

Appendix 2

Selected Legislative Developments in Canada

1. British Columbia

In British Columbia, the water licensing process is set out by the *Water Act* the *Water Regulation*. BC's *Water Act* is expected to be repealed in 2016 and replaced by the *Water Sustainability Act* (WSA) which received Royal Assent in May 2014. The regulations accompanying the WSA are still in development and the WSA will not take effect until they are complete.

Water Act

BC's current *Water Act*¹ and regulations governing water rights and allocation largely mirror those of Manitoba's *Water Rights Act*. The *Water Act* claims ownership of all water in the province and sets out a licensing scheme which regulates all water use that is not domestic. It also sets out the authority to create and implement water management plans.

Water licensing

Licensing and regulation of water power projects fall under the *Water Act* rather than a separate piece of legislation such as in Manitoba. A water licence issued under the *Water Act* entitles its holder to divert and use beneficially, for the purpose and during or within the time stipulated, the quantity of water specified in the licence; store water; construct, maintain and operate the works authorized under the licence and necessary for the proper diversion, storage, carriage, distribution and use of the water or the power produced from it; alter or improve a stream or channel for any purpose; construct fences, screens and fish or game guards across streams for the purpose of conserving fish or wildlife.²

The two types of water licences issued in BC are – condition and final. These are comparable to Manitoba's interim and final licences. Final licences are issued when the time for completing the works are authorized under a conditional licence or the licensee completes the works.³ Licenses for water projects built after 2003 and all licence renewals or amendments to existing licences cannot last longer than 40 years.⁴ The *Water Act* sets out that licence renewals are treated as if the application were for a new licence.⁵ Existing licences may be amended for several reasons including: apportionment, change of works, change of purpose, extension of time, extension of term, transfer of appurtenancy, and abandonment.⁶ The *Water Act* creates a “comptroller” which means a person employed by the government or a government corporation designated in writing by the minister as the comptroller of water

¹ *Water Act*, RSBC 1996 c 483

² *Water Act*, s. 5

³ *Water Act*, s. 14(1)

⁴ *Water Act*, s. 12.2(2)

⁵ *Water Act* s 12.2(5)

⁶ http://www.env.gov.bc.ca/wsd/water_rights/licence_amendments/index.html

rights.⁷ The comptroller has the power to refuse an application for a water licence, amend an application, grant all or part of an application, require additional plans or other information and issue to the applicant one or more conditional or final licences on the terms the comptroller or regional water manager considers proper.⁸ In considering an application, the comptroller or regional water manager must consider the current long term Columbia Basin Management Plan.⁹

The Minister may by order designate an area for the purpose of developing a water management plan if it will assist in addressing or preventing conflicts between water users; conflicts between water users and instream flow requirements; or risks to water quality.¹⁰ Resource management plans can restrict the issuance of water licences.¹¹

Water Protection Act

The *Water Protection Act*¹² prohibits bulk removal of BC's water to locations outside the province.¹³ It also prohibits large-scale diversion between major watersheds of the province. Nine major watersheds of BC are defined and the construction and operation of large-scale projects capable of diverting or transferring water from one major watershed to another are prohibited.¹⁴

Water Sustainability Act

The *Water Sustainability Act* (WSA) received Royal Assent in May, 2013 and will become law some time in the spring of 2015.¹⁵ The BC Legislature plans to bring the new law into effect in stages as new regulations are developed. The WSA is intended replace the 100-year old *Water Act* and provide a comprehensive, modern legal framework for water management in BC.

The WSA is said to create certainty and security of water rights while setting out clear rules for managing conflicts during times of water scarcity.¹⁶ The WSA focuses on seven policy areas:

1. Protect stream health and aquatic environments;
2. Consider water in land use decisions;
3. Regulate groundwater use;
4. Regulate during water scarcity;
5. Improve security, water use efficiency, and conservation;
6. Measure and report; and

⁷ *Water Act*, s. 1

⁸ *Water Act*, s. 12

⁹ *Water Act*, s. 12(2)

¹⁰ *Water Act*, s. 62

¹¹ *Water Act*, s. 12(1.3)(c)

¹² *Water Protection Act*, RSBC 1996 c 484

¹³ s. 5 of the *Water Protection Act* states that a person must not remove water from the province unless they: are registered with the Comptroller of Water Rights; are removing water in containers of 20 litres or less; obtained the water outside the province; or carry the water in vehicles, vessels or aircraft for the use of persons and animals while in transit across BC's borders.

