

# RESOURCES



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## MANAGING THE MACKENZIE: NEGOTIATING A FUTURE WITH THE BASIN IN MIND

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### Introduction

Over the past several years the development of the Alberta oil sands has thrust the future of northern river management into prominence. In particular, national and international attention has been focused on the future of the Lower Athabasca and the implications of significant expansion of oil sands facilities for the people and ecosystem of that basin. The Lower Athabasca is however just one of six major watersheds within the much larger Mackenzie Basin, and intergovernmental negotiations currently underway on the future of the Mackenzie should command the attention of all Canadians. These negotiations will, after all, effectively determine the management regime for the second largest river system in North America—comprising a watershed that covers 1.8 million square kilometres, or approximately twenty percent of Canada's land mass. Somewhat remarkably, however, the future of the Mackenzie Basin has not attracted the interest of most Canadians, even of many of those living in the Basin provinces and territories.

Negotiations on the future of the Mackenzie are currently proceeding primarily through a series of separate bilateral negotiations amongst the various neighbouring Basin jurisdictions,<sup>1</sup> under the auspices of a Basin-wide agreement concluded fifteen years ago. To date only one of these negotiations has been completed (and that agreement is now over ten years old). Rather than attempt to rehearse all the issues that are on the various negotiating agendas, the discussion below will focus on only one of the bilateral agreements being negotiated, not only because that agreement is one of the most critical for the future of the Basin, but also because it is illustrative of the range of

concerns that must be addressed in the negotiations and the range of interests that must be accounted for. The negotiations in question are those between the province of Alberta and the Northwest Territories. Alberta is of course both an upstream (primarily vis-à-vis the NWT) and downstream (primarily vis-à-vis British Columbia) jurisdiction, which relies on the waters of the Basin for, amongst other uses, the development of the oil sands, the province's key industrial development engine. The NWT, by contrast, is essentially the jurisdiction at the "end of the pipe", which depends on the Basin for, amongst other priorities, the maintenance of traditional lifestyles.

In looking towards an Alberta-NWT bilateral agreement on transboundary water management that will meet the needs of the Mackenzie River Basin, it should be noted there has been considerable discussion in Alberta in the past decade with respect to water management planning in the province. Much of this has taken place, first, in the context of implementing a new *Water Act*, and subsequently in the context of the *Water for Life* planning initiative. More recently, regional planning exercises under the auspices of the *Alberta Land Stewardship Act* have been oriented to watershed boundaries and have included water within their purview. Water issues have been of high priority both in the south of the province—where concerns have been raised about the stresses on the South Saskatchewan basin and also in the north, where, as noted, the intersection of water and oil sands development has attracted the most attention. There has, however, been relatively little public focus on transboundary issues, including the potential



obligations owed to the NWT. The primary focus of all these exercises in water management has rather been the appropriate use of Alberta's water resources in Alberta and for Albertans.

While the various water-related initiatives of the Alberta government have been the subject of extensive public discussion and academic comment, far less attention has been paid to the recent initiative out of the NWT directed at the development of a water strategy specific to the north—and in particular one centered primarily on the Mackenzie Basin. The NWT Water Stewardship Strategy<sup>2</sup> of 2010 was the result of a collaborative exercise led by the Aboriginal Steering Committee, the Government of the Northwest Territories (GNWT) and Indian and Northern Affairs Canada, and involved a wide range of exercises in public consultation. The unique nature of the document is perhaps best illustrated by the first two sections of its Introduction—the second being “The Importance of Water to the NWT”, but the *first* being “The Importance of Water to Aboriginal People in the NWT.” The vision of the strategy—clean, abundant and productive freshwaters “for all time”<sup>3</sup>—is reflected in its Guiding Principles and Goals. These comprise a blend of statements that reflect a modern understanding of water management—one that is founded on ecosystems and adaptation—and yet also recognize the specific context of NWT water management (for example, the spiritual and cultural values of water, especially for Aboriginal communities, and the accommodation of both traditional and western scientific approaches to knowledge).

The negotiation of a bilateral water management agreement that can meet the articulated needs of both Alberta and the NWT will provide an important indication of the degree to which it is possible to reconcile industrial development imperatives with the demands for instream protection of the resource. It will also provide an indication of whether the Canadian approach to interjurisdictional water management—which to date has included an extremely limited role for the federal government—is consistent with the achievement of a sound basin management regime. The discussion below begins with an overview of the current Mackenzie transboundary management regime, and then moves on to a consideration of the background to the current bilateral negotiations in the Basin—again, focusing on the Alberta-NWT nexus. In order to provide a context to the Alberta-NWT negotiations, there is also included an overview of two relevant bilateral documents: the already-negotiated Yukon-NWT bilateral agreement and the Alberta-

NWT Memorandum of Understanding on water management negotiations. Both these documents will serve as points of departure for discussing what we might expect from the Alberta-NWT negotiations. Finally, there is a brief general discussion of the types of options that might be considered in moving forward in the bilateral negotiations.

