier de la protection du traité. Étant donné que la chasse dangereuse ne relevait pas d'un droit protégé par traité, la province était libre de réglementer ce domaine. L'interdiction de chasser la nuit avec une arme à feu prévue à la Wildlife Act constituait une mesure législative provinciale valide qui s'appliquait aux accusés, sans que le recours à l'art. 88 de la Loi sur les Indiens ne soit possible.

Cases considered by *Deschamps J.* and *Abella J.*:

Four B Manufacturing Ltd. v. U.G.W. (1979), [1980] 1 S.C.R. 1031, [1979] 4 C.N.L.R. 21, 80 C.L.L.C. 14,006, 102 D.L.R. (3d) 385, 30 N.R. 421, 1979 CarswellOnt 715F, 1979 CarswellOnt 715 (S.C.C.) — referred to

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture) (2002), [2002] 2 C.N.L.R. 143, (sub nom. *Kitkatla Indian Band v. British Columbia (Minister of Small Business, Tourism & Culture)*) 286 N.R. 131, 1 B.C.L.R. (4th) 1, 210 D.L.R. (4th) 577, [2002] 6 W.W.R. 1, 2002 CarswellBC 617, 2002 CarswellBC 618, 2002 SCC 31, 165 B.C.A.C. 1, 270 W.A.C. 1, [2002] 2 S.C.R. 146 (S.C.C.) — referred to

Marshall v. Canada (1999), (sub nom. *R. v. Marshall)* [1999] 4 C.N.L.R. 161, (sub nom. *R. v. Marshall)* 246 N.R. 83, (sub nom. *R. v. Marshall)* 138 C.C.C. (3d) 97, (sub nom. *R. v. Marshall)* 178 N.S.R. (2d) 201, (sub nom. *R. v. Marshall)* 549 A.P.R. 201, (sub nom. *R. v. Marshall)* [1999] 3 S.C.R. 456, 1999 CarswellNS 262, 1999 CarswellNS 282, (sub nom. *R. v. Marshall)* 177 D.L.R. (4th) 513 (S.C.C.) — considered

Marshall v. Canada (1999), (sub nom. *R. v. Marshall)* 179 D.L.R. (4th) 193, 1999 CarswellNS 349, 1999 CarswellNS 350, (sub nom. *R. v. Marshall)* [1999] 4 C.N.L.R. 301, (sub nom. *R. v. Marshall)* 139 C.C.C. (3d) 391, (sub nom. *R. v. Marshall)* 247 N.R. 306, (sub nom. *R. v. Marshall)* [1999] 3 S.C.R. 533, (sub nom. *R. v. Marshall)* 179 N.S.R. (2d) 1, (sub nom. *R. v. Marshall)* 553 A.P.R. 1 (S.C.C.) — considered

R. v. Badger (1996), [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, 1996 CarswellAlta 365F, 1996 CarswellAlta 587 (S.C.C.) — followed

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29 As McLachlin J. stated in *Marshall No. 1*, at para. 78, these words "must be given the sense which they would naturally have held for the parties at the time". She also said that "[t]reaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories". Even on a literal construction, the language of the Treaty supports the view that the right to hunt "as formerly" means the right to hunt according to the methods used by the Tsartlip at the time of and before the Treaty. This would obviously include those methods the Tsartlip have used in hunting "from time immemorial".

30 From 1852 to the present, the tools used by the Tsartlip in hunting at night have evolved. From sticks with pitch to spotlights and from canoes to trucks, the tools and methods employed in night hunting have changed over time. These changes do not diminish the rights conferred by the Treaty. The right of the Tsartlip to hunt at night with illuminating devices has of necessity evolved from its pre-treaty tools to its current implements. As McLachlin C.J. observed in *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 (S.C.C.), at para. 25:

> ... treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made .... Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology.

31 This approach has led the Court in other cases to acknowledge, for example, that hunting with a rifle and ammunition is the current form of an evolving right whose origins were hunting with a bow and arrow (*R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.)), and that a treaty right to erect a log cabin for hunting purposes flows from the former use of mossy lean-to shelters (*R. v. Sundown*, [1999] 1 S.C.R. 393 (S.C.C.)).

32 The evidence in this case makes clear that the use of guns, spotlights, and motor vehicles reflects the current state of the evolution of the Tsartlip's historic hunting practices. Morris testified at trial that the Tsartlip used to hunt at night with

> what they called torch lamps, and I heard this story told to me by our older hunters, that they used sticks with pitch on the end of them to do the same kind of hunt [but that the Tsartlip] had moved into these new tools of the spotlight and of the gun, where it's made it easier for us to hunt. And then we use our vehicles instead of walking or paddling a canoe.

