UNIVERSITY OF CALGARY

Provincial Jurisdiction and Fish Habitat

By

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE

DEGREE OF MASTER OF LAWS

FACULTY OF LAW

CALGARY, ALBERTA

APRIL, 2009

Your file Votre référence
ISBN: 978-0-494-69598-2
Our file Notre référence
ISBN:978-0-494-69598-2

UNIVERSITY OF CALGARY

FACULTY OF GRADUATE STUDIES

APPROVAL

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "Provincial Jurisdiction and Fish Habitat" submitted by Maureen A. Bell in partial fulfillment of the requirements for the degree of Master of Laws.

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ABSTRACT

Jurisdiction over fish habitat is exclusively a federal matter under the Canadian Constitution. The Province of Alberta has jurisdiction to manage water within provincial boundaries subject to exclusive federal jurisdiction and validly enacted and paramount federal legislation. This thesis examines the constitutional effect of the federal mandate to manage fisheries on the provincial mandate to manage water. It looks at where there are inconsistencies and the effect of those inconsistencies. This thesis shows that the federal government has jurisdiction to ensure water is managed provincially such that there is sufficient water in the stream for fish habitat pursuant to "Seacoast and Inland Fisheries," found in subsection 91(12) of the *Constitution Act, 1867* and the *Fisheries Act*, and it is unconstitutional for the Province to manage its water in a manner inconsistent therewith.

ACKNOWLEDGMENTS

My thanks to Professor Arlene Kwasniak for her generosity with her time, her passion for law and water, and patience with my progress. I also extend my gratitude to members of the faculty and staff who provided willing assistance throughout including Dean Alastair Lucas, Professor Jennifer Koshan, and Professor Gene Dais and assistance of Nadine Hoffman, research librarian. To my family and friends who learned more about the Canadian Constitution, and fish than they ever wanted to, I thank them for their support. To my daughter Summer Lane, who tried her best to extract clear thoughts, and to Rocco Ciancio for his encouragement when I didn't want to stay the course, I extend my gratitude for teaching me more about relationships than fish.

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Table of Acronyms

BW1	That part of the Bow River from Bassano to Grand Forks where the mouth of the Bow river joins the SSRB.
BW2	that part of the Bow River from the Highwood river to Carseland
BW3	that part of the Bow River from Carseland to Bassano
BW4	that part of the Bow River starting within the City of Calgary to the mouth of the Highwood River.
EBF	Ecosystem Base Flow is an amount of water in a river when a threshold value is established. It is based on the flow necessary to reduce the impact on habitat during naturally low-flow periods. The EBF is defined for each reach and is calculated on a weekly time-step (i.e., there is a different EFB value for each week). For certain times of the year, and for some reaches where site-specific data were not available, the Tessmann Method, adapted to a weekly time-setup, was used to set the Ecosystem Base Flow.
FA	Fisheries Act
FH IFN	Fish Habitat Instream Flow Needs
NRTA	Natural Resources Transfer Agreement Natural Resources Transfer Agreement attached as Schedules 1, 2 and 3 to the "*Constitution Act*, 1930, Appendix II" (formerly "*British North America Act*" (1930), 20-21, George V. c. 26 (U.K.) (NRTA).
NWIA	North West Irrigation Act
SSRB	South Saskatchewan River Basin
Unsafe IFN	Unsafe instream flow needs means, in this thesis, insufficient water for fish habitat.
WCO	Water Conservation Objective
WCO for SSRB	Water Conservation Objective for the South Saskatchewan River Basin
WRA	Water Resources Act

CHAPTER I: INTRODUCTION

1. Background and Objectives

Southern Alberta is located within the semi-arid region known as the Palliser Triangle.[1] In this region, increased competition for water raises important questions concerning the balance between two competing interests – water requirements for human use and water requirements for fish habitat, among others. This thesis argues that balance has not yet been achieved and the answer is found in Canada's *Constitution Act*.[2]

The principle objective of this thesis is to test whether the current interpretation and application of the *Constitution Act* (Constitution) and laws made pursuant to it contribute to an incoherent approach to water management although the means for a coherent approach are found within the legislation. This objective is based on the argument that the quantity of water sufficient for maintaining healthy fish habitat is a matter falling within exclusive federal legislative authority and is therefore beyond the scope of provincial legislative authority. For purposes of this thesis "healthy fish habitat" means the quantity of water in a river or stream that is necessary for fish to survive and thrive. This quantity of water will be referred to throughout this thesis as "fish habit instream flow needs" (*FH IFN*).

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[1] The Palliser Triangle refers to an area in southern Alberta and Saskatchewan named after the Palliser Expedition of 1857-1860. Captain John Palliser's expedition was tasked with determining the suitability for agricultural settlement of Canada's southern prairie areas. Palliser ultimately concluded that the area, now referred to as the Palliser Triangle, was unsuitable for such settlement. See Prairie Farm Rehabilitation Drought Committee, "Drought in the Palliser Triangle" (1998), online: <www.agr.gc.ca/pfra/pub/drprimer.pdf> (last accessed 16 April 2008).

[2] *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3; *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

The geographic focus of my thesis is the South Saskatchewan River Basin[3] (SSRB) and its corresponding watershed,[4] particularly the sub basin known as the Bow River, located within the Palliser Triangle. The Bow River[5] is the primary focus within the basin because there is much competition for its water and it has an economically viable fishery which is one of the tests for federal jurisdiction.

2. Methodology

To achieve my thesis objective, legal analysis is applied to the relevant legislation and judicial decisions which consider the division of powers between the federal and provincial governments in relation to matters affecting fish, fisheries, water and *FH IFN*. A literature review of secondary sources which consider the exercise of provincial jurisdiction over water is also undertaken. The primary legislative sources considered are the *Constitution Act, 1867*,

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[3] The Saskatchewan River Basin is one of the seven major river basins in Alberta, the others are (1) the Peace/Slave River Basin, (2) the Athabasca River Basin, (3) the North Saskatchewan River Basin, (4) the South Saskatchewan River Basin, (5) the Milk River Basin, (6) the Beaver River Basin, and (7) the Hay River Basin.

[4] *Alberta Fishery Regulations, 1998*, S.O.R/98-246 s. 1. In this section "watershed" is defined as "the area drained by one stream system, the stream and all its tributaries, and includes the lakes and reservoirs within that area whether or not they are directly connected to the stream." This thesis adopts this definition.

[5] *Ibid.* The Bow River is described as part of a "watershed unit" or "unit" meaning "a subdivision of a Fish Management Zone set out in Schedule 2". Under "Schedule 2 Fish Management Zones and Watershed Units", include the eastern slopes of the Rockies form Fish Management Zone 1. Zone 1 is comprised of four separate watershed units. Unit ES1 includes "the Oldman River watershed upstream of Secondary Road 509 near Coalhurst, and the Bow River watershed upstream of Highway 24 near Carseland." See also G. Kasey Clipperton *et al.*, *Instream Flow Needs Determinations for the South Saskatchewan River Basin, Alberta, Canada* (Edmonton: Alberta Environment, 2003) [*Clipperton Report*]. The Clipperton Report discusses instream flow needs in the SSRB including the part of the Bow River starting within the City of Calgary to the mouth of the Highwood as BW4, from the Highwood to Carseland as BW3, from Carseland to Bassano as BW2, from Bassano to Grand Forks – where the mouth of the Bow joins the SSRB as BW1.The Bow River is categorized as a sub-basin of the SSRB discussed more fully in Appendix I.

the federal *Fisheries Act*,[6] and the provincial *Water Act*,[7] which repealed the *Water Resources Act*[8] in 1999. The provisions most relevant to *FH IFN* will be considered. The judicial decisions considered in this thesis focus primarily on the decisions of the Supreme Court of Canada and to those decisions of the Superior Courts in the provinces, primarily in Alberta, concerned with issues relating to the constitutional division of powers, particularly in relation to the specific powers under the federal *Fisheries Act* and the provincial *Water Act*.