¹⁴ *Water Protection Act*, s. 6

¹⁵ *Water Sustainability Act*, SBC 2014, c 15

¹⁶ <http://engage.gov.bc.ca/watersustainabilityact/the-proposal/>

7. Enable a range of governance approaches.

Lessons on water governance from BC

Importance of meaningful public engagement

The planning and creation of the WSA illustrates the importance of extensive public engagement. The WSA is a product of over five years of public engagement and policy development. Engagement on modernizing the *Water Act* began in December, 2009. The Ministry of Environment spent much of 2010 engaging with stakeholders, First Nations and the public. A Discussion Paper was released in February, 2010 and 12 regional workshops were held. Over 900 submissions received from a broad range of interests and citizens were summarized in the Report on Engagement released in September, 2010.¹⁷ The Ministry of Environment staff reviewed and analyzed the public input and developed a draft policy proposal with the support of technical advisors.

In December 2010, the province of BC released a Policy Proposal on the WSA which summarized the key policies of the proposed WSA in order to provide sufficient time for public commentary on the proposed policies.¹⁸

Protection of stream health and aquatic environments

Section 15 of the WSA introduces the requirement to consider environmental flow needs in new water allocation decisions. Environmental flow needs are defined in relation to a stream as “the volume and timing of water flow required for the proper functioning of the aquatic ecosystem of the stream.”¹⁹ It states that the applicant must provide reports of assessment to the decision maker that may be required to determine the environmental flow needs of the applicable stream. It also states that decision makers may take into account the environmental flow need of any stream that may be affected by the application.²⁰

The WSA also sets out a “critical environmental flow threshold” which is defined as “the volume of water flow below which significant or irreversible harm to the aquatic ecosystem of the stream is likely to occur.”²¹ Section 86 states that a declaration of significant water shortage provides for restrictions to all water users to protect the critical environmental flow threshold.

Consideration of water in land use decisions

Section 43 of the WSA gives the Lieutenant Governor in Council the authority to make regulations establishing “water objectives” for watersheds as a whole, or for streams, aquifers or other specified areas or environmental feature in order to sustain water quantity, water quality and aquatic ecosystems. Section 43 also provides legislative authority to the Lieutenant Governor in Council to specify factors and criteria that would apply when evaluating the impacts of a land use or resource use proposal or objective.

¹⁷ http://www.livingwatersmart.ca/water-act/docs/wam_report-on-engagement.pdf

¹⁸ http://www.livingwatersmart.ca/water-act/docs/wam_wsa-policy-proposal.pdf

¹⁹ WSA, s. 1(1)

²⁰ WSA, s. 15(4)

²¹ WSA, s. 1(1)

Consideration of best available information in licence terms and conditions

Section 23 of the WSA establishes a mandatory 30-year review of the terms and conditions of existing licenses. This section applies to licences that were issued on or before the date the section came into force, licences that have at least 30 years remaining on their term, and licences issued after the date the section comes into force. Licenses for a power or storage purpose granted after October 23, 2003 are exempt from the mandatory 30-year review because they are already subject to maximum 40-year term and a renewal process.²²

This section indicates that the decision maker may review the terms of conditions taking into account the best available technology in respect of water use efficiency and water conservation; best practices in respect of water use efficiency and water conservation; any increase in knowledge respecting actual stream flow or aquifer conditions; and the effects of climate change.

Mitigation measures and special consideration to “sensitive streams”

According to s. 16 of the WSA, if the proposed use of water is likely to have significant adverse impacts on water quality, water quantity or the aquatic ecosystem of a stream or aquifer, the decision maker may require the applicant to submit a proposal for mitigation measures to address those effects.

