ENVIRONMENTAL IMPACT ASSESSMENT IN CANADA: THE SLAVE RIVER PROJECT

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In a previous article[1] the author discussed the concept of environmental impact assessment (EIA) and its general application in Alberta. Ambiguities in the legislative mandates of the Alberta Department of the Environment and the Energy Resources Conservation Board (ERCB) were exposed and doubt was expressed whether there was included in those mandates the consideration of, inter alia, social impacts.

The intention in this article is to look at Alberta's and Canada's EIA processes in the context of the proposed Slave River project, which will require not only interdepartmental but interjurisdictional coordination. Following a description of the proposed project, the applicable Alberta legislation will be described. Federal environmental assessment and project approval processes will be described and doubt will be expressed that the Environmental Assessment Review Process as practiced enjoys full legal authority. Following all this, recommendations will be derived from both parts of this study.

I. THE SLAVE RIVER HYDRO ELECTRIC PROPOSAL

Several years ago, the government of Alberta set up a Steering Committee consisting of senior civil servants to study the feasibility of a Slave River hydro electric project. The committee, reporting in June 1982, concluded that a project would be economically and technically feasible.[2]

Obviously a number of assumptions, projections and estimates had to be made. The committee assumed a base case *per annum* growth in electricity demand of 3.61%[3] as well as a "very low"[4] possible growth of 2.94%.[5] These demand figures, coupled with the retirement of some aging coal-fired generating plants,[6] would clearly require new construction even though commitments have been made for building 2250 megawatts (MW) of new coal-fired plants.[7] Assuming an installation on the Slave of a 1700-2000 MW generating facility, at a cost of $2-2.2 billion (1980 dollars will be given throughout),[8] it was estimated that this project could supply the need some $651 million cheaper than other alternatives.

Before describing some of the physical and social dimensions of the project, the importance of the assumptions of the feasibility study should

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1. P.S. Elder, "Environmental Impact Assessment in Alberta" (1985) 23 *Alta. L. Rev.* 286.
2. Slave River Steering Committee, *Slave River Hydro Feasibility Study Final Report* (1982) hereafter *Final Report*; Government of Alberta, *Slave River Hydro Feasibility Study Synopsis* (1982) hereafter *Synopsis*.
3. *Final Report* at 16.
4. *Synopsis* at 33.
5. *Final Report* at 16.
6. Some 80% of Alberta electricity is presently generated by coal buring plants — *Synopsis* at 3.
7. *Id.*
8. *Final Report* at 1.

be underlined. The project will be controversial, because of apparent inconsistencies in or disagreements about these assumptions. The following points are made not to criticize the project but to show the need for meticulous documentation in future steps of the decision-making process.

First, the base case demand estimates assume the construction of eleven new tar sands and heavy oil projects. The low case assumed only two, and net benefits of the project diminished by about $260 million.[9]

Second, the net benefit of the project for the base case will be zero if construction costs are 25% higher than the estimates. Combining this result and the low demand case, a much lower cost overrun than 25% would destroy the project's viability. Both the demand projections and the labour costs have already been questioned. Indeed, the ERCB in September 1982 forecast electricity demand 11% lower after 1990 than did the Slave study and in January 1983 the National Energy Board forecast 12% less than the ERCB for the mid 1990's. Overall, this amounts to a 25-30% reduction.[10]

According to consultants to the Department of Indian and Northern Affairs,[11]

> [t]he Slave River economic evaluation includes a number of assumptions which tend to exaggerate the net economic benefits from commissioning the project in 1993, in the base case. Oil, gas and coal prices are assumed to increase in real terms for the next 40 years, which we believe is unrealistic; electricity demand in Alberta is forecast 25% to 30% higher than can now be expected; the estimated costs of construction could be somewhat low because of seemingly low labour cost estimates for the civil works at the dam site.

On the other hand, these consultants identified improvements in the net economic benefits which partially cancelled out these reductions.[12] It must also be realized that due to the recession, construction costs may have decreased, since these calculations were made.

Third, the comparison of benefits of the Slave was made with coal-fired electricity. It has been questioned whether adequate comparison was made with the costs of the Dunvegan dam proposal and/or a Western power grid with optimal scheduling.[13] During public hearings on the project this kind of comparison will no doubt be stressed.

Fourth, the problem to be dealt with is the peak, not the base demand, and the Slave will be a peaking facility. It will run near capacity for only 6-8 hours daily[14] and its average production will be about 56% of capacity.[15] The seasonal peak occurs in mid-winter, the weekly on working days, and the daily peak about 1100 and 1730 hours.[16] However, no load-shedding or peak-reducing alternatives were considered.

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9. *Id.* at 265.
10. Peter Eglinton Associates Ltd., *Final Report: An Overview Assessment of the Economics of the Slave River Hydro Electric Power Development* (1983) 13.
11. *Id.*
12. *Id.*
13. *Final Report* at 173.
14. *Synopsis* at 4.
15. *Id.* at 10.
16. *Id.* at 16.

Several sites for the project were considered, including one opposite Fort Smith in the Northwest Territories,[17] but the one which is described in detail would have its main dam on the Slave River about 3 kilometres south of the Alberta-Northwest Territories border. The dam would consist of three interconnected structures: an intake and powerhouse, a spillway and an embankment. Although the resulting reservoir will take from one to three months to fill[18] and raise the water level about 35 centimetres in Lake Athabasca and the Peace-Athabasca delta[19] (increasing the mean summer flood area from 140 to about 400 square kilometres),[20] the reservoir is intended to store water for short-term, not seasonal, variation. Fluctuations of water height in the reservoir could be 2 metres[21] and during peaking operations, water levels below the plant could fluctuate 4-5 metres daily in a wave with a frequency of several hours which could travel down river.[22]

Two 500 kilovolt transmission lines are envisaged to transport the power south, and they would have to run through at least one of Lake Athabasca, the Peace-Athabasca Delta or Wood Buffalo National Park.[23]

The size of the project is shown by the estimates of its job potential. Over the ten year period after approval is given, direct employment in the region is expected to be 7,000 job years, with a peak work force of 3,000. Altogether direct and indirect employment could total up to 15,000 job years. Nearly 60% of the materials for the project would be bought in Alberta.[24] In these times of recession, it is easy to see the political and economic attractions of such a substantial construction project.

It is also easy to see potentially significant environmental and social impacts in several jurisdictions. Part of Wood Buffalo National Park's eastern boundary is the Slave Lake and flooding could affect it. Furthermore, the Peace-Athabasca Delta is the largest boreal delta in the world and most of it is in the Park.[25] As well, federal interests arise because of possible impacts on fisheries, navigable waters, migratory birds, natives, native lands (and land claims) and impacts in the Northwest Territories. The government of the Northwest Territories is also concerned. Saskatchewan would be affected by the change in water level in Lake Athabasca.[26] Because of these concerns, the governments of Canada, Alberta, the Northwest Territories and Saskatchewan "have agreed to co-ordinate their review processes and integrate the information they require from a proponent".[27]

17. *Id.* at 7.
18. *Final Report* at 203.
19. *Synopsis* at 20.
20. *Id.*
21. *Id.* at 23.
22. *Id.* at 24.
23. *Id.* at 12.
24. *Id.* at 35-7.
25. *Id.* at 2.
26. *Id.*
27. Governments of Alberta and Canada, *Draft Information Requirements Document: Proposed Slave River Hydroelectric Project* (hereafter *Draft Information Requirements*) (1984), Part 1, Draft Introduction (no page number).

The Steering Committee also pointed out that since the Peace River contributes more than 60% of the flow of the Slave River, and the Bennett Dam's management could augment the Slave's flow by 50% in the winter-time,[28] interjurisdictional co-operation is crucial for the management of the watershed.

The social impacts of the project will be most apparent in Fort Smith, Northwest Territories, the largest and closest community to the proposed damsite. Fort Chipewyan on Lake Athabasca will be less affected by the construction phase than by water level fluctuations and their impacts. Possibly it will also be affected by the proximity of the power line.

