Appendix 8
Specific Issues regarding *The Water Power Act*, *The Environment Act* and the Regulations

The purpose of this document is to consider specific issues regarding *The Water Power Act*, *The Environment Act* and their respective regulations. A summary of those issues is as follows:

1. **Is approval of a final licence mandated under *The Water Power Act*?**
   Yes, if all obligations under *The Water Power Act* and the Water Power Regulation and the terms and conditions of the interim licence have been fulfilled and complied with, then the interim licensee is entitled to a final licence under s. 43(1) of the Water Power Regulation.

2. **Can additional conditions be imposed on a final licence under *The Water Power Act*?**
   Yes, ss. 20, 44 and 92 of the Water Power Regulation give the Minister the authority to impose additional terms and conditions on a final licence or short-term extension of a final licence. In addition, the Water Power Regulation imposes certain general conditions on all interim and final licensees.

3. **Can conservation measures be imposed on an interim licence?**
   Maybe. Sections 19(j)(v), 20 and 39 of the Water Power Regulation give the Minister the authority to impose terms and conditions in an interim licence or an amended interim licence that presumably include conservation measures. Whether that includes the authority to impose conservation measures depends on how those sections are likely to be interpreted. There are arguments on both sides regarding the interpretation of the word “conservation” in the context of the legislation and regulations. The Water Power Regulation does impose certain general conditions relating to some degree to conservation and environmental protection on all interim and final licensees.

4. **Does the term of a final licence need to be 50 years?**
   No, s. 45(1) of the Water Power Regulation states the term of a final licence cannot exceed 50 years and the Regulation authorizes 5-year short-term extensions of a final licence, but nothing in *The Water Power Act* or Regulation says the term of a final licence must be for 50 years.

5. **Is there actual grandfathering from *The Environment Act*?**

No, there is no grandfather clause in *The Environment Act*. The legislative authority for the position that developments in operation prior to the enactment of *The Environment Act* are exempt is not clear.

6. **Can a Class 3 environmental assessment review be initiated without an alteration?**

   Yes, s. 12(2) of *The Environment Act* gives the Minister the discretion to require a person operating a Class 3 development to file a proposal if "new evidence warrants a change in the existing limits, terms or conditions" or "where no existing limits, terms or conditions exist by licence or regulation".

7. **Can one have competing Water Power Licences and Environment Act Licenses, ie. what happens if an Environment Act Licence conflicts with a Water Power Licence condition?**

   The current practice is for Water Power Licences and Environment Act Licences to be issued in series. In addition, s. 87 of the Water Power Regulation prohibits the Minister from instructing a licensee to do something that is inconsistent with certain provincial statutes, which presumably includes *The Environment Act*.

8. **What, if any, impact does the *Campbell Soup* case have?**

   According to the *Campbell Soup* case, unless LWR falls within one of the categories in the Classes of Development Regulation, there is no way an environmental assessment can be triggered, even if the Minister wants there to be an environmental assessment.

ANALYSIS

1. **Is approval of a final licence mandated under *The Water Power Act*?**

If all required conditions have been met, an interim licensee is entitled to a final licence under *The Water Power Act* ("the WPA").[1] According to s. 43(1) of the Water Power Regulation ("the WPR)[2]:

> **Issuance of final licence**
> **43(1) Upon the completion of the initial development according to the plan previously approved, and upon fulfillment and compliance otherwise with all the terms and conditions of his or her interim licence and of this regulation, the interim licensee shall be entitled to a final licence** authorizing one or more of diversion, use, or storage of water at the site in question, for the development of energy therefrom, for the utilization of such energy, for

1 *The Water Power Act*, C.C.S.M., c. W60.
2 Water Power Regulation 25/88R.

> the occupation or use of the lands of the province or whichever one or more of these is, in the minister's opinion, required for the proper maintenance and operation of the works. (emphasis added)

An interim licensee will be aware in advance of the terms and conditions that must be fulfilled and complied with prior to receiving a final license. Section 19 of the WPR requires the interim licence to include a number of particulars, one of which is that the final licence will issue upon completion of the initial development and "observance and fulfillment by the licensee of all the terms and conditions required by the interim licence". In addition, s. 19 requires an interim licence to include "a statement of the principal terms, which, subject to this regulation, will be embodied in such final licence when issued" and "any other special terms and conditions which may be imposed by the minister".

There are other provisions of the WPA and the WPR that impose additional obligations on the Minister or an interim licensee before a final licence will issue. In particular, s. 6(3) of the WPA states that no licence can be issued for land in a national park or forest reserve until Environment Canada or the member of Executive Council responsible for the *Forestry Act* reports on the effects and the Minister decides if it is necessary to insert any provisions to "protect the use and enjoyment of the national park or forest reserve". Section 35(2) of the WPR states that an interim licensee is not entitled to a final licence until copies of final construction plans have been filed after completion of the initial development and s. 36(2) states that a final licence cannot be issued unless construction costs are fixed upon completion of the initial development.