Section 17 makes special consideration for “sensitive streams” by requiring the applicant to include mitigation measures. The decision maker will only grant the application if it is satisfied that:

- any adverse impact resulting from granting the application on the sustainability of any protected fish population of the sensitive stream is likely to be insignificant; or
- the mitigation measures would ensure the application is not likely to cause significant adverse impacts.

2. Northwest Territories

In the Northwest Territories, the *Waters Act* provides a framework for the administration of water use in the territory and forbids any use of water or deposit of waste without a license (excluding domestic or emergency uses).²³ The *Waters Act* is designed to work in concert with the *Mackenzie Valley Resource Management Act* (MVRMA)²⁴, which provides a unique institutional framework for resource management by establishing land and water management boards. The *Waters Act* also sets out the legal process for environmental assessments in the NWT.

The regulatory regime in the NWT is a result of negotiations and land claim agreements between the federal government and First Nations in the area. It is a co-management system between governments and Indigenous groups that is drastically different from models in other parts of Canada. The major land claims agreements that underlie the regulatory regime are: the Inuvialuit Final Agreement; and the Gwich'in, Sahtu and Tlicho Final Agreements which

²² <http://www.projectlawblog.com/2013/10/23/water-use-in-bc-on-the-threshold-of-a-new-regime/>

²³ *Waters Act*, SNWT, 2014, c 18

²⁴ *Mackenzie Valley Resource Management Act*, SC 1998, c 25

are entrenched in the MVRMA.

On April 1, 2014, responsibility for administering laws that regulate water were transferred from the federal government to the government of the Northwest Territories.

Waters Act

Similar to the Yukon's *Waters Act*, this Act provides a framework for the administration of water use in the territory and forbids any use of water or deposit of waste without a license (excluding domestic or emergency uses).²⁵ The *Waters Act* is designed to work in concert with the MVRMA, which establishes land and water management boards in the region.

There are two types of water licences issued in the Northwest Territories: Type A and Type B.²⁶ Section 14 of the *Waters Act* sets out the recording and reporting requirements for both types of licenses. It states that every licensee must submit a report to the Board each year setting out the quantity of water used and the concentration and type of waste deposited.

The *Waters Act* does not have a “interim licence” equivalent. Licenses may be issued for terms not exceeding 25 years.²⁷

Section 41 and 45 of the *Waters Act* set out the requirements for public hearings. Such hearings are undertaken by the appropriate Board depending on where the undertaking is located. The Board may hold hearings if it is satisfied that it would be in the public interest to do so and it shall hold hearings in the following circumstances:

- application for the issuance of a Type A licence; or
- an amendment or cancellation of a Type B licence²⁸

Mackenzie Valley Resource Management Act

The *Mackenzie Valley Resource Management Act* (MVRMA) establishes an integrated co-management system for land and water throughout the Mackenzie Valley, which covers most of the Northwest Territories. The MVRMA establishes regional boards to regulate the use of land and water in their respective territories, and the Mackenzie Valley Land and Water Board, which is a much larger board composed of representatives from the regional boards. The boards regulate the use of water and deposit of waste in each territory. They have authority to issue licenses, create management plans, and carry out environmental assessments of proposed projects in the Mackenzie Valley. The boards created under the Act include the Mackenzie Valley Land and Water Board as well as the following regional Boards:

- the Gwich'in Land and Water Board;

²⁵ *Waters Act*, SNWT 2014, c 18

²⁶ *Waters Act*, s. 26(1). Section 7 of the *Waters Regulation* states: “a licence issued under subsection 26(1) of the Act shall be a type B licence for one or more uses of water or deposits of waste set out in column I of any Schedules D to H, where any one of those uses or deposits (a) meets a criterion set out in column III of the Schedules; or (b) meetings a criterion set out in column II of the Schedules, but does not meet the requirements of paragraphs 4(1)(a) and (b). (2) A licence issued under subsection 26(1) of the Act shall be a type A licence for one or more uses of water or deposits of waste set out in column I of any of Schedules D to H, where any of those uses or deposits meets criterion set out in column IV of those Schedules.”

²⁷ *Waters Act*, s. 26(2)

²⁸ Section 41(3) sets out the hearing exemptions.