II. ALBERTA'S EIA REQUIREMENTS FOR THE SLAVE RIVER PROJECT

As described in the first part of this article,[29] the ERCB and Alberta Environment have created procedures to ensure that an EIA statement, where required, is filed and considered as part of the application for approval of energy related projects. The government of Alberta obviously intends that the Slave River project go through the whole process. The Slave River Steering Committee saw its mandate as generally in conformity with the EIA system. This mandate was to identify and evaluate "all potentially significant effects . . . at a stage when alternative solutions, including remedial measures and the alternative of not proceeding, are available to decision-makers."[30] Its preliminary design explicitly recognized environmental preferences where possible, although the need for electricity generating projects had to be assumed: the "do-nothing" alternative was not available.[31]

As part of the feasibility study, Alberta Environment set up a public information program in the region, and released draft EIA guidelines especially for this project. After public hearings on the draft, the guidelines were released jointly with those of the Federal Environmental Assessment and Review Office (FEARO) in April, 1984.[32] After public consultation at a later stage the two sets of requirements will be combined into one comprehensive set, which will permit a proponent to meet them all with one overall report. Alberta's section of the document already includes Saskatchewan's requirements and Canada's section includes the needs of the Northwest Territories.[33]

The extent of Alberta Environment's mandate to require certain items like social impacts to be included in an EIA has already been questioned[34] and the argument will not be repeated here. Subject to this problem, the guidelines for the Slave River Project appear to be broadly and carefully done. "The EIA must address the physical, biological and social aspects

28. *Synopsis* at 2.
29. *Supra* n. 1.
30. *Synopsis* at 4.
31. *Id.*
32. *Draft Information Requirements.*
33. *Id.* Introduction.
34. *Supra* n. 1.

of the environment . . .".[35] Alternatives to the project are to include careful sensitivity analyses involving various assumptions, including factors beyond the applicant's control and those difficult to estimate in dollars.[36] Discussion of alternatives to the project is to include consideration of the "conceivable" competing sources of supply not only the conventional projects but also of the large scale application of possible new and alternative technologies,[37] including small, dispersed facilities which could result in a substantial reduction of demand.[38] No mention is, however, made of the possibility of managing peak load so as to reduce peaking demand.

The "socio-economic environment"[39] is to be described in detail, including population, economic and employment projections, infrastructure and services, and social and cultural patterns.[40] Special attention is to be paid to traditionally resource based activities like hunting, fishing and trapping.[41] Municipal finances, service facilities and direct employment opportunities for project area residents are to be considered.[42] The "project area" will vary depending on the issue, but is defined as "that area in which the Project is expected to have measurable or otherwise significant physical, environmental or socio-economic impacts".[43] Obviously, the whole province could be the project area for some impacts. Impacts on the existing socio-economic structure are to be described. Where possible, these costs and benefits are to be quantified and attributed to recipient groups.[44]

III. THE FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS

The federal Environmental Assessment and Review Process (EARP) is designed "to ensure that the environmental effects of federal projects, programs and activities are assessed early in their planning, before any commitments or irrevocable decisions are made".[45] It was originally set up in 1973 by Cabinet directive and until 1979 had no statutory basis of authority. An explanatory Guide was issued in 1975 and revised in 1977 and 1979.[46]

In 1979 the Department of the Environment Act[47] was amended to oblige the Minister of the Environment to undertake and coordinate

35. *Draft Information Requirements*, at 17.
36. *Id.* at 31.
37. *Id.*
38. *Id.* at 10.
39. *Id.* at 20.
40. *Id.* at 20-1.
41. *Id.* at 26.
42. *Id.*
43. *Id.* at 2.
44. *Id.* at 26.
45. Federal Environmental Assessment Review Office, *Revised Guide to the Fedeal Environment Assessment and Review Process* (1979) (hereafter *Revised Guide*).
46. Robert T. Franson and Alastair R. Lucas *Canadian Environmental Law, Vol. 1* (1976 to the present) 995-12.
47. R.S.C. 1970 (2nd Supp.) c. 14.

governmental impact assessment programs for "new federal projects, programs and activities."[48] Recently, the Governor in Council, as contemplated in section 6(2) of that Act, has approved the Environmental Assessment and Review Process Guidelines Order.[49] Thus, a combination of cabinet directive and order in council must be consulted to determine the scope of the process and its legal basis. A detailed working procedure has been worked out.[50] Except for proprietary Crown Corporations which are invited but not required to participate, all federal departments and agencies are bound by the process.[51] It automatically applies to all federal proposals,[52] which includes those to be undertaken directly by federal departments, those that may have an environmental effect on an area of federal responsibility, those for which federal funds are sought or those involving lands administered by the Government of Canada.[53]

The process is largely based on assessment by the initiating department which is required, as early in the planning stage as possible, to screen proposed projects to identify adverse environmental effects. If no potential adverse effects exist or if those identified are not thought significant, no formal EIA will be required, although all regulatory requirements will still have to be met.[54] There is no provision under this "self-assessment" approach for a formal review or appeal of the initiating department's judgment,[55] although the new Guidelines state that even projects which would otherwise proceed automatically are to be referred to the Minister of the Environment for public review by an EARP panel if public concern "is such that a public review is desirable."[56] Of course, if this initial screening process indicates that the potential environmental impacts are significant, the project is referred to the formal review process. A project can be significant if it has the potential to be controversial in the professional or public communities,[57] even if scientific evidence may not support the fears of the objectors.[58] If the department is in doubt, a more detailed second examination (the Initial Environmental Evaulation (IEE)) may be done in order to decide whether an EIA is needed.[59]

The formal review involves the formation of an Environmental Assessment Panel, chosen specially for this project, and chaired by the Executive Chairman of the Federal Environmental Assessment and Review Office (FEARO) or his delegate. The panel's terms of reference are drafted by FEARO in consultation with the initiating department and they are issued by the Minister of the Environment, again after consulta-

48. Government Organization Act S.C. 1978-79 c. 13 s. 14.
49. SOR/84 — 467.
50. *Revised Guide* at 12.
51. *Id.* at 1. *See also* EARP Guidelines Order *supra* n. 49 ss. 6-8.
52. S.2 of the EARP Guidelines Order *supra* note 49 defines a proposal as "any initiative, undertaking or activity for which the Government of Canada has a decision/making responsibility".
53. EARP Guidelines Order *supra* n. 49 s. 6.
54. *Revised Guide* at 3.
55. Franson and Lucas *supra* n. 46, at 995-12.
56. *Supra* n. 51 s. 13.
57. Franson and Lucas *supra* n. 46, at 995-11.
58. *Revised Guide* at 3.
59. *Id.*

tion with his initiating colleague.[60] Guidelines for the preparation of the Environmental Impact Statement (EIS) may be issued by the panel, perhaps after public comment for potentially controversial projects (as was done for the Slave River project), and the EIS is prepared by [61] the proponent who intends to undertake the proposal.[62] The formal review of the EIS is carried out by the Panel which acts independently of the Ministry of the Environment and reports directly to that Minister and to the Minister of the initiating department.[63] This review includes technical and scientific reviews by federal and/or provinicial agencies affected and the presentation of views through public meetings in the area affected.[64] All information submitted to a Panel becomes public information.[65] If the Panel discovers deficiencies in the EIS, it may require these to be cleared up before it finally reviews the document and makes its recommendations to the appropriate Ministers.[66] No project can proceed until a decision has been made on the Panel's recommendations, initially by that Minister and the Minister of the initiating department, or if they disagree, by Cabinet.[67] Panels may recommend proceeding with the project, with or without modifications or conditions, or that the project not proceed.[68] In the case of several projects, the Ministers involved have accepted negative recommendations by the panel.[69]

The range of impacts which are generally to be considered includes not only pollution or the disturbance of sensitive wildlife habitats but the type and quality of land to be used for a project and the human element, "in terms of any environmentally-related social consequences of the project."[70] This formulation attempts to include social impacts under the rubric of environmental impact assessment and we shall shortly have to consider its success in doing so. Before looking at this and other legal issues that arise in connection with EARP, however, let us scan the federal Slave River project guidelines. We should note at this time that the Slave River project, whose approval will involve considerable coordination among several jurisdictions, is not a typical example of how

60. EARP Guidelines Order *supra* n. 49 s. 26.

61. *Id.* s. 30.

62. *Id.* s. 34.

63. *Revised Guide* at 2.

64. *Id.* at 5.

65. *EARP Guidelines Order supra* n. 49 s. 29(1).

66. *Revised Guide* at 6.

67. *Id.* at 8.

68. *Id.* at 7.

69. The Panel on the Pt. Granby Uranium Refinery Proposal of El Dorado Nuclear Ltd. recommended against the project because of the unacceptability of the location. The panel considering the proposal to allow offshore drilling in Lancaster sound recommended postponing until a land use plan was developed and until the proponent demonstrated the capability to deal with potential environmental hazards (Franson and Lucas *supra* note 46 p. 995-21 note 39 n). The panel assessing the El Dorado Nuclear Ltd. proposal to build a uranium refinery near Warman, Saskatchewan could not endorse the site "because of the uncertainty with resp to social impact". Before any site was chosen, the panel suggested more information be required about the potential social impacts on the Warman site and that these impacts be compared with similar analysis of alternative sites (Franson and Lucas *supra* n. 46 at 1783).

70. *Revised Guide* at 1.

EARP works. Indeed, section 32 of the Guidelines Order specifically permits the requirements or procedures of the public review, set out in sections 21-31 to be varied in these circumstances.