### The Mackenzie River Basin Agreement

The Mackenzie River Basin Transboundary Waters Master Agreement (MRBA)<sup>4</sup> came into effect in 1997, although calls for a transboundary management regime preceded this by twenty-five years. The Agreement was influenced in some important respects by the Prairie Provinces Water Board (PPWB) arrangements that since 1969 have governed the transboundary management of eastward-flowing prairie rivers (including, of special importance, the South Saskatchewan Basin). In particular, the architecture of the two sets of arrangements is similar, with reliance in both cases on two types of agreement: an overarching master agreement that provides the basic structure of the regime, and a series of bilateral agreements between neighbouring basin jurisdictions which provide the details. Both regimes also provide for a board (the PPWB and the Mackenzie River Basin Board) to oversee the implementation of the regime. In the case of the agreements for the PPWB, the master and bilateral agreements were reached contemporaneously, while in the case of the Mackenzie, the Master Agreement was agreed upon *in expectation* of negotiation of the bilateral agreements. Unfortunately, however, as noted, only one of these has been concluded to date.

While the adoption of a ready template for managing interjurisdictional water relations was no doubt attractive to the negotiators, the use of the PPWB model for the Mackenzie is problematic in a number of respects. One serious drawback is noted above: the adoption of a framework predicated on the conclusion of bilateral agreements that had not yet been agreed upon. Of even more fundamental importance, the context for basin management and the challenges that must be addressed under the respective regimes are very different. The most obvious difference between the two is that while the pressures on the key South Saskatchewan Basin were (and still are) primarily ones related to water quantity, the challenges to interjurisdictional agreement in the Mackenzie Basin are more complex and varied, as are the competing interests in the Basin. For example,





the South Saskatchewan is a relatively mature and developed basin; while it is highly likely to be subject to significant stresses as the result of climate change (and development pressures), the physical nature of the Basin is generally well understood. By contrast, the Mackenzie is not only more physically complex—including a number of very different sub-basins—there is simply less established science for some of its reaches, particularly in northern areas where the presence of permafrost makes the full implications of climate change and increased development more difficult to predict with any accuracy. Apart from these physical differences, the governance of the two basins also differs in some important relevant respects. Quite apart from the different legal powers with respect to water management that are vested in the NWT as opposed to the provinces (a situation that will change over time with devolution), the significance of Aboriginal governance structures pursuant to land claims agreements suggests the need for a much more robust involvement of voices other than provincial/territorial officials in the management of the Mackenzie Basin. Indeed this is reflected in the composition of the MRBB through the inclusion of Aboriginal representatives, as discussed below. In sum, a successful management regime for the Mackenzie must involve something much more complex than the minimalist architecture of the PPWB. While the MRBA recognizes this to some extent in its explicit reference to a number of modern principles of water management that are not present in the governing documents for the PPWB, as discussed below, the MRBA lacks the precision of obligations that characterize prairie transboundary water management.

#### **Mackenzie Master Agreement**

As with the PPWB regime, which is founded in the Master Agreement on Apportionment (MAA), the central framework document of the MRBA is the Master Agreement. However, while the PPWB has at its core an agreement on *apportionment* (although water quality objectives have since been incorporated into the regime through an amendment—a possibility that was indeed foreseen in the original Agreement), the purpose of the MRBA is styled more ambitiously as the establishment of “common principles for the cooperative management of the Aquatic Ecosystem of the Mackenzie River Basin”.<sup>5</sup> These principles involve commitments by the parties with respect to:

- “1. Managing the Water Resources in a manner consistent with the maintenance of the Ecological Integrity of the Aquatic Ecosystem;

2. Managing the use of the Water Resources in a sustainable manner for present and future generations;
3. The right of each to use or manage the use of the Water Resources within its jurisdiction provided such use does not unreasonably harm the Ecological Integrity of the Aquatic Ecosystem in any other jurisdiction;
4. Providing for early and effective consultation, notification and sharing of information on developments and activities that might affect the Ecological Integrity of the Aquatic Ecosystem in another jurisdiction; and
5. Resolving issues in a cooperative and harmonious manner.”<sup>6</sup>

While it is certainly true that these principles are consistent with modern approaches to transboundary water management, and reflect an advance beyond the language of the MAA, it is also the case that they lack the precision of the undertakings in the latter. In sum, the undertakings in the MAA are narrow but precise and measurable; even though the ambit of the agreement has been subsequently expanded to include water quality objectives, these are similarly defined in readily measurable criteria. By contrast, while the vision embraced in the MRBA is more ambitious, it is also more open to interpretation—and ultimately raises more room for disputes. Given the room for interpretation, this makes the role of bilateral agreements under the Mackenzie Master Agreement even more crucial. Without firm and substantive undertakings in the bilaterals that build upon the Master Agreement’s vision of protection of the Basin as a whole—rather than merely reflecting an accommodation of individual sectoral and jurisdictional interests—the regime that will emerge from current negotiations is not one that will inspire any confidence in Canadians that the future of the Mackenzie has been guaranteed for future generations.