In addition, s. 64 of the WPR states that if there is a "material change in any existing works or in their location", a licensee cannot proceed until the proposed change has been authorized. Section 68 states that if there has been a change in undertaking, the licensee must apply for a new interim licence, as follows:

> **Change in undertaking**
> **68** If a licensee desires to develop, sell, use or dispose of any greater quantity of power than authorized by his or her licence, whether such increased disposal of power does or does not necessitate any addition to or alteration in the works, or desires to use or dispose of any power in connection with his undertaking in a manner or for a purpose other than as provided in such licence, the licensee must first apply for an interim licence authorizing the construction of the works or for a final licence authorizing such additional development, sale, use or disposal or authorizing such use or disposal in such other manner or for such other purpose, as the case may be.

Based on all of the above, an interim licensee is entitled to a final licence under the WPA so long as:

- the initial development has been completed in accordance with the approved plans;
- the interim licensee has fulfilled and complied with the terms and conditions of the interim licence;
- the interim licensee has fulfilled and complied with any additional obligations imposed by the WPR, in particular filing final construction plans and fixing construction costs; and
- a report is provided if the land is in a national park or forest reserve and the Minister considers if it is necessary to insert any provisions to protect the use and enjoyment of the national park or forest reserve; and
- there have been no unauthorized material changes in any existing works or their location or unauthorized changes in undertaking.

2. Can additional conditions be imposed in a final license under *The Water Power Act*?

There are three sections in the WPR that allow the Minister to impose additional conditions in a final licence. Section 20 states that interim and final licences are deemed to incorporate and be subject to the regulations in force at the time the licence was issued and “such other stipulations, provisos and conditions” the Minister may impose. Section 44 states that a final licence must embody the terms of the interim licence “and such other terms and conditions” the Minister may impose. Section 92 (which will be discussed in greater detail below) gives the Minister the authority to amend existing terms and conditions or include additional terms and conditions in any short-term extensions of a final licence if it is in the public interest.

In addition to terms and conditions the Minister may impose at the time a final licence is issued, there are provisions in the WPR that give the Minister the authority to impose conditions after an interim or final licence has issued. In particular, s. 66 of the WPR allows the Minister to alter the terms of a final licence in certain circumstances. That section states that if there is a public demand for power that could reasonably be developed from the flow of water granted under a licence, the Minister may order the licensee to develop that additional power for public use. Section 67 allows the Minister to offer an existing licensee a new interim licence if the Minister decides that an “enlarged or more comprehensive development” of the water power is in the public interest. These provisions support the position that interim and final licences are not frozen in time and giving the Minister this authority reflects a legislative intent to modify or alter an existing licence if it would benefit the public.

Further, there are provisions in the WPR that impose specific obligations on a final licensee over and above those imposed by the Minister in the licence. In particular, every final licensee must:

- protect all previously existing telephone, telegraph and power transmission lines and "operate, maintain and render safe to the public his or her own transmission, telephone and other lines" (s. 56);

- submit plans and obtain the Director's approval before erecting any buildings or structures (s. 57(1));

- obtain the Minister's written consent and comply with any conditions imposed by the Minister before removing, altering or in any way affecting "roads, trails, telephone lines, buildings or other improvements that are the property of the Crown" in the construction or operation of the works (s. 58);

- obtain the Minister's approval and comply with conditions imposed by the Minister before using lands for subdivision for a townsite (s. 59);

- pay stumpage and royalty fees for any merchantable timber cut or removed (s. 60); and

- pay persons employed in the construction, alteration, extension, maintenance and operation of the authorized works wages no less than those prescribed under either *The Employment Standards Act* or *The Construction Industry Wages Act* (s. 83).

The WPR also requires a final licensee to do certain things with respect to maintaining and operating the authorized works, as follows:

> **Works, maintenance, and operation**
> **62(1)** The licensee shall at all times install and use first class, modern, standard works, plant, and equipment, giving consideration to their requisite suitability of design, safety, strength, durability, efficiency, and all other relevant factors whatsoever, and shall maintain the same in good repair and condition, and shall exercise all due skill and diligence so as to secure satisfactory operation thereof.
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> ...
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> **65(1)** The director may require any licensee to install and maintain in good operating condition at such places and in such manner as the director shall approve, accurate meters, measuring weirs, gauges or other approved devices which shall be adequate for determining the amount of water used or power developed in the operation of the

works, for determining the flow of the stream or streams from which water is or will be diverted, and for determining the amount of water held in or drawn from storage.

...

Stream regulation and control
72 Every licence shall be deemed to have been executed on the express condition that the licensee shall

(a) divert, use or store the water authorized to be diverted, used, or stored by him in such a manner as not to interfere, in the opinion of the minister, with the maximum advantageous development of the power and other resources of the river or stream upon which the works are located;
(b) conform to and comply with any orders in respect of the control or regulation of the flow of the waters of such river or stream as may be made from time to time by the minister or any person authorized by the minister in that behalf; and
(c) at no time cause or permit the surface level of the waters of such river or stream or of any storage reservoir operated by the licensee to be raised or lowered beyond the limits which shall be fixed from time to time by the minister or by a person authorized by the minister in that behalf.

Based on the above, additional conditions may be imposed by the Minister in a final licence under the WPA. In addition, the WPR deems certain conditions to be part of every final licence.