33 This evidence reveals that the weapons, means of transportation and illuminating devices used in hunting have become more modern. But changes in method do not change the essential character of the practice, namely, night hunting with illumination. What was preserved by the Treaty and brought within its protection was hunting at night with illuminating devices, not hunting at night with a particular *kind* of weapon and source of illumination. This conclusion is dictated by the common intentions of the parties to the Treaty, as distilled from the context in which the Treaty was entered into. The purpose of the hunting clause was to preserve the traditional Tsartlip way of life, including methods of gathering food. It was, in addition, designed to benefit the settlers, whose interests at the time lay

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2007 CarswellAlta 850, 2007 ABCA 206, [2007] A.W.L.D. 3264, [2007] A.W.L.D. 3317, [2007] A.W.L.D. 3265, [2007] A.W.L.D. 3318, [2007] A.W.L.D. 3263, [2007] A.W.L.D. 3267, [2007] A.W.L.D. 3266, [2007] A.W.L.D. 3316, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203, 222 C.C.C. (3d) 129, [2007] 4 C.N.L.R. 281

2007 CarswellAlta 850, 2007 ABCA 206, [2007] A.W.L.D. 3264, [2007] A.W.L.D. 3317, [2007] A.W.L.D. 3265, [2007] A.W.L.D. 3318, [2007] A.W.L.D. 3263, [2007] A.W.L.D. 3267, [2007] A.W.L.D. 3266, [2007] A.W.L.D. 3316, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203, 222 C.C.C. (3d) 129, [2007] 4 C.N.L.R. 281

R. v. Lefthand

Her Majesty the Queen (Appellant) and Ezra Elliott Lefthand (Respondent)

Her Majesty the Queen (Respondent) and Edward Joseph Eagle Child (Appellant)

Alberta Court of Appeal

C. Conrad, J. Watson, F. Slatter JJ.A.

Heard: January 16, 17, 2007
Judgment: June 26, 2007
Docket: Calgary Appeal 0501-0334-A, 0501-0125-A

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Proceedings: affirming *R. v. Eagle Child* (2005), 2005 ABQB 275, 383 A.R. 169, 2005 CarswellAlta 539 (Alta. Q.B.); affirming *R. v. Eagle Child* (2004), [2004] A.J. No. 726, 366 A.R. 277, 2004 CarswellAlta 842, 2004 ABPC 111 (Alta. Prov. Ct.); and reversing *R. v. Lefthand* (2005), 55 Alta. L.R. (4th) 139, 2005 ABQB 748, 2005 CarswellAlta 1512, 388 A.R. 231, [2006] 2 C.N.L.R. 209 (Alta. Q.B.); reversing *R. v. Lefthand* (2004), 353 A.R. 52, [2004] 2 C.N.L.R. 170, 2004 CarswellAlta 153, 2004 ABPC 38, [2004] A.J. No. 169 (Alta. Prov. Ct.)

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Subject: Public; Natural Resources; Constitutional

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Aboriginal law --- Aboriginal rights to natural resources — Fishing offences — Fishing out of season

Accused E, Treaty No. 7 Indian, fished for food using bait in form of worms at time when area where accused was fishing was closed to fishing with bait pursuant to Fisheries Act and Alberta Fishery Regulations, 1998 — Trial judge found no prima facie infringement of aboriginal fishing rights and convicted E of fishing in closed area — Appeal by E was dismissed — Summary conviction appeal judge found that there were numerous other nearby bodies of water open for fishing and that E had not demonstrated prima facie infringement of his fishing rights — E appealed — Appeal dismissed — E had right to fish for food pursuant to terms of Treaty No. 7 — Scope of aboriginal fishing rights can be limited by regulation to conserve game — Regulation is bona fide scheme of management and conservation of fish stocks and does not overtly discriminate against aboriginal fishery — Closed season was to prevent extirpation of breeding stock of rainbow trout in river — Regulation does not breach any specific covenant of treaty and is objectively reasonable — E failed to show any breach of aboriginal right that would raise defence, because aboriginal treaty rights are expressly made subject to regulations of this type.

Natural resources --- Fish and wildlife — Offences — Operating in prohibited territory — Fishing — Closed area

Accused E, Treaty No. 7 Indian, fished for food using bait in form of worms at time when area where accused was fishing was closed to fishing with bait pursuant to Fisheries Act and Alberta Fishery Regulations, 1998 — Trial judge found no prima facie infringement of aboriginal fishing rights and convicted E of fishing in closed area — Appeal by E was dismissed — Summary conviction appeal judge found that there were numerous other nearby bodies of water open for fishing and that E had not demonstrated prima facie infringement of his fishing rights — E appealed — Appeal dismissed — E had right to fish for food pursuant to terms of Treaty No. 7 — Scope of aboriginal fishing rights can be limited by regulation to conserve game — Regulation is bona fide scheme of management and conservation of fish stocks and does not overtly discriminate against aboriginal fishery — Closed season was to prevent extirpation of breeding stock of rainbow trout in river — Regulation does not breach any specific covenant of treaty and is objectively reasonable — E failed to show any breach of aboriginal right that would raise defence, because aboriginal treaty rights are expressly made subject to regulations of this type.