IV. THE SLAVE RIVER PROJECT GUIDELINES

Parks Canada referred the project to the Minister of the Environment in January, 1980,[71] and the Department of the Environment is presumably therefore the "initiating department". At the time the guidelines were issued, no proponent for the project had been named.[72] The specific requirements are similar to those of Alberta, except that, of course, the EARP is concerned with matters for which the Federal Government has responsibility. The panel recognizes, however, "that it will not be making recommendations in its report about electricity demand, or project needs and alternatives".[73] This information is requested, however, in order to set context, although the alternatives to the project which should be considered are not set out. The socio-economic environment plays a prominent role in the requirements, including demography, social and cultural patterns, services and facilities, local business, industry and employment, education and training, and cost of living.[74] Changes in lifestyles consequent upon such possible facilities as an all-weather road into the area are to be considered.[75] Participation by northerners in preparing the socio-economic section is important and wide consultations are to be held.[76] Given the considerable responsibilities fo the Federal Government for Indians and lands reserved for Indians, the project's effect on established native rights, unsettled native claims and treaty entitlements are to be considered.[77]

V. THE LEGAL MANDATE OF EARP

EARP was originally established by Cabinet directive, although as already mentioned, the Minister of the Environment has been given some statutory powers regarding environmental assessment. Hon. Charles Caccia exercised the authority given in subsection 6(2) of the Department of the Environment Act[78] by promulgating the EARP Guidelines Order mentioned earlier.[79] Nevertheless, the process requirements are not formally enacted by Parliament.

Let us now examine several interesting legal issues concerning EARP. First, we will consider briefly whether the courts might be willing to supervise the EIA process. Second, we will discuss the legal mandate of the Minister of the Environment and of FEARO. It will be submitted that private sector proponents cannot be required to provide information on

71. *Draft Information Requirements, supra* n. 27, part 2 p.1.
72. *Id.* at 21.
73. *Id.* at 4.
74. *Id.* at 9-10, 16-17.
75. *Id.* at 5.
76. *Id.* at 15.
77. *Id.* at 16.
78. *Supra* n. 48.
79. *Supra* n. 49.

socio-economic impacts of a proposed project. (FEARO has never explicitly claimed this power, although the Guidelines Order implicitly assumes it). It will also be asked whether the Minister of the Environment, either singly or in concert with the minister of the initiating department, can veto a project because of its predicted adverse impacts. Perhaps a proponent could enter the formal project approval process mandated under other statutes in spite of this disapproval. Third, we will consider the powers of various approval agencies to consider environmental and socio-economic impacts in deciding whether to approve a project. These questions will be examined with reference to the Slave River project.

We have already noted that there is no provision for an appeal if the initiating department, after carrying out the initial screening, decides that no EIS will be required. Any attempt by a citizen or interest group to persuade the courts to order the preparation or upgrading of an EIS would almost certainly fail.[80]

Another question is whether a panel is subject to any judicial control as to its procedures. The mere fact that it is not a statutory body does not exclude it from judicial review. Even the duty to observe natural justice, let alone the probably more modest duty of fairness has been required of a non-statutory body.[81] Franson and Lucas believe that the Government Organization Act amendments of 1978-79 (Part III of which Act is the Department of the Environment Act) make it clearer than before that EARP panels are bodies carrying out public duties, and that the fact that their powers are merely advisory does not protect them from being supervised by the courts.[82] As well, they point out, the *Nicholson* case[83] in the Supreme Court of Canada imposed a duty of fair procedures on all administrative bodies, even those which are not quasi-judicial.[84] Furthermore, the federal Department of Justice has agreed that EARP panels are bound by the duty of fairness.[85]

We now must discuss the mandate of the Minister of the Environment, and FEARO, under the original cabinet directive and as amplified by the Government Organization Act. For economy of discussion, let us assume that FEARO has been legally constituted, although the Department of the Environment Act does not include the normal power of the Minister to hire such clerks and assistants as are necessary to carry out departmental functions.[86] Let us further concede that cabinet or a minister can order studies not only on matters already assigned to an agency by statute

80. Franson and Lucas, *supra* n. 46, at 995-21.

81. Franson and Lucas *supra* n. 46, at 996-22, citing *R. v. Criminal Injuries Compensation Board ex parte Lain* [1967] 2 Q.B. 864 (C.A.).

82. Franson and Lucas *supra* n. 46, p. 995-22, citing *Saulnier v. Quebec Police Commission and Urban Community of Montreal* [1976] S.C.R. 572 and *Edwards v. Alberta Association of Architects* [1975] 3 W.W.R. 38 (Alta. S.C.).

83. *Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671.

84. Franson and Lucas *supra* n. 46, at 995-22.

85. *Id.*

86. Sections 5(1)(b) and 7(1)(a) of the Financial Administration Act (R.S.C. 1970 c. F-10) are believed to give the Treasury Board the necessary authority to determine "manpower" requirements and provide for their allocation in the public service.

but on subjects which they might want researched before deciding on new statutory or regulatory initiatives.

If this is true, the cabinet directive establishing EARP and the employer-employee relationship generally may have been sufficient authority for public servants to study environmental and socio-economic impacts of proposed federal projects, even though we will have to look elsewhere to find authority for requiring a private proponent to do so. Our conclusions, however, may depend on whether the Department of the Environment Act has affected the authority granted under the original cabinet directive. The EARP Guidelines Order, promulgated under subsection 6(2) of that statute, requires the directly related social impact of environmental effects to be examined by the public review, and allows the Ministers involved to broaden this to include the general socio-economic effects. Obviously, however, these provisions of the Order are *ultra vires* if they exceed the bounds of the legislative authority.

VI. THE EFFECT OF THE DEPARTMENT OF THE ENVIRONMENT ACT

Let us examine the Minister of the Environment's mandate. Under section 5 of the Department of the Environment Act,[87]

> The duties, powers and functions of the Minister of the Environment extend to and include
>
> (a) all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, board or agency . . . relating to
>
> (i) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality,
>
> (ii) renewable resources . . .
>
> (vi) the coordination of the policies and programs of the Government of Canada respecting the preservation and enhancement of the quality of the natural environment; and
>
> (b) such other matters over which the Parliament of Canada has jurisdiction relating to the environment as are by law assigned to the Minister.

We here observe that the Minister of the Environment's general mandate involves the natural environment, which seems to exclude the social one (unless "renewable resources" include people). True, the mandate also includes other matters by law assigned to the Minister which have not by law been assigned to any other agencies. But assignment by cabinet directive, the original source for EARP's "authority", is not assignment "by law", a term which in different contexts has been held to include the constitution, statute, regulation and the common law.[88] The powers of the cabinet are derived either from statute or the royal prerogative and to have the force of law (as opposed to being administrative orders to civil servants) would have formally to be promulgated by the Governor in Council. No such promulgation has been found by the writer, and, therefore, the Minister of the Environment can look only to this statute for authority to establish binding requirements.

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87. *Supra* n. 48.

88. Canadian cases have consistently limited the meaning of "law" to statutes, subordinate legislation pursuant to statutes (regulations, ordinances, by-laws), and the common law. *See, e.g., Quebec North Shore Company v. Canadian Pacific Ltd.* [1977] 2 S.C.R. 1054, 1066, per Laskin, C.J.C.

Let us now examine section 6 to see how extensive this authority is:

> 6(1) The Minister of the Environment, in exercising his powers and carrying out his duties and functions under section 5 shall
>
> (a) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed
>
> (i) to promote the establishment or adoption of objectives or standards relating to environmental quality, or to control pollution,
>
> (ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs and activities that are found to have probable significant adverse effects, and the results thereof taken into account . . .

We will observe that the impact review contemplated in subsection 6(1) is limited to federal activities having probable significant effects on only the natural environment, not the socio-economic one. We also observe that the power given is that of initiating and recommending programs *of the government* to ensure that *federal* projects, etc., are assessed. No specific authority is given to require private proponents to undertake any studies. Indeed, if there is a private proponent, can we be so sure that the project is a federal one? Surely not, unless federal funds or lands are involved. Let us not be obstructionist, however: let us assume for the moment the power, purportedly exercised in section 34 of the Guidelines Order,[89] to initiate a government program which requires all proponents to prepare statements regarding impacts of federal projects on the *natural* environment.

Subsection 6(2) allows the Minister, with the approval of the Governor in Council, to establish "guidelines" for the use of various federal departments and agencies (including, where appropriate, regulatory bodies) in the carrying out of their duties and functions. Again this is a derivative power which is limited by the Minister's duties and functions under other sections. Thus, while in principle regulatory agencies ("where appropriate") can be covered by the guidelines, the latter can provide for only those areas within the Minister of the Environment's mandate — i.e., the assessment of project impacts on the *natural* environment. Thus, it is questionable that *legislative* authority exists in the Department of the Environment Act for the requirement of an EIA to assess impacts on the socio-economic environment. Nevertheless, the EARP Guidelines Order purports to grant this authority. It is submitted that imposing any requirement on a private proponent to study socio-economic impacts is *ultra vires*, whether the Minister depends on the statute or the earlier cabinet directive (if it survives the later enactment and Guidelines Order). Perhaps he may order departmental officials to do so. On the other hand, if the Minister's power to issue EIA guidelines is exhausted in section 6 and if the cabinet directive has been implicitly replaced, the guidelines he creates cannot contain directions for anyone to prepare socio-economic material, unless he can find another source of authority. (The argument here would be that since Cabinet can order civil servants to carry out research and since the Guidelines Order has been approved by it, the hierarchical employer-employee relationship renders irrelevant any objection that certain aspects of the order are *ultra vires*.) It

89. *Supra* n. 49.

seems clear, however, that the Minister of the Environment has not been given a wide general legislative mandate to require (or to execute) studies of the socio-economic environment under the sections of the Department of the Environment Act referring to the "natural environment".