Secondary resources considered in this thesis include peer reviewed articles in legal and scientific journals, as well as in government and community based reports and studies.

In undertaking the legal analysis to support this thesis, I rely heavily on the "pith and substance" approach to constitutional and statutory interpretation, emphasizing also the "progressive and expansive" approach to statutory interpretation followed by the Supreme Court of Canada in *Reference Re Same--Sex Marriage*,[9] which updated the law on marriage of same sex partners in a manner consistent with the changes in society. This thesis proposes an incremental interpretation of the *Constitution Act, 1867* in respect of water as it relates to fish habitat.

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[6] *Fisheries Act*, R.S.C. 1985, c. F-14.

[7] *Water Act*, R.S.A. 2000, c. W-3.

[8] *Water Resources Act*, R.S.A. 1980, c. W-5 [*WRA*]. The focus in this thesis is the *Water Act* but where appropriate the *WRA* will be discussed.

[9] *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 29 [*Same-Sex Reference*].

3. Organizational Framework

The argument contained within this thesis begins by setting forth the background and methods of interpretation of the Constitution in relation to provincial legislation. The second chapter sets out the context in which the argument is developed. The third chapter outlines the general approach to constitutional interpretation. The fourth chapter analyzes the scope of the federal constitutional authority over fish habitat as set out in the Constitution and in the federal *Fisheries Act*. The fifth chapter considers the jurisdiction of the Province over water and the extent to which that authority is exercised and may be inconsistent with the *Fisheries Act*. The sixth chapter concludes that regulating the amount of water necessary to maintain *FH IFN* is a matter falling within exclusive federal jurisdiction and therefore it is beyond provincial legislative authority to regulate. Stated another way, provincial regulatory authority over water situated in the province operates once water for the federal matter, being the maintenance of *FH IFN*, has been satisfied. The final chapter provides a summary of my argument and my conclusion.

CHAPTER 2: THE CONTEXT – WATER MANAGEMENT AFFECTING *FH IFN*

1. Introduction

This chapter focuses on matters which have informed, and continue to inform, the water management regime in Alberta, from both the legal perspective and the perspective of *FH IFN*. Five matters of historical significance affecting *FH IFN* are discussed in this chapter. First, the early adoption of British common law riparian rights in Canada which informs our basic law; second, the need to settle drought ridden areas in Alberta along the CPR railway line necessitating changes to riparian rights; third, changes to the common law brought about by the *Northwest Irrigation Act* of 1898 (*NWIA*) together with the earlier versions of this Act;[10] fourth, the creation of the province of Alberta in 1905, as well as the 1930 transfer of certain water rights when natural resources – including certain public lands – were transferred to the provinces under the *Natural Resources Transfer Agreement* (*NRTA*);[11] and finally, provincially crafted water legislation – the *Water Resources Act*. This Act of 1931 laid the foundation for the current *Water Act* proclaimed in 1999 which is discussed at length in Chapter 6.

The chapter mentions but does not deal extensively with matters which have the potential to directly impact provincial authority over *FH IFN*. These matters include historical riparian

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[10] *North-west Irrigation Act*, S.C. 1898, c.35 *An Act to amend and consolidate the North-west Irrigation Acts of 1894 and 1895*, [*NWIA*].

[11] *Natural Resources Transfer Act*, being Schs. 1, 2, 3 of the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, *Natural Resources Transfer (Amendment) Act 1938*.c.36; *An Act to Ratify a certain Agreement between the Government of the Dominion of Canada and the Government of the Province of Alberta*, S.A. 1938, c.14. [*NRTA*].

rights which continue to exist such as those acquired by early landowners who registered under the *NWIA*; Aboriginal rights and public water rights.

Finally, this chapter briefly reviews the current situation in southern Alberta where the shortage of water means industrial, urban and agricultural uses compete for the water used for fish habit (*FH IFN*). In managing the resources of water it is critical to develop a balance which considers all of these sectors, and attributes the appropriate weight to federal jurisdiction concerning *FH IFN*.

2. Riparian Rights Inform Water Management

The common law doctrine of riparian rights established a system for sharing water which formed the basis of our relationship to water management, and which has subsequently been altered but not eliminated. The common law doctrine of riparian rights[12] was the law in England at the time Canada was settled, at which time, it was arguably a coherent approach to water management. However, it was also a time when water was considered to be abundant and all demands placed on it could be easily satisfied. Water was available as a common law riparian right to landowners whose land was adjacent to water. These rights included the right to access and divert water in a confined channel in a manner that did not unreasonably alter the flow for downstream users.[13] This practice allowed the flow to remain

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[12] See David R. Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resource Law, 1988) at 17-22 [Percy, *Framework*] for a more fully developed discussion of riparian rights.

[13] Bora Laskin, "Jurisdictional Framework for Water Management" in *Resources for Tomorrow Convergence Background Papers Volume I* (Ottawa: Queen's Printer, 1961) 211 at 213 [Laskin, "Jurisdicitonal Framework"].

unaltered in a material way, and left enough water in the stream for all other uses including *FH IFN*. Rights to water were not prioritized; surface water was maintained essentially in its unaltered state. The ownership of fish was also appurtenant to the bed and shore as a transferable riparian right in non tidal waters.[14] These common law rights evolved over time and were effective in protecting both the stream and riparian owners in a water abundant environment. The problem is that the system of riparian rights is not a system designed to work in a water-scarce environment in which large quantities of water are withdrawn for irrigation purposes.

Incoherence in the absolute ownership and use of water for economic purposes affects the concept that a riparian owner is entitled to natural flow or is entitled to invoke the common law principle of reasonable use. The two interests do not work together which was realized in Australia. At one time legislation in Victoria, Australia contained a declaration of

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In this article Laskin finds on page 213 that in Canada, "(t)he weight of authority tends to the reasonable use doctrine which, within limits, permits irrigation and manufacturing uses that would be excluded under a strict natural flow doctrine under which only domestic, personal uses (extending to watering of cattle, however) are permissible." The riparian right to flow was expressly limited by s. 22 of the *Water Act*, *supra* note 7. It is important to note that when the federal government took title to the beds and shores and the water under the auspices of the *NWIA* common law riparian rights were impacted. The scope of that impact has not been fully explored. It appeared to be the intent of the legislature that the riparian right to flow would be affected so that irrigation could proceed. However, the fact that the *Water Act* contains s. 22 suggests that the right to flow was considered to exist until removed specifically by statute.