3. Can conservation measures be imposed on an interim license?

There are two provisions in the WPR that give authority to the Minister to impose conditions in an interim licence at the time it issues. Section 19(j)(v) states that every interim licence must contain certain particulars, including “any special terms and conditions which may be imposed by the minister”. As noted above, s. 20 states that an interim licence is deemed to incorporate and be subject to the regulations in force at the time the licence was issued and “such other stipulations, provisos and conditions” the Minister may impose.

In addition, s. 39 of the WPR gives the Minister the authority to amend an existing interim licence, as follows:

Amending interim licence
39 Subject to this regulation the terms of any interim licence may be amended by a supplementary licence entered into between the minister and the interim licensee, and plans and specifications previously approved may be amended with the consent in writing of the minister, but any such amendment shall affect only the portion

specifically covered in such supplementary licence or writing, and shall in no case operate to alter or amend or in any way whatsoever be a waiver of any other part, condition or provision of the original interim licence.

Based on the above, there does not appear to be any doubt that the WPR allows the Minister to impose terms and conditions in a new interim licence or in a supplementary licence that amends an existing interim licence. Whether that authority includes imposing conservation measures depends on how narrowly or broadly ss. 19(j)(v) and 20 is interpreted.

The WPR imposes several obligations and conditions on interim and final licensees that are relevant to some degree to conservation and environmental protection. In particular:

- an interim or final licensee must " maintain the lands, works and property ... in a manner satisfactory to the minister, including the maintenance of all flooded or other areas in a sanitary condition and the improvement of the lands from the point of view of landscape architecture, and shall do all in his or her power to protect the lands and the interests of the Crown therein against injury by anyone engaged on or about the works, or by any other person" (s. 54);

- an interim or final licensee must "do everything reasonably within his or her power, both independently and on request of the minister to prevent and suppress fires on or near the lands to be occupied under the licence" (s. 54(2));

- an interim or final licensee must, "to the satisfaction of the minister, dispose of all brush, refuse or unused timber on lands of the provinces resulting from the construction and maintenance of the works, and shall keep the lands covered by his or her licence clear of unnecessary combustible material at all times" (s. 54(4)); and

- any authority to use or occupy the lands within a forest reserve or park must "be subject to the careful observance by the interim or final licensee of the provisions of any regulation relating to forest reserves and parks, and also of any conditions which the minister may, from time to time, impose with respect to the care, upkeep and management of such forest reserve or park" (s. 61).

In addition, the WPR expressly requires a final licensee to comply with other federal and provincial laws relevant to conservation and environmental protection, as follows:

> 87 Notwithstanding any rights granted or approval given by any licence, every licensee shall comply fully with the provisions of the

Navigable Waters Protection Act (Canada) and any rules and regulations promulgated thereunder, and shall also comply fully with the provisions of any provincial statutes or regulations governing the preservation of the purity of waters or governing logging, forestry, fishing, wildlife or other interests present or future which might be affected by any operations conducted under the licence and shall also observe and carry out any instructions of the minister concerning any of those matters not inconsistent with the said statutes and regulations.

Section 87 refers to provincial laws "governing the preservation of the purity of waters or governing logging, forestry, fishing, wildlife or other interests present or future which might be affected by any operations conducted under the licence" and presumably this includes *The Environment Act*. Therefore, if a development is subject to an environmental assessment under *The Environment Act*, then it would not be necessary for any terms or conditions of an environmental licence to be part of a WPA licence because the licensee is already obligated to comply with that legislation.

Section 87 goes on to say that a licensee must "observe and carry out any instructions of the minister concerning any of those matters not inconsistent with the said statutes and regulations". This is relevant to LWR because it is not currently subject to an environmental assessment under *The Environment Act*. Section 87 would likely not allow the Minister to require an environmental assessment be done as a term or condition of a licence under the WPA because that would be inconsistent with *The Environment Act.*

Section 37(1) of the Water Power Regulation – "general conservation purposes"

Section 37(1) of the WPR states:

Operation under interim licence
37(1) In the event that the works are put into operation before the issuance of the final licence, the interim licensee shall, pending the issuance of such final licence and until otherwise agreed upon, maintain and operate the same to the satisfaction of the director and shall at no time raise the level of the waters of any river, lake or other body of water or permit such level to be raised higher than the elevation which shall be fixed from time to time by the director and shall abide by all reasonable regulations which may from time to time be promulgated by the minister for the control of the flow of any waters for general conservation purposes.

There are more than one possible interpretations of the phrase “for general conservation purposes” in s. 37(1). For instance, it might be interpreted to mean just preserving the water resources to produce the maximum amount of power, or it might have a broader meaning and include ecological values.

How the phrase “for general conservation purposes” is interpreted depends on the purpose and intent of the legislation as a whole and the specific provisions of the WPA and the WPR. The modern principle of statutory interpretation is the following:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[3]

Arguments supporting a narrow interpretation

The purpose of the WPA is to regulate and control “undertakings” required to develop provincial water power or the transmission of energy from that water power (s. 1). The term “water power” is defined in the WPA as the “force or energy from any flowing or falling waters in such quantities as to make it of commercial value” (s. 1). The legislation applies to both water and the lands required to produce the water power or transmit the energy produced (s. 4).