VII. OTHER POSSIBLE AUTHORITY FOR REQUIRING SOCIO-ECONOMIC ASSESSMENT

It might be argued that a government-wide perspective should be taken. Perhaps other Ministers' mandates include the power or obligation to consider socio-economic data in contemplating advice to cabinet on a project's acceptability. For example, perhaps other ministers such as the Minister of the Environment or of Indian and Northern Affairs have some mandate to create and consider socio-economic guidelines for particular issues such as parks, or "Indians and lands reserved for Indians".

It is not proposed to conduct an exhaustive review of ministerial mandates, as the author is not aware of this argument having been made. Let us look briefly, however, at the mandates over parks and Indians. Although section 4 of the National Parks Act[90] provides that parks are to be "maintained and made use of so as to leave them unimpaired for the enjoyment of future generations", this is subject to that Act and the regulations. Subsection 6(2) permits the Governor in Council (not the Minister) to authorize the disposition of lands within a park "when such lands are *required*" (emphasis added) for various rights-of-way, including electrical transmission lines. Nothing is said about permitting power generation projects or the flooding of land therefor.[91]

Since alternative transmission rights of way exist, it could be argued that none through the park is "required", although a counter argument would probably carry the day if the alternative routes would render the project uneconomic. Under these circumstances, if the project is required, a right of way through the park is also required. It has been held that the similar term "necessary" in a statute authorizing the exemption from taxes of land necessary for a railway should be given a liberal construction.[92] Concerning flooding or actual project construction in the park, the relevant sections of the National Parks Act seem to imply that a legislative amendment of the park boundaries would be necessary. It is hard to specify the kind of information which would justify such an amendment, but the bio-physical integrity of the park and *derivatively* its enjoyment by the people of Canada might allow the Minister to require some kinds of social impact assessment in deciding whether or not to bring forward the necessary legislative amendment to remove land from the park. Again, however, the requirement would be an administrative

90. R.S.C. 1970 c. N.-13.

91. Although section 7(1)(i) of the National Parks Act permits the Governor in Council to make regulations concerning the establishment, operation and maintenance of public works and utility services *and* the use of same within the park, the word "and" should, it is submitted, be read conjunctively so that the projects which can be approved are for service in the park. This becomes clearer in section 7(1)(x), which authorizes regulations covering agreements with a province or any person for the development etc. of hydro-electric power "for the use of such power only in the park".

92. *City of Prince Albert v. Canadian Northern Railway* (1913) 3 W.W.R. 900.

order to public servants and not a binding direction upon a citizen proponent, although one which wanted the land would certainly comply. Furthermore, the result of this process would be the removal of a particular obstacle to the project and not an approval for the project. Authority to approve or reject the project rests elsewhere.

No doubt pursuant to a consideration of socio-economic and environmental factors, Parks Canada's Draft Management Plan for Wood Buffalo National Parks states that:[93]

> 1. Parks Canada will not permit any flooding of Park lands or any associated negative impact on Park lands that may result from a dam being constructed on the Slave River.
>
> 2. Construction of a transmission line corridor within the Park will only be considered if alternate routes outside the Park cannot be found, and then only if there is no significant negative impact on the Park environment.

Regarding the use of Indian reserve land, the power to permit a taking or occupying of the land without the consent of the band rests in the Governor in Council, not the Minister of Indian and Northern Affairs, under a combination of section 35 of the Indian Act[94] and section 67(1) of the National Energy Board Act.[95] Presumably the Minister of Energy, Mines and Resources could request a report from the Board on the desirability of doing this.[96] Except in the context of an application for an international power line, however, no specific guidance is given by the Act as to what the board may study in recommending[97]

> such measures within the jurisdiction of the Parliament of Canada as it considers necessary or advisable in the public interest for the controlled supervision conservation use marketing and development of energy and sources of energy.

One would have to examine the statutory mandate of each Minister to determine what, if any, impact information requirements could be imposed in particular cases. However it is tentatively concluded that legislation relating to parks or to Indians does not give any power to the relevant minister to require project proponents to carry out socio-economic impact assessment.

VIII. IS A MINISTERIAL EARP DECISION BINDING ON APPROVAL AGENCIES?

The next questions concern the legal effect of a panel recommendation, or more accurately since this is merely advisory, of a ministerial decision after the recommendation is considered. This question breaks down into a least two parts:

1. Can a positive ministerial decision following an EARP report impose any duty on a statutory approval body to approve the project?
2. Can a negative ministerial decision prevent the statutory approval body from approving the project, in which case the veto should even prevent it from entering the approval process?

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93. Quoted in Deirdre R. Griffiths, *Slave River Hydro-electric Project Environmental Implications:* Slave River Coalition Nov. 15, 1982, pp. 2-3.

94. R.S.C. 1970 c. I-6 as am.

95. R.S.C. 1970 c. N-6 as am. Section 66 of this Act also forbids the taking of possession of, the use or occupation of any lands vested in Her Majesty without the consent of the Governor in Council.

96. National Energy Board Act *id.* s. 22(2)i. *Id.* s. 22(2).

97. *Id.* s. 22(1).

The answer to the first question is fairly straightforward. If an agency has a statutory mandate to decide, it clearly cannot defer to the panel or the Minister(s) to the point of failing to consider the application's merits. This could amount to a failure to consider relevant matters, or an entertaining of irrelevant matters, or an unauthorized delegation of the agency's own decision-making powers.[98] If, on the other hand,[99]

> there is a wide discretion to request information relevant to the proposal, it is unlikely that the use of the EARP procedure and guidelines would result in reviewable error, provided that the agency clearly makes the ultimate decision itself.

Can a ministerial veto be exercised to prevent a project from being approved by a statutory body? One sees why the answer should be affirmative, for if not, an agency without an environmental mandate or without much environmental commitment might approve environmentally disastrous projects. Franson and Lucas, without citing authority, state that a project can be refused by the relevant ministers because of a negative panel report.[100] The point may be arguable, however, for cases when there is a private proponent.

Of course, if the initiating department is also the proponent, ministerial or cabinet veto at the planning stage can bring the project to a complete halt. If there is a private proponent, however, the relevant regulatory bodies may still be able to approve the project in spite of such veto.

It will be recalled that a project becomes a "federal" project if federal funds are sought or lands administered by the federal government are involved. Where decisions involving these funds or land involve cabinet or ministerial discretion outside the formal approval process, a veto for environmental reasons could certainly bring the project to a halt.

Section 33 of the EARP Guidelines Order purports to give the initiating department (defined as the decision making authority for a proposal)[101] the responsibility, in cooperation with other agencies concerned, to ensure that panel recommendations and ministerial decisions after the panel reports are incorporated into the project. Two problems, however, present themselves. First, this power is not to interfere with the regulatory responsibilities of that department.[102] This implies that even a veto is not to bind the regulatory process. Second, the power to promulgate the Guidelines Order is traced back to section 6 of the Department of the Environment Act. This requires the Minister of the Environment to coordinate EIA programs of the Government of Canada "to ensure . . . that the results thereof are *taken into account*".[103] This is obviously different from ensuring that ministerial decisions following EARP are "incorporated into the project".

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98. Franson and Lucas *supra* n. 46 pp. 994-21.

99. *Id.*, citing *The Queen v. Board of Broadcast Governors ex parte Swift Current* (1962) 33 D.L.R. (2d) 449 (Ont. C.A.).

100. *Supra* n. 46 p. 995-21. As this report is only advisory, however, no doubt these ministers could reject a panel report and still refuse a project.

101. *Supra* n. 49 s. 2.

102. *Id.* s. 33(2).

103. *Supra* n. 48 s. 6(1) (emphasis supplied).

Without a veto, that minister may still be able to ensure that EIA is "taken into account" and appropriate mitigative measures implemented. One way could be to have Environment Canada appear before regulatory agencies which had an environmental mandate. If an agency lacked such a mandate, perhaps the initiating department could use section 33 of the Guidelines Order and create binding environmental conditions without actually interfering in its non-environmental approval process. Perhaps the two sets of conditions could live together, although this is unclear.

It is possible, therefore, that the Guidelines Order, to the extent that it goes beyond the power in section 6(1), is *ultra vires*. It may also be that, when private proponents are involved with a project which does not involve federal funds or lands, no veto for environmental reasons exists. Sometimes in the approval process, however, an agency's decision is subject to reversal by Cabinet, which would seem an insuperable obstacle to this conclusion.[104]

Even so, a frustrated private proponent might find an examination of mandates quite profitable. For example, in the *Multi-Malls* case[105] the Ontario Minister of Transportation was held to have exceeded his powers under the transportation legislation when he refused highway access to a development on the basis that it contravened the official plan for that township and overall provincial government policy. The act which gave him his direction was concerned with traffic control and access, and he could not act as a member of the Executive Council and consider overall policy.