[14] See *Re Jurisdiction over Provincial Fisheries* (1896), 26 S.C.R. 444 at 42 [*Re Fisheries*]. In *Re Fisheries* the Supreme Court followed the principle in *Robertson* v. *The Queen* (1882), 6 S.C.R. 52 [*Robertson*] "…in the case of such waters (non-tidal, non-navigable, where the title to the bed of the stream remains in the Crown or not) the Dominion Parliament cannot (grant) exclusive rights of fishing. …. In such water …where title to the bed of the river remains vested in the Crown, … it has already been stated that of common right the public are entitled to fish." The question is whether the *NWIA*, *supra* note 10 changed that right.

property rights in water, but the amendment was withdrawn because "the concept of property in flowing water was unknown to the common law."[15]

Certain reduced aspects of riparian rights continue to exist in the Province of Alberta.[16] A riparian owner can no longer make a claim against licensed users based on an altered rate of surface and groundwater flow of water where the diversions have been properly authorized under the *Water Act*. There continues to exist in the Act the potential for a claim by riparian owners for changes in flow where diversions are not in compliance with the *Water Act*. Therefore, the common law remedies such as nuisance, negligence or trespass are still available to a riparian owner adversely affected by an unauthorized diversion of water or pollution of water. The fact that the right to flow is not completely eliminated creates an expectation of flow which is consistent with *FH IFN* not consistent with the principle of absolute ownership and over allocation.

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[15] Percy, *Framework*, *supra* note 12 at fn 36 p.13. Percy's research revealed that " the original legislation contained a declaration of Crown property rights in water, but it was withdrawn. Further at p.23- 25Percy outlines that the license applicant must overcome provincial hurdles to obtain a license. He does not discuss the pressures on water available for license by reason of the interests and powers of the federal government and Aboriginal rights; however he does make it clear that a licensee is subject to diminution of available water in certain circumstances. The impact of federal authority over fisheries was not extensively explored in his argument.

[16] See *Water Act*, *supra* note 7, s. 22(1). This subsection reads as follows: "Notwithstanding the common law, a riparian owner, riparian occupant or person who owns or occupies land under which groundwater exists has the right to divert water only in accordance with section 21 and may not divert water for any other purpose unless authorized by this Act or under an approval, licence or registration." The following subsection reads: "A person described in subsection (1) may commence an action with respect to a diversion of water only in respect of a diversion of water that is not authorized by this Act or under an approval, licence or registration." It is not clear why the legislature considered it necessary to insert s. 22 in the *Water Act*. If the riparian right to flow ceased to exist with the passing of the *NWIA* (except for household use) it is unnecessary to include this provision in the *Water Act*. If the right to flow continued to exist until the provision was inserted in the *Water Act*, then the right attached to federal lands until the provision was included in the *Water Act.* Note that due to the paramountcy rule, federal lands are not subject to provincial laws unless voluntarily adopted by the federal government. The issue of federal right to riparian flow attached to federal riparian lands needs further exploration to understand whether riparian rights could also be a method by which the federal government can recover water for fish habitat.

My reason for discussing riparian rights is that, until the legislation in Alberta expressly excluded any claim to the right to flow, there continued to be some expectation of an unaltered flow and sufficient water, to the extent provided my nature, for *FH IFN*.

3. The North-west Irrigation Act (*NWIA*)

The *NWIA* was proclaimed by the federal government in 1894 "as an Act respecting the utilization of the waters of the North-west Territories for Irrigation and other purposes".[17] The vesting of water in the Crown applied in the North-west Territories which included Alberta at that time. The wording of the vesting section of the Act is as follows:

> 4. The property in and the right to the use of all the water at any time in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water shall, for the purposes of this Act, be deemed to be vested in the Crown unless and until and except only so far as some right therein, or the use thereof, inconsistent with the right of the Crown and which is not a public right or a right common to the public, is established; and, save in the exercise of any legal right existing at the time of such diversion or use, no person shall divert or use any water from any river, stream, water course, lake, creek, ravine, canon, lagoon, swamp, marsh or other body or water, otherwise than under the provisions of this Act.[18]

In 1894 the federal government was concerned for the future of the province and intended that this legislation would avoid the water disputes occurring in California at that time by

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[17] *NWIA*, *supra* note 10. See also *ibid.* s. 9. By this section, the riparian right to flow could not be altered to deprive a riparian owner of water for domestic purposes.

[18] *Ibid*.

altering the right to water by vesting it in the Crown.[19] It is likely that the world recession, drought between 1891 and 1898, and the need for settlement for the Canadian Pacific Railway as referred to by Charles S. Lee in his book, *The Canada North-West Company (Limited): Land to Energy*,[20] were the primary reasons for this legislation which permitted the diversion of water for irrigation.

The authorization of the diversion of water for irrigation changed the common law doctrine of riparian right to flow of surface water, except for domestic uses.[21] It is unlikely that fisheries, or the loss of fish habitat, were in the legislators' minds at the time.[22] However, the *NWIA* does recognize that the Minister may need to regulate the extent of diversion from rivers, streams, lakes and other water.[23]

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[19] *House of Commons Reports* (June 25, 1894) at 4952 (Mr. Daly). When considering the *NWIA* and the vesting of title in the Crown, Mr. Daly, in the record of the Commons Debate noted "It was found that unless the principle was laid down that the right to the use of water at any time, in any river, stream, watercourse or body of water vested in the Crown, should be held by the Crown to be disposed of as it saw fit, that it would lead to interminable litigation and to the troubles the people of California had experienced."

[20] See Charles S. Lee, *The Canada North-West Land Company (Limited): Land to Energy, 1882-1982* (Canada: Northwest Energy Ltd., 1982) at 1-75.

[21] *Supra* note 10 which states "No application for any purpose shall be granted where the proposed use of the water would deprive any person owning lands adjoining the river, stream, lake or other sources of supply of whatever water he requires for domestic purposes."

[22] *Senate Reports* (July 9, 1894) at 682 (Hon. Mr. Angers). "At present, under the grants made by the Crown, the riparian owner, if the water is not navigable, owns it to the middle of the stream; that is for the past. No legislation should affect that, nor does this bill intend to do so, but in the future the policy of the Government is to reserve such water for the general public, so that they may be in a position to deal with it and to grant the necessary license to corporation formed for the purpose of utilizing that water for the general good of all. It cannot affect any acquired rights." That is the intent of the legislation is then to bring the water in for the general good of all.

[23] *Ibid.*, s. 51.

It is important to my argument to note that the concept of ownership of water in the Crown was rejected in Australia, even though the Canadian system bares resemblance to the Australian system. As noted above, the declaration of the Crown as to ownership of water rights in Australia was withdrawn because the concept of property in flowing water was unknown at common law.[24] In order to facilitate irrigation in the Canadian west and to encourage the banks to lend monies for large capital intensive irrigation projects, entitlement to water was made as strong as the legislators could make it for the public good, without totally eliminating riparian rights.[25] Notwithstanding the need to provide security for banks, the legislature left some opportunity for *FH IFN* by preventing exclusive rights to any body of water which allowed the government to maintain control over water diversions, as follows:

> s.5. Except in pursuance of some agreement or undertaking existing at the time of the passing of this Act, no grant shall be hereafter made by the Crown of lands or any estate in such terms as to vest in the grantee any exclusive or other property or interest in or any exclusive right or privilege with respect to any lake, river, stream or other body of water, or in or with respect to the water contained or flowing therein, or the land forming the bed or shore thereof. [26]

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[24] Percy, *Framework*, *supra* note 12 at 13, fn. 36. Percy traces the history of the ownership of water through various acts noting the concept of ownership of flowing water was unknown to the common law. He also notes the First Nations' rights to water is a matter that raises doubt as the extent of Crown property rights.