In addition to the articulation of the guiding principles for management of the water resources of the Mackenzie Basin, the other two key sections of the MRBA relate to administration (Part D of the agreement) and dispute resolution (Part E). With respect to administration, the agreement establishes a governing Mackenzie River Basin Board to administer the agreement, consisting of up to thirteen members, with eight of these appointed by the parties (up to three by Canada and one each by the five provinces and territories), and five members representing Aboriginal organizations (one from each of the provinces and territories party to the agreement).<sup>7</sup>



In practice all the non-Aboriginal appointees are public servants in the departments with relevant responsibility for water management.<sup>8</sup> The Board's duties are largely supervisory in nature, and in practice the day-to-day work is carried out through a small Secretariat (currently consisting of two persons) and technical committees. With the exception of the production of the State of the Aquatic Ecosystem Report in 2003, the activities of the Board have been relatively modest.

With respect to dispute resolution procedures under the agreement, these are even more timid than those found in the MAA. While the latter at least provides for the possibility of a dispute eventually reaching the Federal Court (although this has never occurred), the dispute resolution procedures in the Mackenzie Master Agreement provide neither for a judicial role nor for any form of binding arbitration.<sup>9</sup> Although these procedures may be supplemented by dispute resolution procedures in the bilateral water management agreements, as discussed below, the one such agreement that has been concluded to date has not moved beyond the approach taken in the MRBA proper.

### Bilateral Agreements

In the case of the PPWB, the ability of the MAA to function as it has is dependent not only on its relatively narrow and precise focus, but also on the bilateral agreements which commit the parties to the defined obligations. In the case of the MAA, these agreements were concluded contemporaneously with the Master Agreement and included as schedules to the latter. In effect then, the system was "up and running" with the conclusion of the MAA itself. The MRBA differs crucially in this respect; as noted above, the MRBA was concluded in expectation of the bilateral agreements which were to spell out the details of the bilateral obligations. In assessing the prospects for negotiations on the NWT-Alberta bilateral, it is useful to review first the one bilateral arrangement that has been concluded to date—that between the Yukon and the NWT.

#### ***Yukon-NWT Transboundary Water Management Agreement***

The Yukon-NWT Transboundary Water Management Agreement<sup>10</sup> is to date the only bilateral agreement negotiated under the MRBA.<sup>11</sup> The successful negotiation of this agreement is no doubt partly owing to the relatively small transboundary water resources shared by the two territories, and consequently the relatively minor importance the agreement

and its undertakings will have on northern water management. Nevertheless, the agreement does have some significance in indicating how and to what extent the ambitious agenda of the MRBA has been realized in practice.

The purpose of the bilateral agreement is cast broadly: "to cooperatively manage, protect and conserve the ecological integrity of the aquatic ecosystem of the Mackenzie River basin ... while facilitating sustainable use of the transboundary waters."<sup>12</sup> The objectives of the agreement<sup>13</sup> expand on this, with a somewhat greater emphasis on water quality issues rather than water quantity. Of particular note in the objectives is the absence of any reference to the special interests of Aboriginal peoples. While it might be argued that there is some implicit recognition of such interests in the inclusion of a reference to traditional knowledge and subsistence users, it is nevertheless surprising that the agreement is not more explicit in this respect in its objectives. It may also be that the negotiators felt that such considerations were covered in the general disclaimer in the agreement with respect to interpreting it consistent with existing Aboriginal and Treaty rights (including those under existing and future land claims agreements) pursuant to section 35 of the *Constitution Act, 1982*.<sup>14</sup> Certainly, however, one could imagine a more positive and proactive approach to the inclusion of Aboriginal interests than this minimalist stance.

While the provisions dealing with the purpose and objectives of the agreement are important in providing the overarching themes for the water management regime, the key provisions are those relating to the substantive undertakings by the parties and the means for assuring the implementation of those undertakings. As to the former, there are two sets of commitments—one relating to water management and the other relating to notification and communication. With respect to the substantive commitments on water management, these consist partly of a reiteration of the general principles in the Master Agreement,<sup>15</sup> but also contain some more specific commitments to the achievement of certain ecosystem objectives<sup>16</sup> as set out in an attached Schedule B (which essentially provides the key undertakings on water management by the Parties). While Schedule B on the face of it is ambitious, and includes provisions on ecological indicators and water quality and quantity objectives, the actual details reveal a much more modest agenda. The development of ecological indicators is deferred, to be added to the schedule when developed. Similarly, for water quantity objectives,





there is included only an interim objective, which is that “there will be no significant change in the flow regime from new human activity that could affect the aquatic ecosystem.” There is no definition as to what constitutes a significant” change, nor is there any clear commitment to establishing permanent defined water quantity objectives—although this seems implicit, in that there is a commitment in paragraph 5.5 of the agreement to “undertake monitoring and assessment activities [once the water quantity and ecological indicators have been agreed on] with a view to determining whether the objectives are being met.”<sup>17</sup> The only ecosystem objectives that are defined with precision are the water quality objectives, and these essentially amount to the mere adoption of the 1999 Canadian Environmental Quality Guidelines produced by the Canadian Council of Ministers of the Environment.