As for the cabinet (Governor in Council), it has been held[106] that discretion given by statute to the Governor in Council is limited to the objects and purposes designated in the statute.

These cases are helpful here for decisions which are not an exercise of the Royal prerogative, where "the decision maker may well not be subject to the supervision or interference of the Courts, but merely answerable to the Legislature."[107] It follows that statutory decisions of ministers or of cabinet will have to be taken with the particular statute's policy field in mind. It is therefore probable that if a statute allows the cabinet or a minister to change an approval body's decision, the ministerial decision, unless the statute says otherwise, must take into account only those factors which the approval agency could consider.

It may appear that cases like *Wimpey Western Ltd. et al. v. Director of Standards and Approvals of the Department of the Environment et al.*[108] and *Re Ball et al. and Ontario Hydro et al.*[109] form a competing line of authority. In *Wimpey*, the Alberta Court of Appeal found that the Director of Standards and Approvals, in exercising his discretion under Alber-

104. For example, a certificate issued by the NEB for a designated interprovincial power line is subject to approval by the Governor in Council (National Energy Board Act R.S.C. 1970 c. N-6 ss. 90.1, 44). Similarly, the Governor in Council's approval is needed under s. 7 of the Navigable Waters Protection Act R.S.C. 1970 c. N-19 s. 7.

105. *Re Multi-Malls Inc. and Minister of Transportation and Communications et al*, (1976) 14 O.R. (2d) 49 (Ont. C.A.).

106. *Canadian Pacific Railway v. R.* (1906) 38 S.C.R. 137.

107. *Re Multi-Malls Inc.*, *supra* note 105.

108. (1983) 2 D.L.R. (4th) 309 (Alta. C.A.).

109. (1975) 53 D.L.R. (3d) 519 (Ont. H. Ct. Div. Ct.).

ta's Clean Water Act,[110] was entitled to consider departmental policy established by his minister under the more general departmental policy established by his minister under the more general Department of the Environment Act.[111] Harradence, J.A. stated that government policy can sometimes be a relevant consideration.[112] The other two judges, however, pointed out that, while the Director's decision was "in keeping" with the policy, it had not been proven that his decision had been affected by that policy.[113] The ratio of the case is twofold: that the Director has discretion under the Clean Water Act to refuse to issue a permit even if the technical standards of the Act and regulations are met and that the Director had not fettered his discretion. He had not treated departmental policy as binding.

In *Ball*,[114] the Ontario Minister of the Environment considered a broad range of policy issues in deciding to approve an expropriation of Ontario Hydro. The applicants for a declaration did not, however, complain about this. Their criticism was that the Minister had declined jurisdiction by failing to impose conditions on Ontario Hydro because he considered he lacked legal authority. The Ontario Divisional Court held that he did lack authority and, therefore, had rightly decided against creating conditions.

Van Camp, J., however, did quote Laskin, J. in *Walters v. Essex County Board of Education*, who, when considering the same section of the Ontario Expropriations Act,[115] said that "an approving authority . . . is invested with the widest discretionary power to determine . . . whether an expropriation should proceed."[116] Indeed, he also said that he "would not read any limitation into" what an approving authority might consider.[117]

These remarks might be taken as high authority for the proposition that an approving authority, at least under expropriation legislation, can consider any factors it considers relevant, without regard to the purposes of the statute authorizing the expropriation. This, it is submitted, would be a mistake. In both *Ball* and *Walters*, the statements described above were clearly dicta. In *Ball* the point was not even argued by the applicants, who would have favoured the broad interpretation. In *Walters*, the point addressed was not whether particular factors could be weighed. No one denied it. Rather, the protesting landowners argued that the board of education (as approving authority) was bound to permit them to make representations concerning these factors. Reports on these subjects had not been before the inquiry officer whose report was ultimately rejected by the board.

Other cases make it clear that the courts can go behind an authority's decision to expropriate if the expropriation is not for a purpose con-

110. R.S.A. 1980 c. 13.
111. R.S.A. 1980 c. D-19.
112. *Supra* n. 108 at 317.
113. *Id.* at 321.
114. *Supra* n. 109.
115. R.S.O. 1980 c. 148.
116. [1974] S.C.R. 481, at 489.
117. *Id.*

templated by the statute authorizing it[118] and it is highly unlikely that Laskin, J. in *Walters* intended to question that proposition. Thus, the author concludes, there is good authority for limiting the factors which a minister or cabinet can consider in exercising approval powers.

The possibility that a private proponent could actually bull through a project in spite of the federal cabinet's disapproval is, of course, remote. Even if the approval agencies would cooperate with the obdurate proponent (a dubious assumption), the federal cabinet could surely find excuses for delay or even invent specious grounds for legally valid objections to the project. No proponent would dare run the risk. To concede this practical point, however, should not mean a dismissal of the author's admittedly "academic" point. It is the rule of law which is at stake here:[119]

> that an administration according to law is to be superseded by action dictated by . . . the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law . . . .

We will answer the last of our three questions, whether the approval authorities have the mandate to consider environmental or socio-economic factors, as we look generally at the major statutes covering the proposed Slave River project.

IX. THE FEDERAL REGULATORY AND APPROVAL PROCESS

Several federal statutes may require the submission of applications for approval of the Slave River Project. If the project is entirely within Alberta, the list could include the Fisheries Act,[120] the Indian Act,[121] the National Energy Board Act,[122] the Navigable Waters Protection Act,[123] and the National Parks Act.[124] If construction of any facilities will be at least partially in the Northwest Territories, other relevant federal legislation would inlcude the Dominion Water Power Act,[125] the Northern Canada Power Commission Act,[126] and the Northern Inland Waters Act,[127] as well as various territorial ordinances.[128]

118. *See, e.g., Galloway v. London Corporation* (1866) L.R. 1 H.L. 34 and *Warne v. Province of Nova Scotia et al.* (1970) 1 N.S.R. (2d) 152 (S.C.N.S., Trial Division).

119. *Roncarelli v. Duplessis* [1959] S.C.R. 121, at 142, *per* Rand, J.

120. R.S.C. 1980 c. F-14 as am.

121. *Supra* n. 94.

122. *Supra* n. 95.

123. R.S.C. 1970 c. N-19.

124. *Supra* n. 90.

125. R.S.C. 1970 c. W-6.

126. R.S.C. 1970 c. N-21.

127. R.S.C. 1970 c. 28 (1st Supp.) as am.

128. According to the *Final Report* (*supra* n. 2, pp. 66-8), the Northwest Territories' Department of Economic Development and Tourism would assess socio-economic impacts and the Department of Renewable Resources would assess the project's effect on the management of fur bearers and upland game. Furthermore, the Report states, the Northwest Territories Water Board would have some role in assessment even if the dam were to be built in Alberta and would be a primary licensing authority if the dam were in the Territories (six of the nine members would be federal appointees and three would be named by the Legislative Assembly). It should be pointed out, however, that the Northern Inland Waters Act *supra* note 106, which creates the Northwest Territories Water Board, excepts from its approval process those projects authorized by the Dominion Water Power act (s. 3). It is therefore possible that the Territories board would not be involved.

If the project is entirely built in Alberta, and if no power from it will be exported to the United States, the National Energy Board would be involved in the approval only if the facility were to be constructed and operated for the purpose of exporting power to other Canadian jurisdictions and if the Governor in Council designated the facility as subject to N.E.B. approval.[129] Such N.E.B. involvement would involve not only the interjurisdictional power line, but the dam and generating works. In theory, of course, the Parliament of Canada could invoke section 92(10)(c) of the Constitution Act and bring the whole project under federal jurisdiction as a work "for the general advantage of Canada or . . . of two or more of the Provinces."

No person may begin the construction of even a section of an international power line or designated interprovincial power facility without a certificate from the Board (with the Governor in Council's approval). The N.E.B. must be satisfied that the line is required by public convenience and necessity.[130] In assessing this question, the Board must take into account all matters which appear to it to be relevant, and without limiting the generality of this statement, the Board is specifically allowed to have regard to a number of things, including economic feasibility and "any public interest that in the Board's opinion may be affected".[131] Subject to the Supreme Court of Canada's unduly restrictive view that the Alberta equivalent to the N.E.B. had only an energy mandate,[132] it seems clear that socio-economic and environmental impacts are included here. The Board may attach conditions it considers necessary or desirable in the public interest.[133] As already mentioned,[134] the Governor in Council may allow federal Crown land to be used for the transmission line.