[25] *Senate Reports*, *supra* note 22 at 679. The Hon. Mr. Angers stated, "The object of this bill (North-west Territory Irrigation Bill) is to encourage and facilitate the formation of companies in the North-west Territories for the purpose of irrigation. It is impossible that a single farmer now can find the necessary funds or would be willing to invest the necessary amount to do such extensive works as are required in several localities in the North-west Territories. There is most valuable land which can be made fertile by irrigation. There are millions more of acres of land which will be rendered most productive by the joint action of the farmers there, or by capital brought in, and it is necessary that some legislation be made to authorize and regulate these works, to provide for expropriation and for the proper construction of dams where the water is to be kept back, and so on, in the interests of public safety." Therefore, the focus of the legislation was to create an economic environment for irrigation.

[26] *Supra* note 10, s. 5.

This section is of the original *NWIA* is inconsistent with the *Water Act* in that what are tantamount to exclusive rights have been given, or as treated as such by the Province.

At the same time as the *NWIA* was proclaimed, the federal *Fisheries Act* was in the books as another valid and important piece of legislation which assented to May 22, 1868. Since its proclamation, it has protected fish as can be seen by the following section:

> s. 8. It shall not be lawful to fish for, catch or kill any kind of trout (or "lunge") in any way whatever between the first day of October and the first day of January; and no one shall at any time fish for, catch or kill trout by other means than angling by hand with hook and line, in any inland lake, river or stream, except in tidal waters; Provided always that as affecting the waters of the Province of Ontario, such prohibitions shall apply only to the kind known as speckled trout.
>
> s. 9 It shall not be lawful to fish for or catch white-fish in any manner between (dates specified) a…. *nor shall the fry of the same be at any time destroyed*.[27] (Emphasis added).

Our legislators were aware of the need to protect fish as far back as 1868, the diversion of large amounts of water resulting in trout kills would have been a breach of the *Fisheries Act* which made it unlawful to kill 'trout' by any means other than by hand or fry at any time. It was deemed important to protect aspects of inland fisheries

It is questionable whether the *NWIA* authorized the management of water in a manner inconsistent with the *Fisheries Act* of 1868, as amended; there is no provision in the *NWIA* which directly authorizes destruction of fish habitat, rather the Governor in Council is authorized to make decisions concerning the extent of diversions as set out in section 51 of

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[27] *Fisheries Act*, S.C. 1868, c.60, s. 8, 9.

that Act. Since 1868, fish in inland water have been protected by methods including closing the fishing season at different times in different parts of the country,[28] requiring fish passes to ensure fish could reach their spawning grounds, prohibiting the obstruction of fish passage,[29] permitting only First Nations peoples to catch fish in particular ways, protecting fish habitat by protecting the quality of the water,[30] and further protecting the quality of water by making it an offense to throw deleterious substances overboard or leave them on shore.[31] It is important to note that all of this protection would be meaningless without sufficient water for fish habitat. Parliament could have chosen to combine these elements and the *NWIA* in order to clarify the relationship between fish habitat and diversion of water.

This legislative situation was unchanged until the federal rights to water were transferred to the Province of Alberta as set out in the *NRTA* which obtained legislative status through the *Alberta Natural Resources Act*[32] and corresponding constitutional amendment[33].

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[28] *Ibid.*, s. 10. "Close-seasons for bass, pike, pickerel (doree), maskinonge, and other fish, may be fixed by the Governor in Council to suit different localities."

[29] *Ibid.*, s. 13(5). "No net or other device shall be so used as entirely to obstruct the passage of fish to and from any of the waters of the Dominion by any of the ordinary channels connecting such water, or debar their passage to and form accustomed resorts for spawning and increasing their species."

[30] *Ibid.*, s. 13(8). This subsection provided that it was unlawful to catch fish by spear etc. except that "the Minister may appropriate and license or lease certain waters in which certain Indians shall be allowed to catch fish for their own use in and at whatever manner an time are specified in the license or lease, and may permit spearing…." This subsection is based on the premise that the federal government would have to acquire rights for the Indians to fish in a particular manner which supports the argument that the province owns the water and the fish, and can control certain aspects of the manner of fishing for which the Federal government would obtain rights.

[31] *Ibid*., s. 14.

[32] *Alberta Natural Resources Act*, S.C. 1930, c. 3.

[33] *Supra* note 11.

4. *NRTA*

The change that occurred in 1930 with the transfer to the Province of public lands and natural resources empowered the Province to manage its water and the fishery, subject to the exercise by the Parliament over sea-coast and inland fisheries.[34] It is important to note that Alberta became a Province in 1905 but did not have the right to manage water within the province until these agreements. The Province inherited the federal system of water management through these agreements ensuring the water management regime which pre–existed the transfer would continue, at least until changed by the province.[35] The federal system included the rights set out in the *NWIA* discussed above, that is, the federal government managed water on the basis of a priority allocation system, primarily for the purpose of irrigation.

The transfer of the lands and water to the Province was not without restraint; it was "subject to any trusts … and to any interest other than that of the Crown" set out in the first section of the *NRTA*, as follows:

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[34] *Supra* note 32, s. 9. "Except as herein otherwise provided, all rights of fishery shall, after the coming into force of this agreement belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, license or otherwise, subject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries."

[35] *Alberta Act*, S.C. 1905, c. 3. The *Alberta Act* created Alberta as a province. The federal government retained entitlement to water in s. 21 which provided that: "All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the *NWIA*, 1898 shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-west Territories."

> In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *Constitution Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Provinces,[36] and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, *subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration* [italics added].[37]

Emphasis is added because the section seems to contemplate the authority in the Province to over ride any federal legislation, which is inconsistent with the principles of constitutional law and the division of powers.

Crown land included the water to the extent of the corresponding common law riparian rights, except as amended by the *NWIA*. The *NRTA* does not define the rights to water other than specifying that the Province acquired the same interests as the federal Crown, subject to the trusts and any interest other than the Crown. The *Alberta Natural Resources Act* repeated the 'subject to' language acknowledging that the resources could be administered by the Province subject to the provisions of any Act of the Parliament of Canada – until the Legislature of the Province otherwise provides.

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[36] Note the additional words found in the *Alberta Natural Resources Act, supra* note 32, sch. 1 after the word "provinces" in the fourth line: "and the interest in the Crown in the waters and the water-powers within the Province under the *NWIA, 1898*, and the *Dominion Water Power Act...".* The reason I mention this section is because it specifically refers to water.

[37] *NRTA*, *supra* note 11.

I argue that the 'subject to' language creates doubt as to the extent of the transfer of legislative authority over water to the provincial government. The wording seems to empower the Province to override federal jurisdiction, which is inconsistent with the constitutional principles governing the division of power discussed in Chapter 3. It is also notable that provincial legislation has not exempted Alberta waters from the provisions of fisheries legislation.