Aboriginal law --- Aboriginal rights to natural resources — Fishing offences — Miscellaneous offences

Fishing contrary to bait ban — Accused L, Treaty No. 7 Indian, fished for food using bait in form of worms at time when area where accused was fishing was closed to fishing with bait pursuant to Fisheries Act and Alberta Fishery Regulations, 1998 — Trial judge found no prima facie infringement of aboriginal fishing rights and convicted L of fishing with live bait in area where bait ban was in place — Appeal by L was allowed and conviction was quashed — Summary conviction appeal judge found that regulations were inconsistent with treaty rights of aboriginal people under Treaty No. 7 — Crown appealed — Appeal allowed — L had right to fish for food pursuant to terms of Treaty No. 7 — Scope of aboriginal fishing rights can be limited by regulation to conserve game — Regulation is bona fide scheme of management and conservation of fish stocks and does not overtly discriminate against aboriginal fishery — Bait ban was to protect vulnerable populations that could not support harvest because they were at threshold levels — Regulation does not breach any specific covenant of treaty and is objectively reasonable — L failed to show any breach of aboriginal right that would raise defence, because aboriginal treaty rights are expressly made subject to regulations of this type.

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Natural resources --- Fish and wildlife — Offences — Operating in prohibited territory — Fishing — Miscellaneous

Fishing contrary to bait ban — Accused L, Treaty No. 7 Indian, fished for food using bait in form of worms at time when area where accused was fishing was closed to fishing with bait pursuant to Fisheries Act and Alberta Fishery Regulations, 1998 — Trial judge found no prima facie infringement of aboriginal fishing rights and convicted L of fishing with live bait in area where bait ban was in place — Appeal by L was allowed and conviction was quashed — Summary conviction appeal judge found that regulations were inconsistent with treaty rights of aboriginal people under Treaty No. 7 — Crown appealed — Appeal allowed — L had right to fish for food pursuant to terms of Treaty No. 7 — Scope of aboriginal fishing rights can be limited by regulation to conserve game — Regulation is bona fide scheme of management and conservation of fish stocks and does not overtly discriminate against aboriginal fishery — Bait ban was to protect vulnerable populations that could not support harvest because they were at threshold levels — Regulation does not breach any specific covenant of treaty and is objectively reasonable — L failed to show any breach of aboriginal right that would raise defence, because aboriginal treaty rights are expressly made subject to regulations of this type.

Aboriginal law --- Aboriginal rights to natural resources — Aboriginal rights — Fishing

Accused L and E, Treaty No. 7 Indians, each fished for food using bait in form of worms at time when areas where they were fishing were closed to fishing with bait — Trial judge in each case found no prima facie infringement of aboriginal fishing rights and convicted accused of fishing illegally — L's appeal was allowed and E's appeal was dismissed — Crown appealed L's acquittal and E appealed his conviction — Appeal by Crown allowed — Appeal by E dismissed — Accused had right to fish for food pursuant to terms of Treaty No. 7 — Treaty No. 7 rights are subject to express "right to regulate" — Scope of aboriginal fishing rights can be limited to conserve game — Modern test should focus on "for food" aspect of "right to hunt" — Where right is expressly subject to regulation, regulation properly within scope of what is contemplated is not breach, but inherent limitation on scope of right — Indians are not immune under treaty from bona fide conservation regulations — Regulations are bona fide scheme of management and conservation of fish stocks and do not overtly discriminate against aboriginal fishery — Regulations do not breach any specific covenant of treaty and are objectively reasonable — Accused failed to show that regulations breach any aboriginal right because treaty rights are expressly made subject to such regulations.

Aboriginal law --- Constitutional issues — Aboriginal rights to natural resources — Fishing offences — Treaty rights

Duty to consult — Accused L and E, Treaty No. 7 Indians, each fished for food using bait in form of worms at time when areas where they were fishing were closed to fishing with bait — Trial judge in each case found no prima facie infringement of aboriginal fishing rights and convicted accused of fishing illegally — L's appeal was allowed and E's appeal was dismissed — Crown appealed L's acquittal and E appealed his conviction — Crown's duty to consult aboriginal people affected was raised as preliminary issue — Accused had right to fish for food pursuant to terms of Treaty No. 7 — Constitutional common law has developed "duty to consult" before some aboriginal rights can be affected — Consultation arises only when necessary to maintain integrity of interest potentially affected — While there was some duty to consult in case at bar, it was at low end of scale — On facts of L's case, it was not shown that there was failure to consult — In E's case, urgent circumstances excused failure to consult — Variation orders could

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not be collaterally attacked — Accused did not establish nature and extent of consultation which would be proportional to anticipated effect on aboriginal right in question — Appeal by Crown allowed and appeal by E dismissed on other grounds.