The second set of undertakings in the agreement relates to Notification and Communication (para. 7), which are more commonly referred to under the rubric of prior notification and consultation (PNC). Such obligations are virtually standard now in both international and domestic agreements dealing with the management of transboundary water resources; for example, such provisions are included even in the relatively dated PPWB regime. These bilateral PNC commitments are phrased in more imperative language than the undertakings of the parties with respect to water management—where the agreement provides merely that the parties are “committed” to certain objectives. By contrast, the use of the word “shall” for each of the six separate undertakings in paragraph 7 suggests that the PNC provisions are intended to be mandatory in nature. These include the obligations:

- for the parties to “provide opportunities for early consultation and notification of developments and activities that might affect another jurisdiction and share environmental assessment information in a timely and consistent manner”;<sup>18</sup>
- on each party to provide the relevant technical and other information in its possession in order that the other parties may assess the probable impact of developments or activities (and to see if new monitoring activities are required);
- on a party undertaking a development activity to provide sufficient time for a responding party to carry out its assessment of probable impacts;
- on any party detecting a deviation from the objectives set out in Schedule B, to provide timely notification to the other parties;<sup>19</sup>

- on any party in whose jurisdiction an “emergency event” has occurred threatening the ecological integrity of the shared waters, to notify the other parties; and
- on each party to bear the responsibility for notifying the public and the specified Aboriginal organizations<sup>20</sup> with respect to the preceding matters.

The PNC requirements in the Yukon-NWT bilateral are typical of those found in international transboundary water agreements, although given its relatively recent vintage one might have expected to see some provisions that reflected the experience with such agreements (and more generally with transboundary environmental agreements) to date. For example, one longstanding criticism of such instruments is the degree of discretion that is vested in the state where the development is taking place. In particular it has been recognized in an international context that it should not fall to the exclusive jurisdiction of the developer state to decide whether a development is sufficiently detrimental so as to trigger the requirement of notification and consultation.<sup>21</sup> The concern in this respect is obvious: that the state which will bear the primary benefits of the development may take a somewhat different view of the environmental risks than the state that will potentially bear the environmental burden but not the economic benefits. We will return to this point in the final section below.

In addition to the two sets of undertakings described above, the other provisions in the agreement of most interest are those relating to ensuring compliance—in particular the provisions for dispute resolution. These are significant in that even an agreement with strong substantive commitments may suffer in its implementation if there is no means to ensure compliance. As to the dispute resolution process in the Yukon-NWT bilateral, the provisions can only be described, even generously, as modest. The process consists of two steps. First, there is a requirement on the parties to use “best efforts” to resolve the dispute or difference of opinion employing direct discussions.<sup>22</sup> In the event this proves unsuccessful, a party or a designated Aboriginal Organization may refer the matter to the Mackenzie River Basin Board, with a request “to examine and report upon the facts and circumstances.”<sup>23</sup> Although the Board is to issue conclusions and recommendations to the parties, there is no requirement whatsoever on the parties to act on these. In brief, the dispute resolution procedure is legally toothless.





In summary, the Yukon-NWT bilateral hardly reflects an ambitious attempt, either substantively or procedurally, to give effect to the goals of the MRBA. Given the relatively small portion of the Basin that falls within its ambit, this probably does not give rise to important practical concerns. What would be very worrisome, however, would be the acceptance of this agreement as a template for a bilateral agreement between Alberta and the NWT. As suggested earlier, the bilaterals now being negotiated must reflect a strong and clear commitment to the protection of the Basin as a whole, with governance structures that include an adequate opportunity for all interests in the Basin to participate in its management. In both these respects, the one bilateral concluded to date must be judged to fall well short of what the Basin deserves.

#### **Prelude to Negotiations: The Alberta-NWT MOU on Bilateral Water Management Negotiations**

The document of most specific relevance to the negotiation of an Alberta-NWT bilateral water management agreement is the Memorandum of Understanding concluded in 2007 by the two jurisdictions, with the Government of Canada also a party.<sup>24</sup> Although, as indicated in its title, the document is not a binding agreement, and does not provide the details that are expected in the ultimate bilateral water management agreement, it is useful insofar as it describes in broad terms what the negotiations between the parties will address.<sup>25</sup> Three sections of this document are of particular significance: vision and context, rationale and intent, and content of the eventual agreement.

The section on *vision and context* sets out some broad, agreed-upon water management principles to guide the negotiations. Here the MOU strikes a balance that reflects the interests of both the upstream and the downstream jurisdiction. On the one hand, the MOU adopts the principle of protecting “the aquatic ecosystem health of these transboundary waters … for future generations” and in particular notes the need for clean water “to support Aboriginal cultures”.<sup>26</sup> On the other, the parties “recognize existing developments and interests critical to the economic well-being of Alberta and the Northwest Territories.”<sup>27</sup> Although it could be argued that both of these elements hold importance to both jurisdictions, it is likely that the importance attached to the two priorities will differ as between the more industrially developed upstream jurisdiction and the less

developed downstream jurisdiction.<sup>28</sup>

The section on *rationale and intent* follows closely the template of the earlier B.C.-Alberta MOU in its acceptance of the principle that that the two jurisdictions must work together, and not in isolation from one another, in order to manage the transboundary waters—and that “shared watershed management is required for the protection and sustainable use of this resource”.<sup>29</sup> Also imported from the B.C.-Alberta MOU is the commitment to the principle of adaptive management and the recognition that the transboundary water resources should be “cooperatively managed”.<sup>30</sup> This raises important questions about how these principles can be reconciled with a management approach that is focused on meeting obligations at the border, and indeed the references to “transboundary waters” rather than to the basin more generally might suggest something less ambitious than true cooperative management of the basin.