This thesis further argues that water management was vested in the Province – subject to federal jurisdiction over fisheries, subject to public rights to fish and navigate, subject to the interests of the First Nation's peoples, subject to certain aspects of riparian rights not eliminated by statute and subject to grants to water which preceded the *NWIA*. Therefore, water was not transferred to the Province without conditions[38] and the extent of these conditions has not been defined.[39] The *NRTA* did not transfer the rights to water absolutely. The concept of ownership of surface water rejected by the Australians discussed above, seems to be borne out by the Canadian experience .

Based on the wording of this section, the question is whether the Province can "otherwise provide" that the Province's water administration is not subject "to the provisions of any Act of the Parliament of Canada relating to such administration" including the federal legislation

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[38] See Laskin, "Jurisdictional Framework", *supra* note 13. See also David R. Percy, "Seventy-Five Years of Alberta Water Law: Maturity, Demise & Rebirth" (1996) 35 Alta. L. Rev. (No.1) 221. Although these articles consider the history of water, the *NWIA*, and the *NRTA*, none of the authors attempt to identify the extent of the 'subject to' the limitations on the transfer.

[39] Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1969) Alta L. Rev. 71 at 73 [Gibson, "Water Planning"] states, "by giving the provinces the ownership of public lands, section 109 also conveyed to them plenary Crown rights in the water upon those lands, and the fish therein." In this article, Gibson does not discuss the meaning of the reserve language.

that relates to *FH IFN*. This thesis argues that the provincial government cannot exclude federal legislation on a matter that is clearly exclusive to the Federal government.

5. Federal Lands and Riparian Rights

In addition to legislative authority, common law rights may attach to federal lands not transferred to the Province but lying within the provincial boundary.

The riparian right to flow may apply to federal lands in the Province as the right has not been absolutely altered. Based on the common law right to flow, the federal government arguably has the potential to affect the province's water management strategy by requiring either an unaltered or reasonable flow past federal lands. The federal military lands at Suffield, Alberta, provide a case study. The federal government owns land on both sides of the river in the lower reaches where the water is most diverted and viable fish habitat is scarce (see Appendix 1). The same common law principle of the riparian right to unaltered flow applies to water flowing through national parks for which the federal government could make similar claims against the Province thereby using the common law to restore *FH IFN*.

The argument that the federal government has the right to affect the province's water management strategy breaks down if federal riparian rights have been altered. There are two principle ways in which these rights can be altered. Either by the *NWIA* as a federal statute through which the federal government can be deemed to have divested itself of riparian rights applicable to federal lands affected by the *NWIA* or by federal legislation subsequent to the

NWIA which limits riparian rights. However, if the federal government no longer has riparian rights to flow this change in rights does eliminate the necessity to understand the relationship between the right to water for irrigation and the right to water for fish habitat. The NWIA does not clearly state that all riparian rights were removed although it is implied by section 9 which provides that an application will not be granted for any purpose shall be granted where the proposed use of water deprives a riparian owner.

6. Downstream Provinces – water moves

In addition to federal lands, riparian rights continue to be of concern for adjacent, downstream provinces. Ownership of interprovincial bodies of water, including groundwater, which moves from one province to another, are contentious issues which have not been resolved. In the comment below, Gibson discusses this issue.

> Water in the natural state is not capable of ownership, either as between individual riparian landowners, or as between neighbouring provinces. It is conceivable, of course, that some form of interprovincial ownership might be created by interprovincial agreement or possibly be federal legislation, but until this occurs the law will concern itself only the with the respective rights of use of the riparian provinces.[40]

Laskin also contemplates the issue of downstream riparian ownership, without resolving it.

> It may be a fine question whether, where Canada is a riparian owner and a private person or a Province is a lower riparian, Canada is under the common or civil law obligation of reasonable use towards other riparians. There is no sound reason why it

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[40] Gibson, "Water Planning", *supra* note 39 at 76.

> should not be unless it has by competent legislation extinguished any such obligation.[41]

Laskin considers that an agreement may resolve the issue. It is my submission that notwithstanding that these rights can be clarified by agreement,[42] the rights exist, and the Province of Alberta cannot ignore these rights in its management of water in the absence of competent legislation to do so.[43] It is my argument that the *NWIA* did not expressly eliminate the common law entitlement to unreasonably altered flow throughout the Province and the federal government retained its right to affect flow as discussed above.

7. *WRA*

The regime established by the NWIA was continued in Alberta under the Water Resources Act (WRA). Shortly after the transfer of water rights to the provinces, the *WRA* [44] was proclaimed. This Act essentially protected existing rights to divert water based on the first in

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[41] Laskin, "Jurisdictional Framework", *supra* note 13 at 214-215.

[42] See e.g. *Master Agreement on Apportionment between Canada, Alberta, Saskatchewan and Manitoba*, 30 October 1969. This agreement provides a formula for the sharing of the waters of eastward flowing interprovincial water bodies. The agreement also recognizes the problem of water quality and groundwater matters. The Master Agreement on Apportionment has fives schedules which form part of the agreement. The first of which is Schedule A – The Apportionment Agreement between Alberta and Saskatchewan which reads in part " Alberta shall permit a quantity of water equal to one-half the natural flow of each watercourse to flow into the Province of Saskatchewan, and the actual flow into the Province of Saskatchewan shall be adjusted from time to time on an equitable basis during each calendar year, but this shall not restrict or prohibit Alberta from diverting or consuming any quantity of water from any watercourse provided that Alberta diverts water to which it is entitled of comparable quality from other streams or rivers into such watercourse to meet its commitments to Saskatchewan with respect to each watercourse." And by subparagraph 2b which states: "For the purpose of this agreement, the said natural flow shall be determined at a point as near as reasonably may be to the said common boundary."

[43] Laskin, "Jurisdictional Framework", *supra* note 13 at 214-215.

[44] *Supra* note 8.

time, first in right rule, with no incentive to conserve or use water efficiently. There was already an insufficient supply of water available in some rivers, the remedy for which was to increase storage and reservoir capacity. There were tools in the *WRA* which could have been used to protect *FH IFN*. These included allocation of instream water rights for instream flow,[45] emergency expropriation,[46] reservation of water for instream flow,[47] attaching conditions to water licenses,[48] and protection at the source. However none of these were used by the provincial government to restore or maintain instream flow sufficient for *FH IFN*. As illustrated in Chapter 6, senior licenses issued under the auspices of the *WRA* contain terms and conditions which would stop diversion when instream flow is at a certain rate (low rate). However, in no license does the cut-off flow rate intentionally correspond to *FH IFN* nor was there any indication of will on the part of the Provincial government to manage water in the stream at the level necessary for *FH IFN*. (In 1962 the *WRA* was amended to include groundwater under the same water management strategy.) As of the date of this thesis, the Province does not know the extent to which groundwater extraction affects surface water and *FH IFN*.

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[45] *Ibid.*, s. 11(1) (b) (c) which read as follows: "On application being made as provided in this Act and the regulations, a person may acquire, subject to any valid and subsisting rights b) a license to impound water for the purpose of water management, flood control, erosion control, flow regulation, conservation, recreation or the propagation of fish or wildlife or for any like purpose; c) a license to use water in its natural state for the purpose of conservation, recreation or the propagation of fish or wildlife for any like purpose."