Aboriginal law --- Constitutional issues — Aboriginal rights to natural resources — Fishing offences — Application of federal statutes

Collateral attack — Accused L and E, Treaty No. 7 Indians, each fished for food using bait in form of worms at time when areas where they were fishing were closed to fishing with bait — Trial judge in each case found no prima facie infringement of aboriginal fishing rights and convicted accused of fishing illegally — L's appeal was allowed and E's appeal was dismissed — Crown appealed L's acquittal and E appealed his conviction — Appropriateness of allowing aboriginal rights to be defined by collateral attack on validity of regulations was raised as preliminary issue — Defence of aboriginal right to fish was collateral attack on validity of game regulations enacted as conservation measures — Aboriginal rights must clearly be subject to rule of law — Collateral attack runs contrary to rule of law and undermines right of community to be consulted before aboriginal rights are impacted — State is entitled to reply on regulatory regime until proper attack on regulations is made, preferably mounted by aboriginal community that owns right — On balance, there were strong arguments for holding that collateral attack was not available in these prosecutions — However, Crown did not object to collateral attack at trial, and defence that regulations were invalid must be considered — There was no prima facie infringement in either case and issue of collateral attack did not have to be decided — Appeal by Crown allowed and appeal by E dismissed on other grounds.

Natural resources --- Fish and wildlife — Jurisdiction to enact legislation — Miscellaneous

Infringement — Accused L and E, Treaty No. 7 Indians, each fished for food using bait in form of worms at time when areas where they were fishing were closed to fishing with bait — Trial judge in each case found no prima facie infringement of aboriginal fishing rights and convicted accused of fishing illegally — L's appeal was allowed and E's appeal was dismissed — Crown appealed L's acquittal and E appealed his conviction — Appeal by Crown allowed — Appeal by E dismissed — Accused had right to fish for food pursuant to terms of Treaty No. 7 — Regulations are bona fide scheme of management and conservation of fish stocks and do not overtly discriminate against aboriginal fishery — Regulations do not breach any specific covenant of treaty and are objectively reasonable — Accused failed to show that regulations breach any aboriginal right because treaty rights are expressly made subject to such regulations — Assuming regulations are not within scope of treaty, there was no infringement of aboriginal right that required justification — Test for prima facie infringement requires accused to show some unreasonableness, hardship or interference with their preferred way of exercising their rights as set out in authorities — Trial judge's factual conclusion that L had not proven any infringement was reasonable and should not have been reversed by summary conviction appeal court — No prima facie infringement of E's right to fish was proven on record.

The accused L and the accused E were both treaty Indians entitled to the benefits in Treaty No. 7. Each man independently fished for food using worms as bait in an area where fishing was closed to fishing with bait pursuant to a variation order enacted in accordance with the Fisheries Act and the Alberta Fishery Regulations, 1998. L was charged with fishing with live bait in an area where a bait ban was in place, and E was charged with fishing in a closed area. At the relevant times, each man had a right of access to the land on which he was found. They both admitted fishing

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illegally and raised as their sole defence an aboriginal right to fish notwithstanding the regulations they breached. The cases were tried separately. In both instances, the trial judge found that there was no prima facie infringement of the accused's right to fish for food and convictions were entered.

In separate appeals, L was acquitted while E's conviction was upheld. The summary conviction appeal judge in E's case found that there were numerous other nearby bodies of water available for fishing, that the closing of the area in question was reasonable, and that E had not demonstrated any prima facie infringement of his fishing rights. The summary conviction appeal judge in L's case found that the regulations in question were made in pursuit of a compelling and substantive conservation objective, but that the resulting infringement of the treaty right to fish was inconsistent with the honour of the Crown because: (1) there was no consultation with the Indians affected by the regulation before it was put in place; (2) without meaningful consultation the Crown was unable to demonstrate that there had been as little infringement as possible to effect the compelling and substantive conservation objective; and (3) the regulations accorded priority over fishery resources in the area in a manner that was inconsistent with the Crown's special trust or fiduciary relationship with the affected aboriginal peoples.

The Crown appealed L's acquittal and E appealed his conviction.

Held: The appeal by the Crown was allowed and L's conviction was restored; the appeal by E was dismissed.

Per F. Slatter J.A.: By raising as their sole defence an aboriginal right to fish, L and E mounted a collateral attack on the validity of the game regulations enacted as conservation measures. Allowing aboriginal rights to be defined by collateral attack on the validity of regulations so undermines regulatory intervention as to promote anarchy in the fishery. Collateral attack runs contrary to the rule of law. It undermines the jurisdiction of the courts and the right of the community to be consulted before aboriginal rights are impacted. It also distorts the adjudicative process by artificially converting what is a civil law issue into a criminal case, with inappropriate procedural and evidentiary rules. Aboriginal rights must clearly be subject to the rule of law. Any attack on the regulations should preferably be a direct attack, preferably mounted by the aboriginal community that owns the right. Until a proper attack is made, the state is entitled to rely on the regulatory regime. On balance, there were strong arguments for holding that collateral attack was not available in these prosecutions. However, as the Crown did not object to the collateral attack at trial, the defence that the regulations were invalid must be considered.