With respect to the *expected content* of the bilateral water management agreement, again following the B.C.-Alberta MOU, it is agreed that the bilateral will identify three elements: shared goals, the roles of the respective parties and a mechanism for dispute resolution.<sup>31</sup> In particular it will include, at a minimum:

- General statements regarding “shared values and guiding principles” for the management of transboundary waters;
- “[S]pecific technical guidelines and objectives for the protection of the water resources *at transboundary waters crossing points* [including both water quality and water quantity parameters];
- PNC procedures; and
- “A mechanism for a fair, flexible and adaptive management process … ”<sup>32</sup>

What do these admittedly general statements suggest as to the anticipated content of a bilateral agreement? First, the reference to technical *guidelines and objectives* might be taken to indicate something less than strictly binding obligations. If so, this would be unfortunate—although it might be argued that this wording reflects an implicit commitment to the principle of adaptive management, so that objectives will evolve over time as the knowledge about particular basin characteristics and the impact of particular substances similarly evolves. However one views the approach to water quality, with respect to water quantity there is much to be said for setting





stronger and more definite undertakings. Particularly given the uncertainty as to future flows arising from the potential effects of climate change, it is important to reach some clear commitments on water quantity (although, as discussed in the final section below, these commitments need not be phrased as an apportionment such as that found in the MAA) before emerging stresses on the resource make the negotiation of quantitative sharing of shared watershed resources more challenging.<sup>33</sup>

Another aspect of the MOU that raises important questions as to the nature of the management regime contemplated for transboundary basins is the reference to “transboundary waters crossing points” as the relevant point to measure the adequacy of protective measures (in terms of both quantity and quality). This approach reflects of course that taken in the Master Agreement on Apportionment for the PPWB (as well as the approach taken in the B.C.-Alberta MOU). As noted earlier, there is at least an argument to be made for such an approach in the context of an agreement that provides only simple and measurable commitments with respect to the quantity and quality of water that is to be passed on to the downstream jurisdiction. However, for an agreement that purports to truly manage the basin on the principles of adaptive management—and moreover to recognize that “shared watershed management is required for the protection and sustainable use of this resource”—then the simple formula of measuring whether commitments are met at the border falls well short of the mark. In other transboundary basins, the recognition of basin-wide concerns has resulted in the creation of institutional arrangements that indeed address the management of the basin as a whole. To take only one example of the problems that are created by an emphasis on transboundary crossing points, the inclusion of the principle of adaptive management in the MOU reflects an acceptance of uncertainty as a fundamental contextual factor in basin management. In other words, water management approaches are expected to evolve in light of experience; water managers to a large extent learn by doing. This also implies a robust dialogue amongst different water managers in the basin as the full implications of different assumptions and management techniques become apparent over time. In the absence of either a Board with meaningful Basin-wide responsibilities in this respect, or, at a minimum, an institutional mechanism that proactively moves such dialogue forward, there is a very real danger that adaptive management will become more an exercise in form rather than in substance.

A final point about the MOU relates to its provisions with respect to PNC requirements and dispute resolution. The commitments here are very bare bones; as described above there is simply an undertaking that the bilateral agreement will include a dispute resolution mechanism and [p]rotocol guidance for the provision of timely, effective and efficient notice about projects or activities occurring in one jurisdiction that may impact the waters of the other jurisdiction.<sup>34</sup>

In sum, the Alberta-NWT MOU represents merely a first step in the negotiating process. While one would have hoped for more ambitious language in the MOU, especially with respect to the implementation of a Basin-wide approach to management, the bare-bones language of the agreement provides ample room for negotiators to take creative approaches on issues such as PNC requirements and dispute resolution. Finally, of course, the MOU is in any event non-binding and, moreover, does not preclude separate Basin-wide negotiations on such fundamental issues as the appropriate role of the Board under the existing, or potentially amended, Master Agreement.

#### **Conclusion: Moving Forward on the Mackenzie**

It has been forty years since the first calls for the negotiation of a transboundary management regime to safeguard the future of Canada’s largest river system, and fifteen years since the coming into force of the MRBA. While the negotiation of a series of subsidiary bilateral agreements is absolutely vital for the MRBA to have any meaningful effect, only one of these has been concluded to date—perhaps not surprisingly in the portion of the Basin that is of least significance. Now that negotiations on the bilateral agreements seem to be gathering momentum, it is useful to reflect on where they may take us. The one bilateral to date is not especially encouraging in this respect if indeed it were to serve as a template for future agreements—although it might be argued that the Yukon-NWT agreement with respect to a relatively small and undeveloped portion of the Basin should not be considered as indicative of what will emerge in other bilaterals.