[46] *Ibid.*, s. 13. This section permitted the government to suspend a license during water short periods. It has never been used due to the lack of political will.

[47] *Ibid.*, s. 12. Water must remain unallocated or designated for instream flow by Order in Council.

[48] *Ibid.*, s. 33. This section established that the Minister could set terms and conditions in licenses.

The *WRA* was replaced by the *Water Act* which, although passed in 1996, was not proclaimed and in force until January 1, 1999.

This new *Water Act* is discussed extensively, with respect to *FH IFN*, in Chapter 6. In August 2006, Alberta's provincial government, by Order in Council, closed certain sub basins in the South Saskatchewan River basin – the Bow, the Oldman and the South Saskatchewan due to the understanding that the water in these rivers was over allocated. However, the determination of over-allocation in the SSRB was made without the decision to apply any scientifically based *FH IFN*.[49] That means, in the event the argument made in this thesis is correct, the water is managed in the SSRB without reference to the FH IFN.

8. Fisheries in Alberta Waters

In order for the argument made in this thesis to be legally valid at one level, the rivers at issue must contain fisheries or an aspect of fisheries. This point is discussed in greater detail in subsequent chapters. I mention it here to illustrate that the rivers of southern Alberta are and have been fisheries for many years. The Bow River is a legendary fly fishing river, with an international reputation. Rainbow trout, brown trout and an occasional bull trout draw anglers to the region. In 2005, anglers contributed $124 million in direct expenditures to the

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[49] *Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)*, O.C. 409/2006, A. Gaz. 2006 (*Water Act*), online: <environment.alberta.ca/documents/SSRB_Plan_Phase2.pdf>, (last accessed 14 September 2008) at 2.1 [*AWMP for SSRB*]. It has been determined during preparation of this plan that the limits for water allocations have been reached or exceeded in the Bow, Oldman, and South Saskatchewan River Sub-basins and flow regimes have been altered by water diversions. This has created risks for both water users and the aquatic environment.

province's revenue.[50] The total value of sport fishing in Alberta in 2005 was estimated to be $441.4 million including direct and related expenditures, purchases and investments.[51] Given that one test as to whether a fisheries exists is an economic one, the rivers of Southern Alberta qualify as fisheries.[52]

9. Aboriginal matters

The context of *FH IFN* and provincial water management strategy must acknowledge the issue of unresolved First Nation's rights to water. Richard Bartlett considered the issue of Aboriginal rights to water concluding that

> aboriginal title is derived at common law from the 'historic occupation and possession' of tribal lands…(it) includes rights to water, the water-bed … but may be limited to traditional use of such resources… The settlement or extinguishment of aboriginal title demands that a substantial construction be given to water rights attaching to reserve lands set apart by treaty, agreement or executive action.[53]

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[50] Aideen McCormick, "At Last Count – The Reel Thing" *Calgary Herald* (17 June 2007).

[51] *Ibid*.

[52] See *Encyclopaedia Britannica Macropedia*, 15th ed., vol. 34 (Chicago: Encyclopaedia Britannica Inc., 2002) "Fishes" at 192; "The study of fishes, the science of ichthyology, is of broad importance. There are many reasons why fishes are of interest to humans; the most important is their relationship with and dependence on the environment … (and) their role as a … food supply. This resource, once thought unlimited, is now realized to be finite and in delicate balance with the biological, chemical, and physical factors of the aquatic environment. Over fishing, pollution, and alteration of the environment are the chief enemies of proper fisheries management, both in fresh waters and in the ocean." See also *ibid.* at 288; "The kind and quantity of fish found in lakes and river vary greatly with the physical and chemical condition of the water. … Rivers for example are divided into different zones beginning with the source, which is often good trout water, and ending in the estuary, where many coastal varieties of ocean fish can be caught. In like manner, fishermen classify lakes by expected catch. The great variations in the productivity of inland waters are explained by differences in their physical and chemical properties" Note there is no clear scientific statement that fish need water to survive, it is so obvious that it need not be stated.

[53] Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, 1986) at 16.

First Nations peoples in the South Saskatchewan river basin include Treaty Six and Seven. It is foreseeable that protecting the Aboriginal way of life will collide with provincial allocations. First Nation's groups are challenging the provincial water management strategy in Alberta. Some are challenging the quality of water in the rivers and the degree to which the rivers offer dilution of the waste that comes downstream.[54] These outstanding riparian rights could conceivably be a significant issue for water management in Alberta if the amount diverted away from federal or Aboriginal lands is considered unreasonable by the courts. The issue is further complicated if First Nations' are entitled to natural flow.

10. Public Right to Fish

Fundamental to the issue of sufficient water for *FH IFN* is whether the public has the right to fish. At common law the right to fish was vested in the owner of the bed.[55] The Province owns the bed and shore of its rivers.[56] The question is whether Albertans have the right to

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[54] See e.g. *Siksika Nation Elders Committee and Siksika Nation v. Director, Southern Region, Regional Services, Alberta Environment, re: Town of Strathmore* (2008), Appeal Nos. 05-053-054-CD (A.E.A.B.). The issue of the quality of the water the band is entitled to has not been resolved.

[55] See also fn 14, supra. *Re Jurisdiction over Provincial Fisheries* (1896), 26 S.C.R.444 Special Case referred by the Government General in Council to the Supreme Court of Canada to consider several questions affecting the federal and provincial jurisdiction over the licensing of the right to fish in navigable and non-navigable waters. Lord Strong at question 10 which asked whether the Dominion Parliament had the right to pass "(a)n Act respecting Fisheries and Fishing" which purported to grant licenses in non navigable waters. The answer by the court was that there was no federal jurisdiction in such cases concerning non navigable waters and found that the right of fishing is "an incident of the right of property in the bed or stream." In order to get to his position on the right to fish in navigable and non navigable waters, the decision concluded that "It is said that the common law of England applies to new settled colonies only so far as it is adapted to the circumstances and requirements of the colonists." The principle of the public right to fish was adapted.

[56] *Public Lands Act* R.S.A. 2000 c. P-40.

fish in the waters owned by their government – a question which was decided in 1896 when the courts decided that the public has the common law right to fish.

The *Constitution Act, 1867* affected our relationship with water in two significant ways. First, the federal government was given legislative jurisdiction over seacoast and inland fisheries, the implications of which are discussed in Chapters 4 and 5. Second, the original provinces were given land subject to interests as set out in section 109 of the *Constitution Act*,

> 109. All Lands, Mines, Mineral, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, *subject to* any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.[57] (emphasis added)

The extent of the meaning of the word "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same" has not been fully considered in the literature.

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[57] *Supra* note 2 at s. 109.

11. Political Will to Comply with the *Fisheries Act*

The political will to affect change to *FH IFN* is illustrated by the federal government think tank, National Round Table on the Environment and the Economy, which takes a hands–off approach to water, a resource which they consider to be 'provincially owned' and by the actions of the government in response to a challenge of their own regulations. The think tank directed its recommendations regarding water conservation to federal decision makers only.[58] The fact federal policy makers take a hands off approach to water conservation, exemplified by the fact the federal government does not have the will even where the principles and intent are already set out in legislation and supported by the courts, is an indication of the reluctance of the federal government to use its authority. Opportunities were available in the series of cases brought be environmentalists in Alberta, primarily concerning the construction of the Oldman dam in southern Alberta, which were deliberately declined by the Province. [59]

12. Current State of Affairs in Alberta

As a result of one hundred years of water management begun by the *NWIA,* the rivers of southern Alberta are over allocated. That means that the amount of water available for fish habitat is reduced by excessive allocation for irrigation, hydro power and municipalities. The

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[58] *Ibid*.