While s. 35 of the Constitution Act, 1982 does not on its face change the character of aboriginal rights, the constitutional common law has developed a "duty to consult" before some aboriginal rights can be affected. Consultation is not an abstract concept, and arises only when necessary to maintain the integrity of the interest potentially affected. There can be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected. Once enactments are in place, consultation only becomes an issue if a prima facie breach of an aboriginal right is sought to be justified. The particular restrictions on fishing in these appeals were found in administrative orders. Where there has been consultation over the broader issue of fisheries management, it is not necessary to have consultation with respect to each particular variation order, so long as the variation orders are within the general contemplation of the original consultation. Merely adopting a new regulatory mechanism of "variation orders" to continue existing bans does not trigger a new duty to consult. The quasi-legislative nature of the variation orders, and the absence of any evidence on their impact on aboriginal rights, again suggested the duty to consult in the case at bar was very low.

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The argument in L's case that there was a failure to consult failed at the factual level. There was no evidence that any aboriginal group was denied an opportunity to participate in the regulatory review. The burden of proof on L to prove that the regulations he had breached were constitutionally invalid was never discharged. There was no basis on the record for the conclusion of the summary conviction appeal judge that there had been insufficient consultation, and that the lack of consultation undermined the regulations to the point that they were invalid. While there was no consultation before the ban in E's case was put in place, there was uncontradicted evidence that this closure was in response to an urgent conservation need, and there was no time for consultation. The closure related only to a specific stretch of river, and overall was an insignificant act, especially in the absence of any evidence from E as to the effect the closure had on his overall right to hunt and fish for food. Absent any complaint by anyone after the regulation was put in place, it could not be assumed that there was any substantive denial of a right to consult. Even if there was a failure to consult, the remedy would not be to ignore the regulation, perhaps endanger the fish stock, and then collaterally attack the regulation when charged. There was ample opportunity to directly attack the regulations. Once an administrative act has been implemented, its validity must be tested based on whether it properly respects aboriginal rights. If the decision violates aboriginal rights, then the failure to consult is moot. The variation orders were reviewed and re-issued annually. There was no evidence that any aboriginal group requested an opportunity to provide input before one of the renewals, or of any dissatisfaction with the regulations in the years that they were in place. Finally, the nature and extent of the duty to consult is proportional to the nature and extent of the interest potentially affected. The accused did not establish the nature and extent of consultation, if any, which would be proportional to the anticipated effect on the aboriginal right in question.

The Crown conceded that Treaty No. 7, which refers only to "hunting," gives a right to fish for food. The Natural Resources Transfer Agreement ("NRTA"), as set out in the Constitution Act, 1930, deals with the proprietary rights to fisheries, consistent with the general transfer to natural resources to the province. The NRTA did not surrender any federal jurisdiction over Indians, except that in s. 12, Canada agreed that provincial laws respecting game would apply to Indians, provided that the province agreed to "assure" Indians year-round hunting, trapping and fishing rights "on all unoccupied Crown lands" and on any other lands to which the Indians might have a right of access. The impact of s. 12 of the NRTA is therefore primarily proprietary, but partly legislative. On its proper interpretation, s. 12 had no bearing on the present appeals. Regulations made under the Fisheries Act are federal legislation. The province did not purport to restrict the aboriginal right to fish in any respect, and the express "assurances" given in the NRTA were not engaged. The appeals fell to be decided solely on the admitted right in Treaty No. 7 to fish for food.

Treaty No. 7 rights are specifically made "subject to regulation," and some aboriginal rights are subject to erosion. Government regulation that infringes or denies aboriginal rights must be justified. The exact content of the right depends on its source. The scope of aboriginal fishing rights as defined in R. v. Sparrow can be distinguished in some respects from the present case because Sparrow did not consider aboriginal rights that arose in a treaty context and that were inherently subject to an express "right to regulate." Universal statements cannot be made with respect to all aboriginal hunting rights without examining the scope of the particular right in question, and the circumstances in which it is being exercised. The modern test should be functional: it should focus on the "for food" aspect of the "right to hunt." Where a right is expressly subject to regulation, a regulation properly within the scope of what is contemplated is not a breach, but an inherent limitation on the scope of the right. On the plain wording of the treaty, it could not have been understood that the Indians were immune from bona fide conservation regulations.