The importance of the development of water power is reflected in s. 8 of the WPA, which gives the Lieutenant Governor in Council the authority to direct the Minister to appropriate land or an interest in land for an undertaking that is necessary to create or develop water power. In addition, s. 14(1) gives the Lieutenant Governor in Council broad regulation-making authority that includes: the storage, regulation, diversion and use of water for power purposes and to protect the water supply; the development, transmission, distribution, sale or use of water power on, through or over Crown and non-Crown lands; and the construction of regulation or storage works to regulate or augment the flow of water needed for power and other purposes. In addition, s. 86 of the WPR gives authority to the Lieutenant Governor to reserve lands “as being valuable for the development of any water power” even if they cannot be used to develop water power for several years.

There are several sections in the WPA and WPR specific to the objective of developing the maximum capacity of water power in order to meet public demand. In particular:

- the Minister has the authority to order “a survey of all streams and all necessary investigations with respect to water powers to determine **the total utilized and available water power and the maximum that can be**

3 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1988] 1 SCR 27, at para 21.

made available by storage, regulation, or other artificial means" (s. 12(1)(b) of the WPA);

- the Minister has free access to all works and records regarding an undertaking and may do things necessary or expedient to "**ascertaining the amount of power developed or capable of being developed**" (s. 12(3)(b) of the WPA);

- the Lieutenant Governor in Council the authority to make regulations "**to secure such power output ... as may be required to supply the public demand and securing of maximum power resources of all streams**" (s. 14(1)(i) of the WPA);

- one of the express conditions of every licence is that the licensee not divert, use or store water "in such a manner as not to interfere, in the opinion of the minister, with the **maximum advantageous development of the power and other resources of the river or stream upon which the works are located**"; (s. 72 of the WPR);

- if a licensee "has not developed the amount of power for which there is a **public demand and which could be reasonably developed from the flow of water**" granted under the licence, the Minister may order the licensee to "**to develop and render available for public use the additional amount of power ... up to the full extent possible from the amount of water granted** ..." (s. 66 of the WPR); and

- the Minister has authority to "investigate the possibility of establishing an **enlarged or more comprehensive development of water power** in any stream at or near the site occupied by any licensee". If it is in the public interest, the Minister may offer the licensee a new interim licence to carry out the "enlarged or more comprehensive development"; (s.67 of the WPR).

In addition, there are provisions that refer to the protection of water powers as a legislative objective, in particular:

- Crown lands upon which there is water power, or lands that are **required to protect the water power** or are required for the purposes of the undertaking cannot be sold and no interest can be granted other than in accordance with the Act and the regulations (s. 6);

- if those Crown lands are no longer required for one of the purposes above, "or the Minister is satisfied that adequate measures have been **taken to protect existing or future undertakings** for which Crown lands are or may be required", the lands may be dealt with under *The Crown Lands Act* and may be disposed of (s. 7); and

- the Lieutenant Governor in Council may direct the Minister to appropriate land or an interest in land for an **undertaking necessary to protect a water power** (s. 8).

Lastly, there are sections that refer to economic interests, as follows:

- where there are two are more water powers, the Lieutenant Governor in Council is to consider whether "they can more **economically and satisfactorily be used** by being developed jointly and operated under one control" (s. 11 of the WPA);

- the Minister has authority to order surveys and measurements for the purpose of determining "the **economic availability or usefulness**" of a stream or body of water for power purposes (s. 12(1)(c) of the WPA); and

- the Lieutenant Governor in Council has authority to make regulations "to **regulate and control the service given to the public by persons engaged in supplying water power; to regulate and control the rates or charges for such service** ..."; and to fix rental, royalties, fees, dues or charges to be paid to divert, use or store water, or to use or occupy land (s. 14(1)(i) and (j) of the WPA).

Based on the above, it is evident that the WPA and WRP create a legislative scheme intended to regulate, control and protect undertakings required for the maximum advantageous development of provincial water power of commercial value and the transmission of that water power to supply public demand. The Minister and the Lieutenant Governor in Council are given very broad powers to achieve those objectives, including appropriating land to meet current needs, reserving land to develop water power in the future, and making regulations.

This characterization of the overall objectives of the WPA and WPR and the legislative intent is consistent with ss. 18 and 44 of the WPR relating to interim and final licences. The specific terms and conditions that are included in an interim or final licence relate primarily to such things as how the water power will be developed and used. Although they allow the Minister to impose additional terms and conditions, neither section expressly states those terms and conditions include conservation measures intended to reduce the environmental impacts of the undertaking.

As noted above, the rules of statutory interpretation require the WPA and WPR to be interpreted in a manner "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". An argument could therefore be made that the phase "for general conservation purposes" should be interpreted narrowly and be limited to regulations controlling the flow of water that will achieve the legislative objectives. If that is the case, it means the Minister may

only make regulations to preserve the water resource to produce the maximum amount of power and not consider ecological values.

Arguments supporting a broad interpretation

The starting point when there are more than one possible interpretations of a statute or regulation is to look at the words "in their grammatical and ordinary sense". The dictionary definition of "conservation" is "the protection of animals, plants and natural resources; the careful use of natural resources (such as trees, oil, etc.) to prevent them from being lost or wasted".[4] This is a very broad definition and the inclusion of the word "general" in s. 37 reinforces the legislative intent not to limit the Minister's authority to regulate the flow of water solely to develop or transmit the maximum amount of water power necessary to meet public demand.