It is not clear whether in deciding on an application for a certificate of public convenience and necessity a hearing is required.[135] If a hearing of this type is held, however, it must be public.[136]

X. THE DOMINION WATER POWER ACT

Although the very wide Regulations promulgated under the Dominion Water Power Act[137] would permit the requirement of environmental and socio-economic assessment of the Slave River Project, these parts of the Regulations are probably *ultra vires.* This Act does not authorize such requirements.

If the Rapids of the Drowned site in the Northwest Territories is chosen for the dam, the major approval process would revolve not around the Alberta ERCB but around the Dominion Water Power Act.

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129. *Supra* n. 95 s. 90.1.
130. *Id.* s. 44.
131. *Id.*
132. *Athabasca Tribal Council v. Amoco Petroleum Co. Ltd.* [1981] 1 S.C.R. 699.
133. *Supra* n. 95 s. 46(1).
134. *See* text accompanying n. 91 and n. 92.
135. Alastair R. Lucas and Trevor Bell, *The National Energy Board Policy and Practice*, Ottawa: Law Reform Commission of Canada, 1977, 54.
136. *Supra* n. 95 s. 20.
137. *Supra* note 125, s. 5.

Regulations under this Act specify a detailed approval process, including public hearings, if protests to the project are lodged or if for other reasons the Minister of Indian and Northern Affairs decides a hearing should take place. The Final Report on the Slave River project contemplates that an application to the Northwest Territories Water Board would be necessary under the Northern Inland Waters Act,[138] but section 3 of that Act appears to exempt a person who has permission under the Dominion Water Power Act from the need to acquire an inland waters license. If both processes were necessary the Minister of Indian and Northern Affairs might wish to combine these procedures by naming the Water Board to hold the hearing and advise him under the Dominion Water Power Act.[139] That Act gives considerable powers to the Governor in Council to make a broad variety of regulations and to make orders necessary to carry out the provisions of the Act and regulations "according to their true intent".[140]

Regulations under this Act give remarkably wide powers to the Director to require information "consistent with the regulations" or, in the case of the Minister, to give a licensee *any instructions not inconsistent* with federal or provincial statutes or regulations concerning[141]

> the preservation of the purity of waters or governing logging, forestry, fishing or other interests present or future that might be affected . . . .

Two questions arise here. If a statute has addressed a topic, is it "inconsistent" to require more rigorous standards or to implement standards in respect of topics unmentioned? A literal *expressio unius exclusio alterius* perspective would imply this, but the author would prefer to analogize from W. Lederman's urbane treatment of concurrent jurisdiction between federal and provincial legislation.[142] We can then say that requirements of the Minister which are repugnant to the statute obviously fail, that duplicative ones might fail as uneconomical and unnecessary, but that requirements which are more rigorous than the statute's or which are in new territory can stand.

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138. R.S.C. 1970 (1st supp.) c. 28.

    It may briefly be mentioned that, unlike the Dominion Water Power Act, the Northern Inland Waters Act clearly contemplates regulation of both the quantity and quality of water (see, e.g., ss. 3,6 and 10). Furthermore, the objects of the water boards set up under s. 9 of the act

    > . . . are to provide for the conservation, development and utilization of the water resources of the . . . Territories in a manner that will provide the optimum benefit therefrom for all Canadians and for the residents of the . . . Territories in particular.

    Regulation-making power under s. 26 of the act includes the establishment of water management areas, priorizing among the classes of use therein, prescribing water quality standards, the quantities of waste allowed, testing techniques and the submission of waste samples, and the imposition of water use fees.

    Based on these powers, considerable environmental and socio-economic assessment could be required, although only if the project involved some construction north of Alberta and if the Northern Inland Waters Act were used instead of the Dominion Water Power Act.

139. *Supra* n. 125.

140. *Id.*, s. 12.

141. C.R.C. 1978, c. 1603, s. 67.

142. W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 *McGill L.J.* 185.

The second question is whether the Regulations giving such wide powers are *intra vires*. If they are, all kinds of impact assessment material could be required to help the Minister decide on the protection of various interests, present or future. The Dominion Water Power Act, however, does not seem either explicitly or implicitly to include such broad objects or authorization. The "public interest" is mentioned in the Act but only in the context of authorizing joint development of water powers "if they can be more economically and satisfactorily utilized."[143] The Governor in Council's power in section 12 of the act to make regulations is clearly oriented toward the utilization of water for power purposes, although the flow of water can be regulated in the interests of all water-users.[144] This does not even hint, however, at the water quality management which section 67 of the regulations contemplates. The usual general power to make regulations is given, but again this is limited to "carrying into effect the purposes and provisions of this Act."[145]

The Act does not state its purpose, but it seems fair to infer from its thrust that the primary purpose is the efficient development and use of waterpower within federal jurisdiction. Given the decision by the Supreme Court of Canada that the Alberta ERCB (whose powers include an environmental mandate) administers exclusively energy-oriented statutes,[146] it is easy to doubt that the Governor in Council has been empowered by the provisions just cited to permit the Minister to instruct a licensee on any "interest that might be affected" so long as he does not contradict any federal or provincial statute on the matters listed. The Minister cannot be authorized, as section 8 of the Regulations purports to do, to impose terms on virtually any matter as long as Dominion Water Power Regulations are not contradicted.

Under the Regulations the Minister has discretion to reject an application.[147] Ministerial discretion should never be exercised against the public interest, but in considering that interest it is not clear that matters extraneous to the relevant statute can be weighed.[148] Here, the interest is the development and use of water power, not the preservation of any socio-economic or natural environment. Nothing in the statute implies that these are key matters in the approval process and we must, therefore, conclude that section of the regulation, and hence the requiring and consideration of socio-economic and environmental assessment, are *ultra vires*. Even if a court wished to read the section narrowly so as to preserve its *vires*, the reading would render *ultra vires* practically all such requirements a Minister might seek to impose, so the effect would be the same.

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143. *Supra* n. 125, s. 9.

144. *Id.*, s. 12(c).

145. *Id.*, s. 12(q).

146. *Athabasca Tribal Council* v. *Amoco Canada Petroleum Co. Ltd. et al.* [1981] 1 S.C.R. 699.

147. Section 4(7) of the Regulations specifically confers this power if, after a public hearing, "he deems it necessary in the public interest." Sections 7 and 8 permit but do not require the Minister to grant priority permits and interim licences.

148. *Multi-Malls Inc. and Minister of Transportation and Communication et al.* (1976) 14 O.R. (2d) 49 (Ont. C.A.).

Would the Dominion Water Power Act apply for a project built entirely within Alberta? Space does not permit an analysis of this question, but the crucial question here would obviously be whether the project involves water power on federal Crown land. Neither the siting of a transmission line on federal Crown land nor the fact of water flowing over that land would seem to suffice. There is probably a water power only where the force or energy contained in the flowing water could be generated in commercially valuable quantities.[149] Sites containing this sort of potential, however, do not abut the national park.[150]

Without pressing this point any further, we conclude that the Dominion Water Power Act probably does not apply if the project is built completely in Alberta.

The above discussion has raised doubts about the legality of the federal government's techniques to establish a holistic look at environmental and socio-economic impacts of federal projects. It is, however, highly desirable that such a perspective be continued and, should the doubts above be well founded, it seems clear that federal legislation could be passed to clarify and substantiate the EARP's mandate and the environmental and socio-economic mandates of various approval agencies.

XI. OTHER FEDERAL LEGISLATION

Other significant approvals would be required under the federal Fisheries Act and the Navigable Water Protection Act. Under section 31 of the Fisheries Act, no work or undertaking, if it would result in the harmful alteration, disruption or destruction of fish habitat, can be carried on without authority of the Minister of Fisheries and Oceans or under regulations made by the Governor in Council.[151] Section 33 forbids the deposit or permitting of the deposit of deleterious substances into waters inhabited by fish. Section 33.1[152] requires persons to submit, on request by the Minister or under regulations made under the section, sufficient information to enable the Minister to determine whether a work or undertaking is likely to result in an offence under either section 31 or 33 and what measures, if any, would mitigate this. He may require, in accordance with regulations if any, or with the approval of the Governor in Council if none, modifications or additions as he considers necessary. He may also restrict the operations of the work or undertaking.[153] This power has been invoked to forbid a project.[154] Except in urgent circumstances, however, the power under section 33.1(2) is to be preceded by an offer to consult with the relevant provinces or federal agencies.[155]

It should also be noted that section 20(10) of the Fisheries Act permits the Minister to regulate the quantity of water passing over a dam or

149. Dominion Water Power Act *supra* note 125 s. 2.

150. *Synopsis supra* n. 2, at 1.

151. R.S.C. 1970, c. F-14, as am.

152. *Id.*, as am. by 1976-77 c. 35, s. 8.

153. *Id.*, s. 33.1(2).

154. *See, e.g.*, SOR/77-350 where the Minister prohibited landfilling and construction in a slough.

155. *Id.*, s. 33.1(4).

obstruction where necessary for the safety of fish and of fish ova on spawning grounds.