- the Gwich'in Land Use Planning Board;
- the Sahtu Land and Water Board; and
- the Wekeezhii Land and Water Board²⁹

These boards are authorized to issue, renew, suspend and/or cancel water licenses in their respective jurisdictions.³⁰ The MVRMA also sets out the authority of the Inuvialuit Water Board which issues water licences in the Inuvialuit settlement region. This board works in parallel with other water boards established under the MVRMA. The Inuvialuit Water Board's powers include the ability to: issue licences (subject to approval of federal minister); impose conditions on licences; issue orders and hold public hearings.

An interesting and unique feature of the *Waters Act* and the MVRMA is that the federal minister of Environment and Natural Resources is able to set policy directions that are binding on the regional water boards.³¹ This can only be done once the boards have been consulted. Enforcement of the MVRMA is the responsibility of the federal minister. The minister also retains authority to approve licenses.³²

Lessons on water governance from NWT

Meaningfully engaging those directly affected

The development of decentralized regional regulatory boards ensures more meaningful engagement of all those directly affected, including Indigenous people. These regional boards are more responsive to changing circumstances and have strategies for more effective communication and participation of community interests. They also add to the efforts to build a collaborative vision of economic and social development through region-specific land use plans.

The boards also ensure meaningful engagement as no proposed water or deposit of waste that would adversely affect the waters of the Gwich'in and Sahtu First Nations or the Tlicho Government can be approved by the Inuvialuit Water Board, unless an agreement has been reached between the proponent and the First Nation.

The integration of knowledge frameworks

The provision for cumulative effects monitoring explicitly refers to the integration of western scientific knowledge and traditional knowledge when implementing the process.³³ Further, s. 60.1 of the MVRMA says that boards must consider “the importance of conservation to the well being and the way of life of Aboriginal peoples of Canada... and any traditional knowledge and scientific knowledge that is made available to it.”³⁴

²⁹ The MVLWB consists of: The MVLWB Chairperson, nominated by the majority of the members and appointed by the Minister of Aboriginal Affairs and Northern Development Canada (AANDC); Five members of the Sahtu Land and Water Board; Five members of the Gwich'in Land and Water Board; Five members of the Wek'èezhii Land and Water Board; and, Four members appointed pursuant to Section 99 of the MVRMA. See <http://mvlwb.com/content/about-us>.

³⁰ *Waters Act*, s 26(1)

³¹ *Waters Act*, ss. 25 and 83; MVRMA, s. 109.1

³² *Waters Act*, s. 9

³³ MVRMA, s. 146

³⁴ The Wekeezhii Land and Water Board is also bound by laws of the Tlicho Government, and cannot exercise its powers in a way that contravenes its laws [s.61(2)]

Sections 72 and 73 of the MVRMA also explicitly provide protection for Aboriginal water rights including the use for traditional heritage, cultural and spiritual purposes.³⁵

Requirements for monitoring and reporting

The MVRMA states that the Cumulative Impact Monitoring Program and an environmental audit must be conducted every five years with the participation of First Nations.³⁶ Further, the requirements for reporting contained in licensing documents are extensive and provision is made so licensing documents and associated plans can be adjusted as monitoring and reporting requirements are submitted. The Boards can require the proponent to undertake studies about the impact of the undertaking.

Transparency and access to information

All documents related to water licensing in the Northwest Territories are available from the Mackenzie Valley Land and Water Board's public registry.³⁷

3. Yukon

Prior to 2003, the *Yukon Waters Act* provided the legal framework for the issuance of licenses in the Yukon. In 2003, with the devolution of federal responsibilities to the Yukon, the *Yukon Waters Act* was replaced by the *Waters Act*, which was intended to be mirror legislation.³⁸ The Waters Regulation also sets out the requirements related to the water licensing process.³⁹

Under the *Waters Act*, the Yukon Water Board is responsible for the issuance of water licences for a variety of undertakings including the deposit of waste into water. The Board's main power is to grant licences for water use and depositing waste. The objectives of the Board are to provide for the conservation, development, and utilization of waters in a manner that will provide the optimum benefit for all Canadians and for the residents of the Yukon in particular.⁴⁰