There are specific provisions in the WPA that support a broad interpretation because they relate to the protection of animals, plants and natural resources. In particular:

- s. 6(3) requires the Minister to obtain a report and consider if any conditions are necessary for an interim or final licence if the land is in a national park or forest reserve to "protect use and enjoyment of the national park or forest reserve";

- s. 14(1) gives the Lieutenant Governor in Council the authority to make regulations, in particular relating to:
    - regulating the passage of logs, timber and other products of the forest through or over any dams or other works; and
    - to require the construction of "fishways, to permit the free and unobstructed passage of fish up and down stream at any season of the year and to require their operation in accordance with *The Fisheries Act* and regulations; and

- the provisions cited above regarding terms and conditions in an interim licence that are relevant to conservation or environmental protection.

In addition, there are several sections in the WPA and the WPR that refer to the "public interest", the interests of others, and the most beneficial use of water. An argument could be made that this suggests a legislative intent to balance competing interests, including environmental protection, when controlling the flow of water "for general conservation purposes". In particular:

4 Merriam-Webster online dictionary; accessed at http://www.merriamwebster.com/dictionary/conservation

- s. 14(1)(c) of the WPA gives the Lieutenant Governor in Council the authority to make regulations relating to regulating and controlling the flow of water **in the interests of all water users;**

- the director determines whether the proposed development "is in general accord with the **most beneficial utilization of the resources of the stream" and in the public interest** (s. 12(1) of the WPA);

- when considering whether two or more water powers should be developed jointly and operated under one control, the Lieutenant Governor in Council is to consider whether "**the public interest is best served** by reserving the water power(s) so as to bring about joint development and single control of all water powers" (s. 11 of the WPA).

- plans and specifications for a proposed development must "show what provision is made for **navigation, logging and other interests**, as required by s. 87" (the section that requires a licensee to comply with the *Fisheries Act* and provincial legislation)", which is the provision relating to other federal and provincial legislation (s. 12(2)(d) of the WPR);

- if a hearing is held because of protests or objections to a proposed development and a report with findings and recommendations is made, the Minister must "take such action as the minister may consider advisable including dismissal of the application if such action is required **in the public interest**" (s. 6(4) and (5) of the WPR);

- the Minister may issue a priority permit if the proposed development "is in general accord with the **most beneficial utilization of the stream waters" and is in the public interest**. In addition, the Minister may give preference to a province or municipality if that is **in the public interest** (s. 14 of the WPR);

- a priority permit does not bind the Minister to issue an interim licence nor relieve the Minister from considering other possible developments for the site "if there is reason to believe they may result in a **more beneficial utilization of the natural resources or be otherwise more in the public interest**" (s. 15 of the WPR);

- the Minister may issue an interim licence if the proposed development "will accord with the **most beneficial utilization of the resources of the stream and that it is the best possible development, in the public interest, bearing in mind both present conditions and future requirements**" (s. 18 of the WPR);

- if an interim licensee defaults on a condition, the Minister must "consider the **detriment occasioned to the public interest** by reason of the default or failure of the interim licensee, and the said compensation" (s. 41(5) of the WPR);

- the terms and conditions in a final licence may relate to the maximum flow or quantity of water that may be diverted and used and stored subject to "the control and regulation of the stream flow and of storage **in the interests of all users of the stream**" (s. 44 of the WPR);

- when considering whether to renew or terminate an existing final licence, the licensee will be given preference over other applicants if "the proposed use and development of the site is **at least as desirable in the public interest** as that of any other pending applicant" (s. 46(2) of the WPR); and

- when considering whether to issue a short-term licence extension or renew a short-term licence, the Minister may amend any term or condition or include other terms and conditions if it is **in the public interest** (s. 92(3) and 92(6) of the WPR).

Based on the above, an equally strong, if not stronger argument can be made that "for general conservation purposes" in s. 37(1) of the WPR ought to be interpreted broadly to include consideration of ecological values.

4. Does the term of a final licence need to be 50 years?

Section 45(1) of the WPR deals with the term of a final licence and states:

> **Term of licence**
> 45(1) Every licence shall be limited to such term not exceeding 50 years from the time fixed in the original interim licence for the completion of the initial development, as may be agreed upon between the minister and the licensee.

Sections 46 and 92 of the WPR deal with renewals of final licences. Section 46(1) states that a licensee may apply for an extension of the rights held under the final licence no less than four and no more than six years before the termination of the licence. After the expiry of that two year period, s. 46(2) requires the Minister to consider the application for renewal and any pending applications for the occupation and use of the lands and waters in question to determine what future disposition will be made. This provision gives the Minister the discretion to hold a public hearing if necessary to make that determination.

Section 92 states that if a final licence has expired and the licensee has not applied for an extension within the time period set out in s. 46(1), upon written

application from the licensee the Minister may issue a short-term extension licence for a term of not more than five years. This short-term extension licence must include the same terms and conditions contained in the final licence, "except where the minister considers it is in the public interest to amend any term or condition, and may include such other terms or conditions as the minister may impose". Section 92(6) states that a short-term extension licence may be renewed for one or more 5-year terms and again, the Minister may impose additional terms and conditions on each renewal if it is in the public interest. In addition, s. 93(2) states the Minister may conduct public hearings and "provide for any consultations with First Nations or aboriginal communities about an extended final licence".