In moving forward on the Mackenzie, one of the fundamental questions is to what extent governments feel bound by existing arrangements and approaches. For example, one of the consequences of adopting a regime that draws heavily on the architecture of the PPWB is that there is relatively little room for a Basin-





wide board that actually engages in management. While this might arguably be appropriate for a board whose major responsibility is simply to supervise an apportionment agreement (even one that has subsequently incorporated water quality objectives within its ambit), this makes little sense in the context of a regime that purports to implement adaptive management to advance the ecosystemic and other values of the Basin as a whole. The MRBA is currently structured so as to emphasize the role of the Board as a forum for discussion, and that indeed is largely the approach that has been taken by the Board to date. Ideally a board that had a more proactive mandate for actually engaging on issues would have these responsibilities spelled out in its constituent document. Whether the negotiating parties will be willing to re-visit the Board's capacity to act meaningfully on behalf of the interests of the entire Basin remains to be seen. However, even within the existing agreement there is room to take a more ambitious approach to responsibilities that are assigned to the Board—for example, in exercising its potential roles, set out in the MRBA, to recommend water quality and quantity objectives and guidelines and to carry out studies and issue recommendations. Again, though, it is not clear whether all governments in the Basin are willing to re-think the very role of the Board (including its secretariat) beyond the disappointingly minimalist functions it now exercises.

Even if one were to accept the status quo with respect to the role of the MRBB, there is room to improve bilateral arrangements beyond the one agreement that has been concluded to date. Such improvements can be both substantive and procedural. With respect to the former, for example, an approach based on the simple adoption of CCME guidelines for water quality (as in the Yukon-NWT bilateral) is clearly inferior to one that is targeted to specific watershed problems. Thus, in the case of the Alberta-NWT bilateral, one would hope to see some specific recognition of the now-identified problem of transboundary air-borne deposition of contaminants, especially as it affects water quality. Similarly, with respect to water quantity, a straightforward apportionment of water, such as that managed by the PPWB, is probably premature given the uncertainties that attend future Basin flows—not to mention possible Aboriginal rights to water that are still unsettled. In this respect, the adoption of a commitment to no significant alteration to flows may be more appropriate, with a process in place to spell out the implications of such an approach. For both water quantity and water quality, moreover, the emphasis should be on designing indicators

that measure the Basin-wide health of the aquatic ecosystem, rather than a narrow focus on meeting objectives at boundary-crossing points. Whatever advantages the latter approach has in the context of the PPWB, it is not sufficient to meet the needs of the more ambitious MRBA.

Apart from the substantive provisions, there is also room for substantial re-thinking of some of the procedural aspects of an eventual bilateral agreement. To take only two examples, one could hope that negotiators will aim for improved provisions both with respect to dispute settlement and prior negotiation and consultation. With respect to the former, governments should at least be prepared to re-visit the possibility of binding dispute settlement as a last resort—if only to encourage parties to take their responsibilities seriously and to act in a timely manner. Especially since such a provision already exists for the PPWB, this could hardly be considered a radical departure from precedent. As to PNC procedures, the assurance of early and meaningful engagement on issues of potential transboundary concern is vital if one indeed accepts that the management of the Basin should be predicated on an adaptive management approach. As noted in this paper, the principle of adaptive management sits uneasily with an approach based on management by reference to border crossing points. Failing a willingness on the part of some Basin governments to re-consider the transformation of the current mandate of the Board so as to invest it with real Basin-wide responsibilities, negotiators should at a minimum consider the possible use of robust PNC procedures as a partial surrogate in this respect. One example is PNC provisions that allow for a role (with appropriate safeguards) in downstream jurisdictions to initiate and participate in reviews of upstream projects that might otherwise escape PNC requirements (because the upstream jurisdiction decides on its own that the potential effects are not sufficient to trigger the PNC obligations). Again, though, this approach is merely a surrogate for a more desirable commitment by all MRBA parties to provide a Basin-level assessment process for projects that may have transboundary impacts, one that is truly consonant with the stated purpose of the Agreement, “to establish common principles for the *cooperative management of the Aquatic Ecosystem* of the Mackenzie River Basin” (emphasis added).

The current negotiations on bilateral agreements under the MRBA represent a chance to finally give the Mackenzie Basin a governance regime that will protect it for succeeding generations. They also





represent an opportunity for all Basin governments to think in fresh ways about how to incorporate the best of modern watershed management approaches into interjurisdictional decision-making. A successful outcome will be to the benefit not just to the people of the Basin, but to all Canadians.