No requirement of environmental impact assessment data is contained in either the act or regulations, except insofar as fish are affected. The link to effects on fish must be made. For example, section 33(3) of the Fisheries Act[156] was declared *ultra vires* by the Supreme Court of Canada since the general prohibition against putting logging debris into water was not sufficiently linked to the protection of fish.[157] *A fortiori* the Minister cannot consider general physical environmental factors unconnected with the protection of fish, let alone socio-economic factors, when exercising his power in section 31 to permit construction of works or undertakings disruptive to fish habitat.

The Navigable Waters Protection Act[158] specifies that navigable water "includes . . . any . . . body of water . . . altered as a result of the construction of any work". Under this Act, no work can be, *inter alia*, built or placed in, over or across any navigable water unless the work, site and plans thereof "have been approved by the Minister [of Transport] upon such terms and conditions as he deems fit prior to commencement of construction".[159] The Act does not specify what information the Minister may require to allow him to make up his mind, except that he must approve the "plans". The Governor in Council's regulation-making powers do not help here, as they are limited to those she "deems expedient for navigation purposes"[160] and they do not advert to this point.[161] We infer, therefore, that no environmental impact assessment data could be required of an applicant for approval under this Act whose purpose is to preserve the public right for navigation.[162]

Various other federal Acts could have some relevance. For example if part of the project were to be built in the Northwest Territories, the Arctic Waters Pollution Prevention Act[163] would apply. Under certain circumstances the Canada Water Act[164] would also apply. Indeed, there has already been an inter-jurisdictional agreement on the Mackenzie River basin.[165] It might also seem that permission would be required under the Migratory Birds Convention Act[166] since considerable disruption of the habitat of some migratory birds would be involved, although the most severe disruption would be to a rookery of white pelicans[167] which are not

156. *Supra* n. 151.

157. *Dan Fowler* v. *The Queen* [1980] 2 S.C.R. 213.

158. R.S.C. 1970, c. N-19, s. 2.

159. *Id.*, s. 5(1)(a) (words in brackets supplied).

160. *Id.*, s. 10(1).

161. See Navigable Waters Works Regulations, C.R.C. 1978, c. 1231, as am.

162. *Champion and White* v. *City of Vancouver* [1918] 1 W.W.R. 216 at 218-19 (S.C.C.).

163. R.S.C. 1970 (1st supp.), c. 2.

164. *Id.*, c. 5.

165. Submission by Hon. Arnold McCallum, Northwest Territories Minister of Economic Development to the EARP Panel's Assessment Review Hearings, p. 36.

166. R.S.C. 1970, c. M-12.

167. *Final Report* at 58. For a detailed discussion, see Reid Crowther and Partners Ltd. *Slave River Hydro Project Feasibility Study Task Area 4 Environmental Study Regions C and D Volume 3 Appendices Part B* (1982) 70.

protected under the act. The Act permits regulations to be made on this and other matters.[168] Existing regulations prohibit disturbance or destruction of migratory birds' nests without a permit or the deposit of oil or any other substance harmful to migratory birds unless within emission limits of regulations promulgated by the Governor in Council.[169] No such emission regulations have been promulgated so all harmful emissions are in theory illegal. The Migratory Bird Sanctuary Regulations prohibit interference with migratory bird habitat only in designated sanctuaries.[170] Richardson Lake Sanctuary is close to the south-eastern end of Wood Buffalo National Park, but no sanctuary area exists within the park or near the proposed dam and reservoir sites. Habitat in other places is not specifically protected.

To summarize, it appears that the N.E.B. has full powers to require environmental and socio-economic information; that the Dominion Water Power Act is a paper tiger since the applicable parts of its regulations are *ultra vires*; that the process under the Northern Inland Waters Act, if applicable, is also broad; that some specific environment regulation is possible under both the Fisheries Act and the Migratory Birds' Convention Act; and that nothing of environmental consequence can be done under the Navigable Waters Protection Act. With the exception of the National Energy Board Act, no powers regarding socio-economic assessment appear to exist.

Earlier the question was raised whether ministerial or cabinet decisions regarding the desirability of "federal projects" can be constrained in any way. If prerogative power is involved, the legislature but not the courts can control it.[171] As for the prerogative, "judges now use the term to mean any capacity of the Crown . . . which is not statutory".[172] This includes the rights of ownership and although the point is not entirely clear, La Forest thinks that unless there is a statutory restriction the Crown can convey Crown lands on the advice of the executive.[173] If federal projects involved prerogative decisions concerning the grant of money or land, the executive could decide not to advise the grants to a project proponent if the project seemed to involve unacceptable environmental, socio-economic or any other kind of consequence. The situation changes somewhat, however, in the statutes which create a project approval process. The purposes and criteria in the statute will obviously bind the approving authority created under it. Without exploring the range of statutes involved, we should mention that the House of Lords has quashed a decision of the Secretary of State for Education which he was statutorily authorized to take if he was "satisfied" that a local education authority was acting "unreasonably". In *Secretary of State for Educa-*

168. *Supra* n. 166, s. 4.

169. Ss. 6 and 35 respectively of the Migratory Birds Protection Regulations, C.R.C., 1978, c. 1035.

170. C.R.C., 1978, c. 1036, as am., ss. 3(2) and 10.

171. *Re Multi-Malls Inc. and Minister of Transportation and Communications, supra*, n. 148 at 58.

172. H.R.W. Wade, "Judicial Control of "Prerogative" (1977) 93 *L.Q.R.* 325 at 327.

173. Gerard V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution.* (1969) 20.

tion and Science v. *Tameside Metropolitan Borough Council*[174] the House held that even if he was satisfied, he should not have been as no reasonable person could have held such a view on the evidence. Apparently subjective discretion must now, in the United Kingdom at least, meet more than a "good faith" test.

The result of this discussion is that even if some of the EARP process is *ultra vires*, a proponent may not be able to deny that environmental or socio-economic issues can be considered by Her Majesty's government in advising the Governor General on the exercise of her prerogative where prerogative powers are involved. On the other hand, where statutory powers are involved (and they clearly are, under the various statutory approval processes) neither the approving agency nor (probably) the Governor in Council in confirming or reversing its decisions can consider factors which do not come within the agency's mandate.

XII. THE ALBERTA APPROVAL PROCESS

The Slave River project may require many approvals under various Alberta statutes, but the two most important acts are the Hydro and Electric Energy Act[175] and the Water Resources Act.[176] A brief discussion of their salient points will suffice here.

The Alberta ERCB is, of course, the approving authority under the former act, whose purposes include providing for "the economic, orderly and efficient development and operation in the public interest" of hydro energy, its generation and its transmission.[177] For our purposes, it is also important to note that the act seeks to assist the Government to control pollution[178] and ensure environment conservation "during these activities".[179] Regulation making powers allow the board to prescribe measures to be taken in the construction, operation or abandonment of any power plant or transmission line for the protection of wildlife, for the control of pollution and to ensure environment conservation.[180] As well, the Board may make "any just and reasonable" orders that it considers necessary to effect the Act's purposes.[181]

Under the Act, the hydro development, the power plant and the transmission line must be approved separately. In considering the hydro development, the ERCB may make any investigation or hold any hearing it considers desirable.[182] The application is referred to the Ministers of the Environment and Energy and Natural Resources for their approval and conditions on environmental matters. These conditions are to be attached to any approval by the Board[183] unless the Lieutenant Governor

174. (1976) 3 W.L.R. 641.

175. R.S.A., 1980, c. H-13.

176. R.S.A., 1980, c. W-5.

177. *Supra*, n. 175, s. 2(c).

178. *Id.* s. 2(e).

179. *Id.*

180. *Id.* ss. 3(1)(i) and 3(4). Those regulations to control pollution and ensure environment conservation are subject to the approval of the Minister of the Environment.

181. *Id.* s. 5.

182. *Id.* s. 7(3).

183. *Id.* s. 7(5) and (10).

directs otherwise.[184] If the Board reports favourably on the application to the Lieutenant Governor in Council, a bill must be prepared and introduced in the Legislative Assembly.[185] When the bill is passed and receives royal assent, the Board must approve the development;[186] without such a bill, no Board approval can be given.[187] However, operation of the development requires an order of the Board and the authorization of the Lieutenant Governor in Council, who may attach "any terms or conditions he considers necessary or desirable".[188]

Construction or operation of a power plant requires Board approval with the Lieutenant Governor in Council's authorization.[189] Before the Board approves the application it must refer it to the Minister of the Environment for his approval and binding conditions.[190] Again, however, these conditions may be waived by the Lieutenant Governor in Council.[191] No reference is made in the act to any hearings on power plant applications (power plants are defined as "the facilities for the generation of electric energy . . .").[192]

Transmission line construction requires a Board permit, to which are attached binding conditions (unless the Lieutenant Governor otherwise directs)[193] of the Minister of the Environment and, if Crown land is affected, the Associate Minister of Public Lands and Wildlife.[194] An ERCB licence to operate the transmision line is also required.[195]

Overall, this Act certainly gives many opportunities for EIA information to be incorporated into the approval process, notably through the minister's power to attach environmental conditions in response to what emerges from the EIA. Board regulations could (but do not) also require this sort of information. Subject to the courts' applying the *Athabasca* [196] or *Padfield* [197] type of limitations, the Lieutenant Governor in Council may attach any desirable conditions, at least within the framework of the objects of the Act. Since these include "economic, orderly and efficient development in the public interest", arguably socio-economic conditions can be imposed by the Lieutenant Governor in Council. As part of the process requires an act of the Legislature, a cautious government could include any conditions whatsoever in the Act unless they are *ultra vires* the province.