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The regulations are a bona fide scheme of management and conservation of the fish stocks. The right to regulate for conservation reasons allows some closing of waters to fishing so long as a reasonable opportunity to hunt or fish for food is preserved in the vicinity. On the evidence, the regulations do not offend the covenant for hunting and fishing "throughout the Tract" as there was fishing available in the immediate vicinity for that purpose. There was no evidence that the scheme overtly discriminates against the aboriginal fishers. The right to regulate reserved in Treaty No. 7 includes a right to allocate scarce resources, so long as due regard is given to aboriginal hunting rights, mindful of the fiduciary duties of the Crown. On the record, there was no unconstitutional preference given to non-aboriginal fishers. No absolute priority or exclusivity need be given to the aboriginal fishers, so long as meaningful recognition is given to their rights. The bait ban in L's case was to protect vulnerable populations that could not support a harvest because they were at threshold levels. The uncontradicted evidence was that the closed season in E's case was to prevent extirpation of the breeding stock of rainbow trout in the river. There was no evidence that the regulations were overbroad. They adequately recognize the priority that should be given to the aboriginal right to fish for food, even if there is some incidental allocation of fish stocks to non-aboriginal fishers because of the mortality rate inherent in catch and release fishing. The regulations do not breach any specific covenant of the treaty and are objectively reasonable. As a result the defendants had failed to show that the regulations breach any aboriginal right at all, because their treaty rights are expressly made subject to regulations of this type. That alone was sufficient to dispose of the appeals.

Assuming the regulations are not within the scope of regulations contemplated by the treaty, there was no breach of the aboriginal right. Not every act of the government that has some impact on an aboriginal right amounts to a breach of that right, or amounts to a "prima facie infringement." To show a prima facie infringement, the accused must show some unreasonableness, hardship or interference with their preferred way of exercising their rights, to the level set out in the cases. At L's trial, there was no expert evidence to rebut the evidence of the Crown witnesses that the regulations are a part of a reasonable scheme of conservation. On the question of undue hardship and L's"preferred means" of exercising his right to fish, there was simply no evidence. Since not every impact on an aboriginal right is an infringement, L's argument that a prima facie case of infringement had been admitted by the admitted "limitation" on his fishing rights failed. The trial judge's factual conclusion that L had not proven any infringement was reasonable, and should not have been reversed by the summary conviction appeal court. The closing of the river where E fished limited, in the short term, the ability of aboriginal people like E to fish; and it prevented him, on the day he was charged, from harvesting trout for food at that precise location. However, when the broader picture was examined, the limitation on E's ability to fish was insignificant compared to the overall collective fishing rights of aboriginal people under Treaty No. 7. E provided no evidence that there were no other meaningful alternatives open to him to gather food, or on how essential this portion of the river was to him for the gathering of food generally. He admitted he rarely fished. The trial judge found that E had not proven any prima facie infringement of his right to fish. Considering the absence of evidence from E on the impact that the ban had on his fishing rights, and the fact that the regulations in question were there to enhance the community's fishing rights in the long term, no prima facie infringement of the right was established on this record. Justification becomes an issue only when a prima facie breach of an aboriginal right has been shown. In the further alternative, any infringements were justified by the Crown. Conservation of fishing stocks has been accepted as a valid legislative objective. On the record, the uncontradicted evidence was that the regulations were the least intrusive way of achieving the valid conservation objectives. They were reasonable in scope and content. There was no real priority given to non-aboriginal fishers, but assuming there was the allocation of resources was fair and compatible with the fiduciary duties of the Crown. There was an ample opportunity for consultation in L's

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case, and the absence of consultation in E's case was justified by the circumstances. Compensation was not suggested as a realistic alternative. In conclusion, the accused failed to show any breach of an aboriginal right that would raise a defence to the charges against them. E's appeal was dismissed. The Crown's appeal was allowed, and the conviction and sentence against L were restored.

Per C. Conrad J.A. (concurring): Where it is alleged that a treaty right has been impacted, the claimant bears the burden of demonstrating that there is a prima facie infringement of the right. Such an infringement requires proof that the right is subject to something more than an insignificant interference. Given the lack of evidence on how the impugned variation orders impacted L and E, and in light of the fact that there were numerous other lakes and rivers open for fishing at the time of the respective offences, no more than a modest burden was placed on their rights.

The basic legal framework for assessing whether an aboriginal right has been infringed was provided by the Supreme Court of Canada in R. v. Sparrow. A court must determine whether the impugned legislation creates a prima facie infringement of the right, and whether the infringement can be justified. The degree of Crown consultation is appropriately considered under the justification portion of the infringement analysis. The Supreme Court of Canada held that the NRTA did not create new rights for Indians vis-à-vis the federal government, and that any novel rights contained within the NRTA were only guaranteed in relation to provincial powers. All of the parties proceeded on the assumption that L and E were entitled to fish for food pursuant to Treaty No. 7, as modified by the NRTA. Assuming, without deciding, that there is a right to fish either under Treaty No. 7 or under the treaty as modified by the NRTA, neither L nor E had met the evidentiary burden required to show a prima facie infringement of this right.