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#### Notes

1. These are: Yukon, British Columbia, Alberta, Saskatchewan and the Northwest Territories.
2. Canada and Northwest Territories, *Northern Voices, Northern Water: The NWT Water Stewardship Strategy* (May 2010) [Stewardship Strategy].
3. *Ibid* at 10.
4. Canada-British Columbia-Alberta-Saskatchewan-Northwest Territories-Yukon Mackenzie River Basin Transboundary Waters Master Agreement, in effect 24 July 1997, online: <<http://www.mrbn.ca/uploads/files/general/19//mackenzie-river-basin-transboundary-waters-master-agreement.pdf>>.
5. *Ibid*, Part A.
6. *Ibid*, Part C.
7. Part D, para 1(b); the Aboriginal representatives are nominated by the respective Aboriginal organizations and are appointed and serve at the pleasure of the respective responsible provincial/territorial Minister.
8. In the case of the Government of Canada, the three appointees are drawn from Environment Canada, Indian and Northern Affairs Canada and Health Canada.
9. The provisions under Part E of the Master Agreement allow any Board member to refer "a dispute or question" under the Agreement to the Board, which may take a number of steps before recommending terms of settlement; the ultimate recourse is a reference of the dispute or question to the responsible Ministers of the affected jurisdictions.
10. Yukon-NWT Transboundary Water Management Agreement, in effect 21 February 2002, online: Mackenzie River Basin Board <<http://www.mrbn.ca/uploads/files/general/18/yukon-northwest-territories-transboundary-water-management-agreement.pdf>>.
11. Technically, it is a trilateral agreement insofar as there are three governments as parties: Yukon, the NWT and Canada.
12. Yukon-NWT Transboundary Water Management Agreement, para 1.0.
13. *Ibid*, para 2.
14. *Ibid*, para 10.1
15. *Ibid*, paras 5.1-5.2.
16. *Ibid*, para 5.3.
17. *Ibid*.
18. Subject to developments and activities listed as exclusions in relevant resource management and environmental assessment legislation: *ibid*, para 7.1.
19. And on the party in whose jurisdiction the action resulting in the deviation has taken place to respond with appropriate mitigative measures: *ibid*, para 7.4.
20. Under the agreement these are: in Yukon, the Nacho Nyak First Nation, the Vunut Gwitchin Tribal Council and the Tr'On dek Hwech'in First Nation; and in the NWT, the Gwich'in Tribal Council and the Inuvialuit Game Council. *Ibid*, para 3.0.
21. See for example: AE Utton, "International Environmental Law and Consultation Mechanisms" (1973) 12 Colum J Transnat'l L 56 at 66.
22. Yukon-NWT Bilateral, para 8.1.
23. *Ibid*, para 8.2.
24. "Alberta-Northwest Territories Memorandum of Understanding, Bilateral Water Management Agreement Negotiations", among Alberta Environment, Environment and Natural Resources [GNWT] and Indian and Northern Affairs Canada, 2007 [Alberta-NWT MOU]. Although there are three parties, Canada's participation reflects its current legislative responsibilities in water resources management in the NWT. Effectively though, the lead party north of 60 is the GNWT, as indicated in paragraph 5 of the MOU, which provides that the two governments "will act together on behalf of the Northwest Territories." This was the second MOU concluded by Alberta with respect to the negotiation of a bilateral water management agreement. The first was in 2005 with the Government of British Columbia; see British Columbia-Alberta Memorandum of Understanding, Bilateral Water Management Negotiations, between British Columbia Ministry of Water, Land and Air Protection and Alberta Environment, 18 March 2005. The structure of this MOU is broadly similar to that of the Alberta-NWT MOU.
25. Another document that is of relevance in this respect, albeit not one that it is necessary to address in detail here, is the Guidance Document with respect to bilateral agreements, issued in August 2009 by the MRBB: Mackenzie River Basin Board, "Bilateral Water Management Agreements Guidance Document",





- 3 August 2009. The document is of no binding effect, however, and its stated purpose is merely "to assist the parties when negotiating bilateral or multilateral agreements by setting out common expectations and building on principles established in the Master Agreement" (at 5). The Document accomplishes essentially three tasks: it provides an overview of the bilateral agreement process; it provides a "generic annotated outline" indicating the core elements that should be included in such agreements; and it describes the process for coordination of the negotiation and timing of the agreements.
26. Alberta-NWT MOU, para 2.
  27. *Ibid.*
  28. In this respect, it might be noted for example that the reference to water in support of Aboriginal cultures is absent from the equivalent section on vision and context in the B.C.-Alberta MOU. More generally, the recognition of a special weight to be given existing users in the basin is a not-unusual feature of international instruments that purport to set out principles for shared use of basin waters. This is usually to the advantage of the downstream state, since—unlike the case of the Mackenzie Basin—as a practical matter it is typically the downstream jurisdiction that develops first in shared basins.
  29. Alberta-NWT MOU, para 3. The language here is identical to that used in the equivalent section of the B.C.-Alberta MOU.
  30. Although these principles are included here under the section on rationale and intent rather than under the section on vision and context, as is the case for the B.C.-Alberta MOU.
  31. Alberta-NWT MOU, para 4.
  32. *Ibid.* Emphasis added. Again, following the B.C.-Alberta MOU, but with the addition of the reference to PNC procedures.
  33. In this respect, one might well ask, for example, whether the agreed allocation under the Prairie Provinces Master Agreement on Apportionment would be achievable today in light of the emerging stresses in the South Saskatchewan basin.
  34. Alberta-NWT MOU, para 4.

## PUBLICATIONS

### ***Sharing Land Stewardship in Alberta:***

***The Role of Aboriginal Peoples***

by David Laidlaw & Monique M. Passelac-Ross.

2012. 53 pp. Occasional Paper #38. \$20.00

(softcover) (download available)

This paper explores one possibility of revitalizing the relationship between First Nations, the people of Alberta and the lands and waters of Alberta that we all care for. To further this, we propose involving First Nations in the joint management of their traditional lands and resources under formal Joint Stewardship Agreements. We introduce the concept of co-management, which is a means of decentralizing decision-making over land use and resource management from government to local communities. We provide a brief overview of the literature on co-management.

### ***Assessing Where Renewable Energy and Energy Efficiency Stand in Alberta Policy and Government Organization***

by Michael M. Wenig. 2011.