The Yukon Water Board also has specific responsibilities under the *Yukon Environmental and Socio Economic Assessment Act* (YESAA) and the Umbrella Final Agreement.⁴¹ The Board cannot issue a water use licence, or set terms of a licence, that are contrary to a decision document issued under that legislation. For this reason, an application for a water use licence must be accompanied by a decision document issued under YESAA. Pursuant to the Umbrella Final Agreement, First Nations and indigenous people may apply to the Board to determine whether their rights are being infringed, whether they are entitled to compensation,

³⁵ "According to s. 72, "the Gwich'in and Sahtu First Nations have the right to use waters or deposit waste without a license for purposes of trapping and non-commercial wildlife harvesting other than trapping, for purposes of transportation related to those activities and for traditional heritage, cultural, and spiritual purposes." Section 73 provides exclusive rights to use water flowing through first nations lands.

³⁶ MVRMA, ss. 146 and 148

³⁷ <http://www.mvlwb.ca/Boards/mv/SitePages/registry.aspx>

³⁸ S.Y. 2003, c 19

³⁹ YOIC 2003/58

⁴⁰ <http://www.yukonwaterboard.ca/role.htm>

⁴¹ SC 2003, c 7

and whether there is an alternative way to mitigate or avoid an adverse affect.⁴²

Umbrella Final Agreement

The Umbrella Final Agreement (UFA) is a modern treaty formed between the government of Canada and the Indigenous people of the Yukon in the late 1980s. The First Nations of Yukon were able to negotiate a much broader set of rights than those of historic treaties in other parts of Canada. Chapter 14 of the UFA contains special provisions for water management. Under this part the rights of First Nations to exclusive use of the water flowing through their territory is protected.⁴³ In addition, all indigenous people have the right to use water for traditional purposes (such as hunting and trapping or domestic use) without a license.⁴⁴ Before granting a license the Water Board must consider the effect a water use will have on a First Nation and an indigenous person and must consider conditions to mitigate those effects.⁴⁵ The Water Board must also order compensation to be paid to a First Nation if the quality or quantity of its water is adversely affected.⁴⁶ The government must consult with First Nations before making any inter-jurisdictional agreement that will affect their water rights.⁴⁷

The Yukon Environmental and Socio-Economic Assessment Act

The YESAA is a federal law intended to give effect to the provisions of the UFA respecting assessment of environmental and socio-economic effects.⁴⁸ YESAA was fully implemented in November 2005, and it applies to every project that requires a water use licence.

Its purpose includes: the protection and promotion of the well-being of Yukon Indigenous persons and their societies and Yukon residents generally; ensuring that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities and their residents, and societies in general, depend.⁴⁹

The Yukon Environmental and Socio-Economic Assessment Board (YESAB) administers the YESAA. An assessment under YESAA must be undertaken by the YESAB when a project activity is listed in the regulations and requires a permit or authorization, a transfer of land, or uses federal funding. The YESAA designated office carries out a public consultation process, identifies potentially significant effects, and recommends mitigative terms and conditions to a decision body. Assessors consider the potential environmental and socio-economic effects of proposed activities by gathering and analyzing relevant information from various sources (federal, territorial and First Nation governments, experts in the field, and the public) and by conducting research to allow for a complete and thorough assessment.

⁴² Umbrella Final Agreement, between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, 1993 [UFA] s. 14.11.

⁴³ UFA s.14.5.4

⁴⁴ UFA s.14.5.1 to 14.5.2

⁴⁵ UFA s.14.8.5 and 14.8.6; section 14.11 also provides First Nations and indigenous people also have a right to apply to the Water Board to determine whether their rights are being infringed, whether they are entitled to compensation, and whether there is an alternative way to mitigate or avoid the adverse affect.

⁴⁶ UFA s.14.8.5 and 14.12.0

⁴⁷ UFA s.14.10.2

⁴⁸ *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7. [YESAA]

⁴⁹ YESAA, s.5

Once the appropriate information has been collected and considered, the assessor recommends whether the project should proceed and, if so, under what conditions. The water licence cannot contradict the decision document.⁵⁰

Water licensing

The Yukon Water Board is granted the power to issue Type A and Type B water licences under s. 12 of the *Waters Act*. Schedule 2 of the Water Regulations⁵¹ sets out the criteria for determining which type of licence.⁵² Water licences under this legal framework cannot have a term exceeding 25 years.