Although it appeared at first blush that L was a case about the means used to exercise a treaty right, both cases were really about whether a prohibition on fishing at a particular location automatically constitutes a prima facie infringement of the right of each accused to fish. The mere existence of a closed season or prohibition on harvest on a particular body of water is insufficient to show that a prima facie infringement has occurred. Neither Treaty No. 7 nor the NRTA guarantees a right to fish in every stream at all times. It is the activity of fishing and not the geographical site which is protected. Thus, the burden of demonstrating that a prima facie infringement has occurred is not met by simply showing that the claimant has been prevented from fishing for food at a particular location. Here, the Crown's uncontested evidence indicated that in both cases, there were numerous other lakes and rivers in close proximity and open for fishing at the time of the offences. The onus was on L and E to show that, despite the presence of these other bodies of water, their right to fish was more than modestly burdened. Each had failed to do so. A regulation limiting access at one geographical location is distinguishable from one which prohibits the protected activity altogether. Neither L nor E had demonstrated a prima facie infringement of their right to fish, whether that right derives from Treaty No. 7 or from the treaty as modified by the NRTA. Accordingly, it was not necessary to consider possible justifications; nor did the issue of collateral attack have to be decided. The Crown's appeal should be allowed and E's appeal should be dismissed.

Per J. Watson J.A. (concurring): The disposition of the appeals should be as indicated by F. Slatter J.A. However, it was not necessary to pronounce on the question of collateral attack on the regulations in the case at bar inasmuch as no basis for the claims of L and E for exemption from the regulations had been shown. For the reasons given by F. Slatter J.A., the positions of L and E failed for lack of proof of the nature and extent of any right to fish for food, and of any infringement of any such right arising from the application of the Crown's regulations. The opinions expressed by F.

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Slatter J.A. as to justification for the regulations were also agreed with, as was his conclusion on the topic of duty to consult. L and E failed to make out any basis for concluding that the Crown's regulations arose after a constitutionally inadequate performance of any duty to consult that would be sufficient to undermine the specific regulations under consideration. A duty to consult, howsoever it evolves in the law, should be feasible, proportional to the interests affected, and necessary. Consultation must be bona fide, and must involve fair treatment of the communities affected. Courts should be chary of declaring justiciable a legislative process of Parliament, when the legislation is already sufficiently vulnerable to constitutional evaluation and response and its consequences are capable of remedy under law if need be.

Cases considered by *F. Slatter J.A.*:

Authorson (Litigation Guardian of) v. Canada (Attorney General) (2003), (sub nom. *Authorson v. Canada (Attorney General))* 2003 C.E.B. & P.G.R. 8051, (sub nom. *Authorson v. Canada (Attorney General))* 227 D.L.R. (4th) 385, (sub nom. *Authorson v. Canada (Attorney General))* 109 C.R.R. (2d) 220, (sub nom. *Authorson v. Canada (Attorney General))* 306 N.R. 335, (sub nom. *Authorson v. Canada (Attorney General))* 66 O.R. (3d) 734 (note), (sub nom. *Authorson v. Canada (Attorney General))* [2003] 2 S.C.R. 40, 2003 CarswellOnt 2773, 2003 CarswellOnt 2774, 2003 SCC 39, 36 C.C.P.B. 29, (sub nom. *Authorson v. Canada (Attorney General))* 175 O.A.C. 363, 4 Admin. L.R. (4th) 167 (S.C.C.) — considered

Boddington v. British Transport Police (1998), [1999] 2 A.C. 143, [1998] 2 W.L.R. 639, [1998] 2 All E.R. 203 (Eng. H.L.) — referred to

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Daniels v. White (1968), 4 C.R.N.S. 176, 64 W.W.R. 385, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, [1968] S.C.R. 517, 1968 CarswellMan 23 (S.C.C.) — considered

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both *Lefthand* and *Eagle Child* is whether a prohibition on harvest at the particular location each man was fishing constituted a *prima facie* infringement of their respective rights to fish.

178 In my view, the mere existence of a closed season or prohibition on harvest on a particular body of water is insufficient to show that a *prima facie* infringement has occurred. Neither Treaty No. 7 nor the *NRTA* guarantees a right to fish in every stream at all times, and I agree with my colleagues that it is the *activity* of fishing and not the *geographical site* which is protected. Thus, the burden of demonstrating that a *prima facie* infringement has occurred is not met by simply showing that the claimant has been prevented from fishing for food at a particular location. This does not mean, however, that the onus on the rights claimant is a large one, nor that he or she must testify. At this stage of the analysis, the court is evaluating the impact of the impugned action on the claimant's ability to exercise the right, and all that needs to be demonstrated is that the interference is something more than insignificant. This may involve showing, for example, that the restriction or closure is occurring on the only body of water that is reasonably accessible to the claimant, or that fish are not available in other lakes or streams of close proximity. Even where, as here, worthwhile conservation objectives appear to underlie the regulations, the law does not impose a high burden on the claimant, and in many cases very little evidence will be required to show that a *prima facie* infringement has occurred. It may not be sufficient, however, for a claimant to offer no evidence at all of the impact of the Crown's action, as in some cases this renders it impossible for the court to determine whether more than a "modest burden" has been placed on the claimant.