40 pp. Occasional Paper #37. \$15.00 (softcover)

(download available)

Alberta has committed to "set a table" for renewable energy and to "encourage" energy efficiency and conservation. This commitment begs the questions of how fast or much these two sectors are expected to progress and what specific roles the province will play in promoting that progress. This paper addresses these questions by considering the evolution of provincial policy-making with respect to these two sectors and what governmental institutions have been created to specifically address the sectors.

### ***The "Public Interest" in Section 3 of Alberta's Energy Resources Conservation Act: Where Do We Stand and Where Do We Go From Here?***

by Cecilia A. Low, 2011.

41 pp. Occasional Paper #36. \$15.00 (softcover)

(download available)

Section 3 of the *Energy Resources Conservation Act* (ERCA) requires the Energy Resources Conservation Board (ERCB) to consider whether a proposed energy resource project is "in the public interest" having regard to three factors, the social and economic effects of the





project and its impact on the environment. Although the concept is fundamental to the discharge of the Board's mandate, the phrase "in the public interest" is not defined in the ERCA.

Since little has been written about section 3 of the ERCA and since Alberta Energy propose to change to how the public interest is engaged in the course of regulation of the upstream oil and gas industry, this paper sets out to assess the current state of the interpretation and application of that provision by the ERCB against the background of relevant social science literature on the topic of the public interest and applicable court decisions. The paper concludes with a series of recommendations for the way forward.

***Water Stewardship in the Lower Athabasca River: Is the Alberta Government Paying Attention to Aboriginal Rights to Water?***

by Monique Passelac-Ross and Karin Buss. 2011. 61 pp. Occasional Paper #35. \$20.00 (softcover) (download available)

This paper examines the status of aboriginal rights to water in the Lower Athabasca River Basin. It starts from the premise that Aboriginal peoples living in the Athabasca oil sands region have constitutionally protected water rights, and inquires whether or not these rights are acknowledged and protected by the Alberta government.

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## WHAT'S HAPPENING IN CIRL?

**On November 8, 2012**, CIRL is offering the popular one-day course, *Contract Law for Personnel in the Energy Industry* at the University of Calgary. This course is now full to capacity. For more information or to be added to the waiting list for an upcoming course, please contact Sue Parsons (403.220.3200 or sparsons@ucalgary.ca).

**Allan Ingelson and Sharon Mascher's** article on the new *Canadian Environmental Assessment Act (CEAA)* and *Fisheries Act* has been accepted for publication in *Lawyer's Weekly*.

**On September 21**, Allan Ingelson made a presentation on "Alberta Paleontological Resource Laws" at the Mount Royal University.

**On September 18**, the Faculty of Law and CIRL hosted the Graduate Student Reception. The event was held in CIRL's board room.

**Chilene Nwapi** was hired as a Research Fellow to complete a CIRL Occasional Paper on "Challenges Arising from Environmental Prosecution in the Context of Alberta Oil Sands Development."

**Rob Omura** was hired as a Research Fellow to complete a CIRL Occasional Paper on "Strategies for Cleaning Up Contaminated Sites in Alberta."

**Dr. W.N. Holden**, an Associate Professor in the Department of Geography, became a Research Associate at the Canadian Institute of Resources Law (CIRL) in 2012. Dr. Holden's legal research interests focus on the federalism of environmental law, nuclear energy law and policy, and the efficacy of mining as a development strategy in the Philippines, particularly conflicts between mining and indigenous peoples and conflicts between mining and local government units.

**Astrid Kalkbrenner**, a Research Fellow, will complete a CIRL Occasional Paper on Alberta oil sands and nuclear energy.

**Effective July 1, 2012**, Professor Allan Ingelson became the Executive Director of the Canadian Institute of Resources Law. His main areas of research are oil and gas law, renewable energy, mining law and environmental impact assessment. He is the recipient of several teaching excellence awards.



# RESOURCES

NUMBER 114 – 2012

## WHAT'S HAPPENING IN CIRL? (CONT.)

**Effective June 30, Owen Saunders** retired as the Executive Director of the Canadian Institute of Resources Law. Mr. Saunders will continue to hold an appointment as a Senior Fellow in the Institute and an Adjunct Professor in the Faculty of Law at the University of Calgary. He will maintain an office in the Institute.

**Effective June 30**, Monique Passelac-Ross retired as Research Associate at the Canadian Institute of Resources Law. Ms. Passelac-Ross is continuing as a Research Associate who will focus on Canadian and international issues affecting indigenous peoples.

*Resources* is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newsletter's purpose is to provide timely comments on current issues in resources law and policy. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. *Resources* is e-mailed free of charge to subscribers. (ISSN 0714-5918)

**Editors:** Nancy Money and Sue Parsons

## Canadian Institute of Resources Law Institut canadien du droit des ressources

### THE INSTITUTE

The Canadian Institute of Resources Law was incorporated in September 1979 to undertake and promote research, education and publication on the law relating to Canada's renewable and non-renewable natural resources.

The Institute was incorporated on the basis of a proposal prepared by a study team convened by the Faculty of Law at the University of Calgary. The Institute works in close association with the Faculty of Law. It is managed by its own Board of Directors and has a separate affiliation agreement with the University of Calgary.

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