[59] National Round Table on the Environment and the Economy, *Securing Canada's Natural Capital: A Vision for Nature Conservation in the 21st Century* (Ottawa: National Round Table on the Environment and the Economy, 2003) at 4, online: <www.nrtee-trnee.ca/eng/publications/securing-canadas-natural-capital/securing-canadas-natural-capital-eng.pdf>, (last accessed 7 September 2008). See *Imperial Oil Resources Ventures Ltd. v. Canada (Minister of Fisheries and Oceans)*, [2008] F.C.J. No. 541. In this case, the federal court supported further study by the panel reviewing a tar sands project, consistent with government regulations, which caused the DFO to revoke its authorization given under s. 35(2). The decision was upheld on appeal. Notwithstanding court support for the regulations, the DFO reissued its approval for the project within two months of the court decision. See *Kostuch v. A.G. Alberta*, [1995] A.J. No. 866 (Alta C.A.).

province stopped issuing licenses in 2006 to begin the process of restoring the river, which may never reach an appropriate FH IFN required by the argument made in this thesis. The current state of affairs is discussed in detail in Chapter 6 below.

12. Conclusion

The imbalance of the allocation of water between federal uses for fisheries and provincial uses for economic and human use has been below the radar because, until recently, the supply of water has not been recognized as a significant issue. Alberta has not acknowledged in clear language in legislative form a policy and practice to manage surface water in the Province at a level below the amount scientifically required for safe fish habitat (hereinafter unsafe IFN). Notwithstanding the lack of clear legislative intent, in August 2006 the Bow, Oldman and South Saskatchewan sub basins in southern Alberta were closed to further applications for water diversions because of the over allocation in the basin. The closing of the basin suggests the intent that there not be further degradation of the basins but such closure does not impose an obligation on the Province to achieve *FH IFN*. [60]

In this Chapter 2, I have briefly described matters which affect the manner in which the Province of Alberta manages water. Common law riparian rights governed the water regime when Canada was settled by the British, these rights were affected by the *NWIA* by which the federal government vested water in the federal government to allow large scale irrigation. The common law riparian rights were not specifically amended by this legislation and the issue of riparian rights to flow – past federal lands, including national parks, and Aboriginal

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[60] See e.g. *AWMP for SSRB*, *supra* note 49. See also *Clipperton Report*, *supra* note 5 which sets out scientifically established IFN's for Alberta rivers.

lands and downstream provinces and nations remain outstanding issues. By the *NRTA* the federal rights to water were transferred to the Province which formed the basis for subsequent provincial water legislation such as the *Water Resources Act*. Potions of the South Saskatchewan River Basin are closed according to the provincial water management plan but the protection of the *FH IFN* is not part of this water management plan. Both the federal government and provincial governments have had the legislative authority to protect *FH IFN* but they have chosen not to do so, contrary to constitutional law which is the subject of the next chapters.

CHAPTER 3: CONSTITUTIONAL LAW, FISH, FISHERIES, AND WATER

Most law is opinion, and that is particularly true of constitutional law.[61]

1. Introduction

In Canada, legislative control over inland water raises questions about the division of power between federal and provincial legislatures. In order to fully understand all aspects of this question, it is necessary to consider applicable principles of constitutional law. In this chapter, I provide an overview of Canada's constitutional framework which includes a discussion of the basis of federal and provincial legislative power. This chapter also includes a discussion of the process that the courts follow in order to determine whether a matter – such as the amount of water necessary for *FH IFN*—is within the legislative power of either the federal or provincial legislature exclusively, or both concurrently. If federal jurisdiction over *FH IFN* is found to be within its exclusive jurisdiction, this finding will significantly impact the water-management strategy in Alberta. If federal and provincial legislative powers over *FH IFN* are concurrent, issues arise only when there are inconsistencies, and here the jurisprudence will provide a solution. Finally, the chapter considers whether the concept of interjurisdictional immunity applies to the amount of water necessary to sustain fish habitat.

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[61] Gibson, "Water Planning", *supra* note 39 at 71.

2. Overview of Constitutional Structure

Canada is a federation composed of two parliamentary houses – the federal Parliament and the provincial Legislatures. Federal legislative powers are, for the most part, enumerated in section 91 of the *Constitution Act, 1867* and provincial legislative powers are enumerated in section 92. The primary struggle in constitutional interpretation is finding the appropriate balance between the two by determining the scope of these powers. Because the constitutional division of powers is intended to be exhaustive, all legislative acts must be assigned to an enumerated head of power.[62] The question is: which level of government has the legislative authority to ensure sufficient water for fish habitat? Is it the federal government primarily under subsection 91(12) – its "Sea Coast and Inland Fisheries"[63] power, or is it the provincial governments under subsection 92(13)– their "Property and Civil Rights"[64] power?

A matter may be assigned exclusively to either the federal or provincial legislative authority, or it may be within the jurisdiction of both concurrently, subject to constitutional rules of interpretation. One of the principles of constitutional interpretation emphasized in this thesis is the principle that allows change – the living tree principle.

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[62] *References by the Governor in Council (Re)*, [1912] J.C.J. No. 2 (P.C.) at para. 2; *Same-Sex Reference, supra* note 9 at para. 34 which states "In essence, there is no topic that cannot be legislated upon…. [a] jurisdictional challenge in respect of a law is therefore limited to determining which head of power the law relates."

[63] *Supra* note 2, s. 91(12).

[64] *Ibid.*, s. 92(13).

3. Living Tree

The interpretation and application of the *Constitution Act, 1867* allows paradigms to shift, including paradigms which have defined the scope of seacoast and inland fisheries, or the scope of property and civil rights. The Supreme Court is not bound by the scope attributed to a particular power. In the Supreme Court of Canada's 2005 *Same-sex Reference* decision, the court ruled that "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation, stating: "the *Constitution Act, 1867* is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[65] In the *Same-sex Reference*,[66] the court was not bound by the 1867 definition of marriage. It is my argument that it is time to revisit the concept of a fishery that existed in 1867 and later, and the concept of provincial right to the property in water. I will do this through analogy. I believe that the realities of modern life have severely affected fish habitat and the implications of this fundamentally affect the provincial jurisdiction over water.

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[65] *Same-Sex Reference*, *supra* note 9 at para. 22. The court in this case considered the marriage relationship contemplated in the Constitution and was invited to maintain the scope set out in the Constitution. The court was reluctant to do so, considering that society has changed and considering the living-tree principle. It can be considered that included in the 'modern life' that the Court refers to would be changes respecting the use and allocation of water. See also *Reference re: British North America Act, 1867 s. 24*, [1930] A.C. 124 (P.C.) [*Persons*]. *Persons* first introduced the living tree argument; it was raised in relation to the interpretation of "qualified person".

[66] *Ibid*.