179 Here, the Crown's uncontested evidence indicates that, in the case of both Lefthand and Eagle Child, there were numerous other lakes and rivers in close proximity and open for fishing at the time of the offence. Although this alone does not establish that there was *not* a *prima facie* breach of the right to fish, it is evidence that must be considered by the court when deciding whether the right was infringed. It is not the Crown who bears the burden at this stage of the analysis, and it is Lefthand and Eagle Child who must show that, despite the presence of these other bodies of water, their right to fish was more than modestly burdened. Each has failed to do so.

180 It should be noted that a regulation limiting access at one geographical location is distinguishable from one which prohibits the protected activity altogether. The latter of these situations was considered in *Badger*, where Cory J. found that the structure of the licensing scheme meant that Indians had to apply from the same limited pool of hunting licences as other Albertans. The result was that some Indians — those not fortunate enough to get a licence — were not able to hunt anywhere in the province (*Badger* at paras. 92-93). Where a prohibition, like the one considered in *Badger*, makes it impossible for an Indian to exercise a treaty right anywhere at all, it is clear that a *prima facie* infringement may be established without any further evidence. Where, however, the restriction is limited to a particular geographical area, as it was in these cases, the claimant bears the burden of showing how the restriction infringed the right being asserted.

181 Given the evidence in these cases, I am of the view that neither Lefthand nor Eagle Child has demonstrated a *prima facie* infringement of their right to fish. My finding on this point applies regardless of whether the right derives from Treaty No. 7 or from the treaty as modified by the *NRTA*, and I therefore find that it is unnecessary for me to reach a conclusion on the precise source or scope of the right.

B. Can the prima facie infringement be justified?

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regulations contemplated by the treaty.

100 With respect to the first factor, it has not been shown that the regulations in these appeals are other than a *bona fide* scheme of management and conservation of the fish stocks.

101 Secondly, there are no express promises in the Treaty that are broken. As discussed previously, the express covenants in the Transfer Agreement do not apply here, as these are Federal regulations. The Treaty does allow hunting "throughout the Tract", but that phrase should not be read literally (*supra*, para. 62). It is merely there to confirm that the rights are coextensive with the Tract. The rights granted are collective, and were granted at large to the numerous Blackfoot, Blood, Piegan, Sarcee and Stony bands in the area, without intending to suggest that every band could hunt or fish everywhere. Covenants of this type should not be read as guaranteeing a right to fish in every stream at any time, regardless of the effect that will have on conservation measures. The treaty protects an *activity*; no site specific rights are granted. Further, the reference to the "Tract" is clearly subject to two limits: government regulations and the taking up of land for settlement. There is no reason to assume the areas of the Tract open to fishing cannot be regulated. The right to regulate for conservation reasons allows some closing of waters to fishing so long as a reasonable opportunity to hunt or fish for food is preserved in the vicinity. In these appeals the uncontradicted Crown evidence was that there were other waters in the immediate vicinity that were open for fishing (in the case of Eagle Child), and other waters where bait fishing was permitted (in the case of Lefthand). On the evidence the regulations do not offend the covenant for hunting and fishing "throughout the Tract", as there was fishing available in the immediate vicinity for that purpose.

Priority to the Aboriginal Fishery

102 With respect to the third factor, there is no overt discrimination against the aboriginal fishers. Lefthand argues that a priority has been given to non-aboriginal fishers, because they are allowed to inflict a small mortality rate on the stocks through catch and release fishing (*supra*, para. 9). There are several answers to this argument.

103 By way of background, several of the early cases held that priority must be given to aboriginal hunters when there is a shortage of game to meet all demands: *Jack* at pg. 313 and *Sparrow* at pp. 1115-6. There is no obvious source of the declared priority to game that aboriginal hunters are said to have. It is not mentioned in any Treaty, nor in the Transfer Agreements. The right to continue their "vocation of hunting" would have been a vocation in competition with the European settlers. Historically, the Crown had no authority to grant an exclusive fishery, and had a policy of not doing so: *Nikal* at paras. 31-32. Even the promises made by the Treaty 8 Commissioners (*supra*, para. 98) "that they would be as free to hunt and fish after the treaty as they would be if they never entered into it" would only have implied a right to hunt in competition with the settlers. Even if Ominayak (one of the hunters in *Badger*) had a right to hunt moose on privately owned but unoccupied land, it cannot have been intended that he would have a priority to the game there over the private owner. While the Transfer Agreements and treaties gave aboriginal hunters certain privileges, a priority to game stocks is not obviously one of them.

104 Further, conservation measures are not subordinate to aboriginal rights. In *Sparrow* at pg. 1115 the Court held that the constitution merely sets a priority for access to fish and game, adopting "an order of priorities" set out in *Jack*, "of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports

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