Further, s. 71 of the WPR gives the Minister the authority to approve contracts for the sale and delivery of energy or power for up to 10 years beyond the term of the licence "when the public interest so requires". In that case, the licence is not terminated at the end of its term "unless the new licensee or some competent authority acting for or at the request of the government has assumed to fulfill all such contracts so approved".

Based on the above, the WPR allows the term of a final licence to be up to 50 years and authorizes an indefinite number of 5-year short-term extensions and renewals. All of this is within the Minister's discretion and there is no guidance in the WPA or the WPR as to how that discretion is to be exercised. Having said that, there is also nothing in the sections cited above or elsewhere in the WPA or WPR that says the term of a final licence has to be 50 years.

5. Is there actual grandfathering from *The Environment Act*?

In environmental assessment legislation, developments that were completed prior to the enactment of such legislation are generally considered exempt from the environmental assessment regime. This is usually through the inclusion of a "grandfather clause" in the new legislation that explicitly exempts such projects from the new legal regime. In some cases, such provisions will contain a mechanism for bringing pre-existing developments under the new legislation.

The Environment Act ("the EA")[5] does not contain a "grandfather clause" as seen in other jurisdictions like BC and the Northwest Territories. In Manitoba, it seems to be assumed that developments that were completed before the EA was enacted in 1988 are exempt from the environmental assessment and licensing process. For example, in the Terms of Reference for the Lake Winnipeg Regulation CEC hearing that is currently in progress it is stated that: "*The Environment Act* does not apply to the Lake Winnipeg Regulation project as it was completed before this legislation came into force."

5 *The Environment Act*, C.C.S.M., c. E125.

A good example of grandfathered developments are hydroelectric generation projects. Of all such existing projects, only two have EA Licences: Wuskwatim and Keeyask, unless they have undergone a significant alteration. There are currently a number of developments that are in operation in Manitoba that are not required to comply with the EA due to the fact that they pre-date the legislation. Many of these developments are hydro-electric generating stations that were built in the 1960s and 1970s including: Grand Rapids Generating Station, Kelsey Generating Station, Laurie River Generating Station, and Long Spruce Generating Station. There are existing mining operations that likely also fall into this category of pre-existing developments.

As noted above, despite the statements made in the LWR terms of reference, the EA does not contain an explicit grandfather clause to exempt pre-existing developments. It is currently unclear what legal authority the Minister is relying on to draw this conclusion. There is no case law in Manitoba addressing pre-existing developments and the silence of the EA on this issue.

It is possible that the language of s. 46(c) of *The Interpretation Act*[6] could be used to make an argument in support of this exemption:

> **Effect of repeal**
> 46(1) The repeal of an Act or regulation, whether or not it is also replaced, does not
>
> ...
>
> (c) affect a right, privilege, obligation or liability acquired, accruing or incurred under the repealed Act or regulation;

However, the potential application of s. 47 of *The Interpretation Act* should also be considered:

> **When the new procedure must be used**
> 47(4) To the extent it can be adapted, the procedure established by the new Act or regulation must be followed in the following cases:
> (a) in recovering a fine or enforcing a penalty or forfeiture imposed under the former Act or regulation;
> (b) in enforcing a right existing or accruing under the former Act or regulation; and
> (c) in a proceeding in relation to matters that happened before the repeal or amendment.

It should also be noted that under s. 15(3) of the EA, an order issued under *The Clean Environment Act* (enacted in 1968) is deemed to be an EA Licence. If an

6 *The Interpretation Act*, C.C.S.M., c. I80.

Order was issued for a development under *The Clean Environment Act*, it could then be possible for the development to trigger an environmental assessment under the licence alteration section of the EA.

Alterations to Pre-Existing Developments

There have been some alterations made to pre-existing developments, such as the Grand Rapids Generating Station, which was built in the 1960s, which have required an EA Licence. For example, Manitoba Hydro was granted EA Licence No. 2299 (Class 2) in November 1997 for the Grand Rapids Walleye Spawning Enhancement Project which involved the construction of low containment dykes and rockfill riffle structures in the lower portion of the Spillway Channel. A low barrier was also constructed upstream of the enhancement works to prevent the stranding of fish in the upper portion of the channel. This project allows the spillway to provide low flows through the enhancement works during the spring and early summer in years when the channel would otherwise be dry.

Therefore it appears that new additions or enhancements to pre-existing developments may not be exempt from the EA. However, the environmental assessments associated with such additions generally address only the potential effects of the new addition and not the development as a whole.

The alterations sections of the EA would not apply to grandfathered projects. In order for this section to apply a proponent must have already submitted a proposal for development or have an existing environmental licence.

> **Proponent to notify director or minister of alteration in development**
> 14(1) Where a proponent
>
> (a) has submitted a proposal for a development in accordance with sections 10, 11 or 12, but is not yet in receipt of an environmental licence; or
>
> (b) has received an environmental licence for a development;
>
> and the proponent intends to alter that proposal or the development as licensed that does not conform to the limits, terms and conditions or that is likely to change the environmental effect, the proponent shall notify the director or the minister, as the case may be, of the proposed alteration before proceeding with it.