The Board may include in a licence any conditions that it considers appropriate, including conditions:

- relating to the manner of use of waters permitted to be used under the licence;
- relating to the quantity, concentration, and types of waste that may be deposited in any waters by the licensee;
- under which any such waste may be so deposited;
- relating to studies to be undertaken, works to be constructed, plans to be submitted, and monitoring programs to be undertaken; and
- relating to any future closing or abandonment of the appurtenant undertaking⁵³

When setting the conditions of a licence, the Board must make all reasonable efforts to minimize adverse effects of the issuance on the licence on: licensees, domestic users, instream users, authorized users, authorized waste depositors, owners of property, occupation of property, holders of outfitting concessions, registered trapline holders, and holders of other rights of a similar nature.⁵⁴

The Board may hold a public hearing in connection with any matter relating to its objects, if it is satisfied that it would be in the public interest.⁵⁵ The Board is required to hold a hearing when considering the issuance or renewal of a type A licence; an amendment to a type A licence pursuant to which the use, flow, or quality of waters, or the term of the licence, would be altered; the cancellation of a type A licence; or the cancellation of a type B licence⁵⁶, unless the exemptions found in s. 19(3) apply. A public hearing is held at such place in the Yukon as the Board considers appropriate, and may be adjourned from time to time and from place to place within the Yukon.⁵⁷

The Waters Regulation sets out the requirements for the public registry. Each file is required to contain: a copy of the application and of all supporting documents; all records from any public hearing held in connection with the application; a copy of any licence issued in respect of the application and the reasons for the decision of the Board in respect of its issuance; and all correspondence and documents submitted to the Board in respect of compliance with the conditions of any licence issued in respect of the application.⁵⁸ Licensing documents are

⁵⁰ <http://www.yukonwaterboard.ca/role.htm>

⁵¹ OIC 2003/58

⁵² Water Regulation, s. 7

⁵³ *Waters Act*, s. 13(1)

⁵⁴ *Waters Act*, s. 13(2)

⁵⁵ *Waters Act*, s. 19(1)

⁵⁶ *Waters Act*, s. 19(2)

⁵⁷ *Waters Act*, s. 19(4)

⁵⁸ Water Regulation, s. 13(2)

available online on the Waterline Registry.⁵⁹

The licensee is required to submit an annual report “setting out the quantity of water used under the licence and the quantity, concentration, and type of any waste deposited under the licence.”⁶⁰ Reporting requirements are also set out in the licensing document.

Lessons on water governance from Yukon

Balancing the interest of Indigenous peoples and economic development

The Yukon *Waters Act* attempts to balance the interests of indigenous people and economic development by setting out an administrative scheme for water use that explicitly recognizes the rights of Indigenous peoples and the need for environmental assessment.

Indigenous people are engaged in many ways. The Yukon Water Board must have one third of the Board's members nominated by the Council for Yukon Indians.⁶¹ The modern treaty agreements outlined in the UFA ensure that First Nations in the Yukon have a meaningful role in water management decisions and that their rights to water are protected. The provisions of the UFA are woven into every applicable law governing water in the territory. In addition, environmental and social assessment legislation sets out an independent and comprehensive process for the assessment of new projects.

The creation of the YESAB ensures an independent board monitors whether Indigenous rights have been infringed and ensures that proper compensation is provided if applicable. The requirement that the Water Board decision cannot contradict the YESAB report may assist in assuring Indigenous people directly affected by developments that their voices will be heard.

Reporting requirements

The Yukon's water licensing regime is similar to that of the Northwest Territories in that there are extensive reporting requirements and undertakings are required to undergo an annual dam safety inspection, and undertake a comprehensive dam safety review at least every five years. Such inspections must comply with the Canadian Dam Safety Associations “Dam Safety Guidelines”.

⁵⁹ <https://apps.gov.yk.ca/prod/waterline/f?p=127:1:>

⁶⁰ Water Regulation, s. 14(1)

⁶¹ *Ibid.*