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184. *Id.* s. 18(3).
185. *Id.* s. 7(8) and (9).
186. *Id.* s. 7(10).
187. *Id.* s. 7(11).
188. *Id.* s. 8.
189. *Id.* s. 9(4).
190. *Id.* s. 9(4) and (5).
191. *Id.* s. 18(3).
192. *Id.* s. 1(k).
193. *Id.* s. 18(3).
194. *Id.* s. 13(1).
195. *Id.* s. 14.
196. [1981] 1 S.C.R. 699. See discussion of this case in P.S. Elder's "Environmental Impact Assessment in Alberta" *supra* n. 1 at text accompanying n. 79-92.
197. *Padfield* v. *The Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 (discretion exercised under an act cannot be exercised so as to frustrate its objectives).

The Hydro and Electric Energy Regulation[198] does not materially affect the provisions in the Act respecting environmental impact. The regulation does not advert to the approval process for major plants or transmission lines. The only requirement for environmental impact information is with respect to minor alterations to existing plants, transmission lines or distribution systems,[199] which the Board may approve without a detailed application.

Let us now examine the Water Resources Act.[200] The construction or use of "works" (which includes hydro electric generating plants as well as dams, reservoirs and other like appurtenances)[201] for the diversion of water requires approval under this Act.[202] An application must be filed with the Minister of Environment containing particulars prescribed by him and setting out the nature and purpose of the proposed diversion or works.[203] Unless the Minister waives the requirement,[204] public notice must be given of the application and objectors, within 30 days, may file a statement of reasons for their objection.[205]

The Minister, after considering all protests filed (no hearing is stipulated), may grant an interim license authorizing construction of the proposed works, subject to any changes or conditions the Minister considers necessary.[206] If land not belonging to the applicant may be affected, an easement against that land will be filed so as to ensure that the interim licensee may use the land as approved.[207] Indeed, expropriation powers are extended to the holder of an interim licence.[208] If land is required by the Crown for a project, the Lieutenant Governor in Council may direct the Minister to expropriate.[209]

After the works are constructed in accordance with the interim licence and verified by inspection, the Minister must issue a license for the diversion and/or the use of the water, subject to any terms and conditions he prescribes.[210] The Minister, if he considers it in the public interest, may construct or take over and operate any undertaking or works.[211] Interestingly, it is implied in all approvals under this Act that no power generated will be exported from Canada and that licences will be suspended if export occurs.[212]

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198. Alta. Reg. 409/83.
199. *Id.* ss. 11-12.
200. *Supra* n. 176.
201. *Id.* s. 1(x).
202. *Id.* s. 5.
203. *Id.* s. 15(1) and (6).
204. *Id.* s. 19.
205. *Id.* s. 16.
206. *Id.* s. 18(1).
207. *Id.* s. 34(1) - (7).
208. *Id.* ss. 31 and 80.
209. *Id.* s. 68.
210. *Id.* s. 33.
211. *Id.* s. 47(1). S. 83(1) also allows him "in his absolute discretion" if he "considers it advisable and in the best interest of Alberta" to construct, operate, maintain and repair works and undertakings.
212. *Id.* s. 66.

The Minister has many other powers under the Act, including entering into agreements with the Government of Canada for the construction and operation by the latter of water development and conservation projects in Alberta.[213] With the approval of the Lieutenant Governor in Council, he may enter into agreements with other provinces or the Government of Canada for the establishment of boards to study and advise on the control and use of boundary or interjurisdictional waters.[214] The Act is binding on the Crown.[215]

Since licences may be granted for purposes, *inter alia*, of water management, erosion control, conservation, recreation and the propagation of fish or wildlife "or for any like purpose",[216] these environmentally-related aims are certainly included within the objects of the Act. The Minister's power to prescribe particulars to be included in an application[217] therefore would include at least these aspects of EIA. In addition, the Lieutenant Governor in Council may make regulations, *inter alia*, prescribing the particulars to be filed by applicants; governing the utilization of water by licensees, the extent of diversion, the passage of logs or timber; requiring the construction of fishways; and concerning the protection of any source of the water supply and its regulation and control in the interests of all users.[218]

If land in a forest reserve is required for a water-power project, the Minister of Energy and Natural Resources will report on the effect of approval on the reserve and may insert provisions necessary to protect the reserve's "use and enjoyment".[219]

The Provincial Water Power Regulations[220] were passed long before EIA was contemplated. Nevertheless, the Director of Water Resources, to whom the Regulations require that an application be made to divert, store or use water for power purposes,[221] may at any time call for additional information even if only indirectly connected to the proposed works, if he considers it necessary. This material is to be provided by and at the expense of the applicant.[222] The wording of these Regulations is, in material respects, copied from the Dominion Water Power Regulations.[223]

It does not follow, however, that the Alberta Regulations are *ultra vires*, as the statutory objects and regulation-making powers appear considerably broader. That is not to say that the Minister has *carte blanche* to issue any directions to a licensee, but relevant instructions could probably be issued since it does not appear that the Alberta Regulations are themselves *ultra vires*.

213. *Id.* s. 76.
214. *Id.* s. 71.
215. *Id.* s. 95.
216. *Id.* s. 11 (1)(b).
217. *Id.* s. 15(1).
218. *Id.* s. 72.
219. *Id.* s. 67.
220. Alta. Reg. 284/57, as am. by 306/72 and 388/72.
221. *Id.* s. 2(1).
222. *Id.* s. 2(7).
223. C.R.C. 1978 c. 1603.

XIII. SUMMARY AND CONCLUSIONS

A brief summary of the ground covered herein may be helpful. After a description of the Slave River hydro electric proposal, the federal environmental assessment and review process was set out. Both Alberta's and the federal EIA guidelines were described as comprehensive. After examining the legal basis for EARP, the author concluded that the present requirements for socio-economic assessment by proponents are not authorized, even if the Minister of Environment can order his civil servants to carry out studies of impacts on the natural environment. It is also doubtful that other relevant *departmental* legislation authorizes EIA, either broadly or narrowly interpreted.

The link between ministerial decisions following an EARP panel report and the approval process was explored. It appeared dubious to the author that either a positive or negative decision about the report on the project's environmental acceptability could bind approval agencies operating under their own statutory mandate. However, where federal lands or money are involved, or where the proponent is a federal department, ministerial or Cabinet rejection can obviously halt the project.

Where statutes require an approval agency's decision to be reviewed by Cabinet, it may also be true that the criteria used by Cabinet in its decision are limited to those contemplated by the statute. Usually, these criteria will be the same as those to be used by the approval agency.

An examination of the most significant federal statutes under which approvals for the Slave River project would be considered revealed that only the National Energy Board has a broad mandate to examine environmental and socio-economic aspects of projects. Regulations under the Dominion Water Powers Act, which purport to give similarly broad powers to the Minister of Indian and Northern Affairs, are *ultra vires.* Limited environmental information, where relevant to fish or migratory birds, may be considered under the applicable sections of the Fisheries Act and the Migratory Birds Convention Act. No environmental mandate exists under the Navigable Waters Protection Act.

The Alberta approval process for the Slave River project was also briefly described, and it was concluded that the possibilities of requiring environmental and socio-economic assessment are somewhat wider.

Overall, the lessons from this study and the preceding part[224] are two. First, careful thought must be given to the appropriate scope of EIA information requirements and to the EIA's place in the approval process, as well as in the planning process. For the purposes of argument, the author has assumed that melding SIA and EIA and concentrating on the approval process is the best way to proceed. However, it should at least be noted that SIA practice and methodology are in a state of crisis. It is possible to argue that SIA should be oriented toward community development, not the bureaucratic approval process; that it should be severed from the EIA; that it should be done by the community (if

224. P.S. Elder, "Environmental Impact Assessment in Alberta" *supra* n. 1.

necessary with consultants); and that it should involve a bargaining process between proponent and affected communities.[225]

Second, the results of such an examination at both the federal and provincial levels must be clearly expressed in the different legislative mandates. The present ambiguity seems to allow either illegal government decisions or a virtual disregard of relevant, important environmental information when approvals are under consideration. The first threatens the rule of law, the second the political accountability of governments who can pretend to provide more environmental protection than they deliver.

225. *See* Rachel Corbett, "A Bargaining and Community Development Approach to Social Impact Assessment" unpublished Master's Degree Project (thesis), Faculty of Environmental Design, University of Calgary (1986).