Existing Developments

The EA does however, contain a mechanism that allows grandfathered projects to trigger a review. For each Class of Development, a corresponding sectionexists that addresses “existing developments”. This category of

development is not defined in the EA or the Classes of Development Regulations[7].

> 10(2) Notwithstanding subsection (1)
>
> (a) where in the opinion of the director, new evidence warrants a change in the existing limits, terms or conditions; or
>
> (b) where no existing limits, terms or conditions exist, by licence or regulation;
>
> the director may require any person operating an existing Class 1 development to file a proposal with the department for consideration under this section.

> 11(6) Notwithstanding subsections (1) and (2),
>
> (a) where in the opinion of the minister new evidence warrants a change in the existing limits, terms or conditions; or
>
> (b) where no existing limits, terms or conditions exist by licence or regulation;
>
> the minister may require any person operating an existing Class 2 development to file a proposal with the department, to be considered under this section.

> 12(2) Notwithstanding subsection (1),
>
> (a) where in the opinion of the minister new evidence warrants a change in the existing limits, terms or conditions; or
>
> (b) where no existing limits, terms or conditions exist by licence or regulation;
>
> the minister may require any person operating an existing Class 3 development to file a proposal with the department, to be considered under this section.

It is assumed that the application of the appropriate section is determined based on which Class of Development a grandfathered project would be assigned if the project was a new development.

Sections 10(2), 11(6) and 12(2) of the EA give the Minister the discretionary power to require the proponent of an existing development to file an EA Proposal with the EAB if “no existing limits, terms or conditions exist by licence or

7 Classes of Development Regulation 164/88.

regulation” for a development. There are no legislated requirements for when such a decision should be made and what criteria should be considered when making such a decision. There is no mechanism that allows reasons for such a decision to be obtained by proponents or the public.

Specific Examples

There have been several instances where upgrades to existing developments have triggered the environmental assessment and licensing process under the EA. What follows is a summary of the Pointe du Bois Spillway Replacement Project and the Brandon Generating Station.

Pointe du Bois Spillway Replacement Project

The Pointe du Bois Generating Station was built by City Hydro, later known as Winnipeg Hydro, and was acquired by Manitoba Hydro in 2002. The in-service date for the first unit of the generating station was 1911. All 16 units were commissioned by 1926. The Pointe du Bois Generating Station is the oldest power plant still in operation on the Winnipeg River. The Pointe du Bois Generating Station is a run-of-river hydroelectric generating facility consisting of a 16 unit close-coupled intake/powerhouse with a generating capacity of 78 MW, a 5-bay gated sluiceway, 92 spillway bays, concrete non-overflow dams, and earthfill dykes.

The replacement project involved the construction of new spillways and new concrete and earth dams at the Pointe du Bois Generating Station. The existing powerhouse would continue to operate and once the old spillways were completed, the old ones would be decommissioned. The scope of the EIA and corresponding licence addressed the scope of the replacement project and not the entire development (such as the powerhouse). The Spillway Replacement project and the corresponding EA Licence was considered a Class 2 Development based on s. 3 of the Classes of Development Regulation. The Development as a whole would also be considered a Class 2 Development (78 MW).

Brandon Generating Station

This generating station is located on the outskirts of the City of Brandon. This station is the only one of 16 in Manitoba that uses a mix of fuel sources – coal and natural gas. The Brandon Generating Station has a capacity of 333 MW from 2 natural gas fired units and 1 coal fired unit. The first four units at the Brandon Generating Station entered service between 1957 and 1958, with Unit 5 coming on-line in 1969. Since that time the station has undergone several provincial environmental licencing reviews. Formal environmental, regulatory approvals for the Brandon Generating Station date back to April, 1972 when the Manitoba Hydro-Electric Board submitted an application to the Clean Environment

Commission for a licence to operate the station. This eventually resulted in the issuance of CEC Order No. 340 on March 19, 1974. This approval dealt entirely with station effluents entering the Assiniboine River. This Order is not available on the Province's public registry.

The first full Environmental Impact Assessment (EIA) was completed in 1976. Specific terms and conditions regarding air emission were established on April 22, 1984 with the issuance of CEC Order No. 1039. This order was subsequently revised in 1986 as Order No. 1039 VC and was significantly updated afterwards on January 26, 1989 as EA Licence No. 1246. Licence No. 1246 was entirely focused on air quality related issues.

In 1992, Manitoba Hydro submitted a proposal to upgrade Unit 5 to assure reliable operation into the 21st century. This proposal was accompanied by a plan to remove Units 1-4 from service by 1996. The proposal included a comprehensive EIA of all aspects of the operation of Unit 5 and a full regulatory review under the EA. This review resulted in the issuance of EA Licence No. 1703 in 1993, which was a comprehensive licence containing terms and conditions regarding air, water and solid waste, and with the pending retirement of Units 1-4, became applicable solely to the operation of Unit 5. This licence was revised on February 14, 1994 as Licence No. 1703R and currently governs the operation of Unit 5 and its related systems.

One of the licensing conditions of Licence No. 1703R was that the licence undergo a review if Unit 5 was to continue operation beyond 2006. Since Manitoba Hydro intended to continue operation beyond this time, a review was triggered in 2006. This review was viewed as an "opportunity to assess its environmental performance and to identify and obtain approval to carry out potential improvements. The Licence Review is an opportunity to update the terms and conditions of the entire EA Licence to ensure alignment of ongoing operations, environmental controls and operating practices with current environmental science".

It is not clear what happened as a result of the EIS and Licensing Review. The only licence that is available on the Public Registry is the one that triggered the review described above, issued in 1994, even though the link is labelled as the most updated version of the Licence from 2014.

Application to LWR

As noted above, it is unclear what the legal basis is for considering projects in operation before 1988 exempt from the EA. There does not appear to be a clear legislative mechanism within the EA to exempt such projects.

It is clear, however, that there is a mechanism in the EA for bringing existing developments that do not currently have an EA Licence under the legislative

framework. This does not appear to be restricted to alterations or additions to existing projects, but appears to be potentially applicable to all existing developments, including LWR. Therefore, it appears that the Minister currently has discretionary power to require Manitoba Hydro to submit an EA Proposal for LWR.

6. **Can a Class 3 environmental assessment review be initiated without an alteration?**

Yes, s. 12(2) of the EA gives the Minister the discretion to require a proponent of an existing Class 3 development to submit an EAP at any time. That section states:

> **Existing developments**
> 12(2) Notwithstanding subsection (1),
> (a) where in the opinion of the minister new evidence warrants a change in the existing limits, terms or conditions; or
> (b) where no existing limits, terms or conditions exist by licence or regulation;
>
> the minister may require any person operating an existing Class 3 development to file a proposal with the department, to be considered under this section.

The term “new evidence” is not defined in the EA and there so it is not certain how that provision is being interpreted.

7. **Can one have competing Water Power Licences and Environment Act Licences, ie. what happens if an Environment Act Licence conflicts with a Water Power Licence condition?**

It may be possible in theory for this to occur since there is no specific language in either statute giving one precedence over the other. However, the current practice is to issue EA Licences and WPA Licences in a series: EA Licence first followed by the WPA Licence a few days later. As seen for Wuskwatim and Keeyask, the WPA Licence has specific language linking it to the EA Licence. Based on this type of linkage in the licensing documents it appears these two types of licences are intended to be complementary.

In addition, and as noted above, s. 87 of the WPR requires a licensee to comply with provincial legislation, which presumably includes the EA. That section prohibits the Minister from instructing a licensee to do something that is inconsistent with that other provincial legislation so presumably this means the

Minister cannot include a term in a final licence under the WPA that conflicts with the licensee's legal obligations under the EA.

8. What, if any, impact does the *Campbell Soup* case have?

In *Campbell Soup Co. v. Manitoba*, (1991), 74 Man. R. (2d) 237, the Manitoba Court of Queen's Bench considered whether a mushroom farm was subject to an environmental assessment under the EA because it is a "food processing plant" as defined in the Classes of Development Regulation. In addition, the Court considered the scope of the Minister's authority under s. 16 of the Act, which states:

> **Deemed development**
> 16 Where there is a disagreement as to whether any project, industry, operation or activity, or any alteration or expansion thereof is a development, the matter shall be determined by the minister.

With respect to the first issue, the Court concluded that a mushroom farm is not a food processing plant and therefore not a Class 2 development subject to an environmental assessment. With respect to the second issue, the Court held that s. 16 is not broad enough to allow the Minister to deem the mushroom farm to be a development subject to an environmental assessment.

The result of the *Campbell Soup* decision is that unless a project, industry, operation or activity is expressly covered by the Classes of Development Regulation, there is no way an environmental assessment can be triggered. According to a 2015 Consultation Report prepared by the Manitoba Law Reform Commission, the Court's narrow interpretation of s. 16 has contributed to the problem of "an increasing range of projects that would be exempt from an environmental assessment", even if they are likely to cause significant negative environmental effects.[8]

The *Campbell Soup* decision is relevant because unless LWR falls under the Classes of Development Regulation, there is currently no way for an environmental assessment to be triggered, even if the Minister wanted there to be one. If LWR does not fall under the Classes of Development Regulation, there has to legislative and/or regulatory amendments before it is subject to an environmental assessment.
The Manitoba Law Reform Commission's recommendations at p. 56 of its report is intended to remedy this gap in the law, as follows:

> 3.1 Section 16 of The Environment Act should be amended to expand the Minister's discretionary power to include the ability to

8 Manitoba Law Reform Commission, "Manitoba's Environmental Assessment and Licensing Regime Under *The Environment Act*", Consultation Report, January 2015, available at: http://www.manitobalawreform.ca/pubs/pdf/additional/consultation_environment_act.pdf

decide on the classification of a development, or to require an environmental assessment for a particular project that is not contemplated in the existing list of developments. This expansion of discretionary power should be accompanied by decision-making criteria in the same, or following section of the Act.

3.2 The criteria included in the *Classes of Development Regulation* should be expanded to include a consideration of a wider range of requirements that includes, but is not limited to:

- Proposed location of the development;
- Environmental sensitivity of the proposed location;
- Uniqueness of the proposed development;
- Potential environmental effects;
- Existence of standard or tested mitigation measures.