The Supreme Court of Canada's decision in *R. v. Crown Zellerbach Canada Ltd.*[67] can be viewed as an example of where federal jurisdiction was broadened as a result of an emerging, modern concern. In that case, the issue was jurisdiction over unauthorized dumping of waste into internal provincial waters. As a result of the issue, the Court broadened the federal government's powers confirming that it could validly regulate in response to the issue under became known as the national concern doctrine. This doctrine is derived from the peace, order and good government provisions found in the opening words of the Constitution Act, 1867 section 91 which confer on the federal government the power "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." Prior to this decision, there had not been a doctrine so clearly articulated, or so necessary. This thesis does not purport to explain the doctrine or apply it in the case of *FH IFN*, it is merely used as an illustration to demonstrate the change in scope and interpretation of constitutional powers over time.

This thesis illustrates that the destruction of fish habitat as a result of excessive water diversion is a new issue faced by modern Canadian society and could eventually become a matter of national concern. Under the living tree doctrine, then, authority over water management has the potential to shift: from being a property matter of primarily provincial jurisdiction to being a federal matter because of the serious impact upon fisheries.

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[67] [1988] 1 S.C.R. 401 [*Crown Zellerbach*] at 432 The national concern doctrine "applies to 'new matters' which did not exist at Confederation and matters 'originally ... of a local or private nature in a province [which] ... have since ... become matters of national concern."

The living tree doctrine has another important implication: it confirms that the original intent of Parliament may not be conclusive of the current scope of the legislation. If we go back in history to obtain extrinsic evidence such as House of Commons debates, government studies, and reports which are admissible when considering the scope of legislation, it is not necessary to rely on them. Emphasis in this thesis is placed on the evolution of the Constitution, interpreting and applying it to the realities of modern life and modern interpretation and application.

4. The Steps of Constitutional Interpretation

First, it is necessary to understand and apply the principles of constitutional interpretation to determine in which level of government a matter resides. Water is not specifically included in any head of power in the Constitution; therefore, it is necessary to consider the specific legislation under scrutiny – such as the *Water Act*, to determine whether the legislative authority exercised pursuant to the statute is federal or provincial authority. In order to ascertain this, the court follows two fundamental steps which are closely intertwined. The first of these is that the court must characterize the legislation.[68] The character of legislation is determined by considering such aspects as its pith and substance, also referred to as the content or subject matter of the law, its leading feature, its true nature and character, and its true meaning or dominant characteristic and its effect. Second, the court must assign the

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[68] *Citizens' Insurance Co. v. Parsons* (1880), 4 S.C.R. 215 at para. 87.

legislation to one of the heads of power enumerated in sections 91 and 92.[69] These terms are a fundamental to constitutional interpretation and are explained in greater detail below.

(a) Step 1: Pith and Substance

There is no precise formula that the court applies to determine the pith and substance or the effect of an enactment. The court considers and weighs the aspects of the legislation in each case, and then it is up to the court to decide.[70] In this case, I am asking whether the pith and substance of the *Water Act* and related regulations and policies are based on valid provincial jurisdiction or whether they come within the scope of the *Fisheries Act*.

It is possible for legislation to be carefully drafted under what appears to be the appropriate constitutional authority, but the effect of the legislation may have implications beyond the scope originally contemplated. The pith and substance analysis is considered by the Supreme Court of Canada in *Ward v. Canada (Attorney General)* in 2002.[71] The issue in this case was the validity of a federal regulation passed pursuant to the *Fisheries Act* which prohibited the

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[69] See *Same-Sex Reference, supra* note 9 at para. 34.

[70] See *Canadian Association of Broadcasters v. Canada*, 2008 FCA 157, [2008] F.C.J. No. 672 at para. 39. In this case the court considered a charge levied on the broadcasting industry and the issue was whether the federal government had the jurisdiction to impose the levy. The court found "The pith and substance of a levy is its dominant or most important characteristic. The dominant or most important characteristics are to be distinguished from its incidental features … The fees in this case have characteristics of both a tax and regulatory charges. The Court must ascertain which is dominant and which is incidental…. it is the primary purpose of the law that is determinative." See also Nigel D. Bankes & Alastair R. Lucas, "Kyoto, Constitutional Law and Alberta's Proposals" (2004) 42 Alta. L. Rev. 355 at 372. In this article, the authors provide a summary of the terms used to determine pith and substance and discuss how the courts consider the issue.

[71] 2002 SCC 17, [2002] S.C.J. No. 21 [*Ward*]. McLachlin C.J. delivered the judgment for the court. In this case the court put more weight on the effect of the law rather than on its plain meaning.

sale of certain endangered baby seals. The specific issue raised by the provinces was whether the regulations prohibiting the "sale, trade or barter of whitecoat and blueback seals"[72] were properly matters within the federal authority over federal fisheries in the *Constitution Act* subsection 91(12) and were therefore valid, or whether they were within the power of the provincial government over property and civil rights in the *Constitution Act* subsection 92(13) and were invalid. The court considered the pith and substance of the regulations, their essential character, true meaning and dominant feature by looking at its purpose and legal effect.[73] The Court in *Ward* also considered the options available to achieve the outcome sought by the federal legislation – the protection of one aspect of fisheries – and found that the difficulty in policing the catching of specific seals which were indistinguishable from other seals until caught, justified the legislation. The Court found that the legislation was "essentially concerned with the ... protection of fisheries (and) … in pith and substance (was) concerned with the management of the Canadian fishery".[74] Therefore, by applying the test, the court concluded the appropriate allocation of the division of power.

The point I want to emphasize arising from *Ward* is that it confirmed that the boundaries of federal legislative authority over seacoast and inland fisheries have not been established:

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[72] S.O.R./93-56, s. 27.

[73] *Ward, supra* note 71at para. 17. "... (the) purpose is relevant to determine whether parliament was regulating fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law..." See also *Reference re: Firearms Act (Can)*, [2000] 1 S.C.R. 783.

[74] *Ward*, *ibid.*, at para. 28.

> The constitutional validity of a given measure is resolved through more specific analysis of its pith and substance, or fundamental nature, aimed at determining under which head of the enumerated division of powers the resultant classification most directly falls, bearing in mind always, as the judge points out …, that jurisdictional powers are not in 'watertight compartments' and there may be incidental overlapping of federal and provincial powers.[75]

Another example of matters that do not fit into watertight compartments[76] are matters dealing with the environment. Water can be considered to be an environmental matter over which the court can apply "the principles of federalism… [that] power is shared by two orders of government, each autonomous in developing policies and laws within their own jurisdiction… In cases where federal and provincial classes of subjects contemplate overlapping concepts, meaning may be given to both through the process of 'mutual modification'."[77] It is these principles which are applied to subsection 91(12) and subsection 92(13) powers.

To summarize this section, the pith and substance of any legislation must be analyzed in order to determine in which legislative house the matter belongs. The pith and substance of both the federal *Fisheries Act* and the *Water Act* will be considered in this thesis since both are relevant to the issue. I will consider the *Fisheries Act* in Chapter 5 and the *Water Act* in Chapter 6.

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[75] *R. v. Ward*, [1999] N.J. No. 336 (N.F.C.A) at para. 10.

[76] See *Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] A.C. 326 (J.C.P.C.) at para. 15. The expression "watertight compartments" is coined here by Lord Atkin.

[77] *Ward, supra* note 71at para. 30. In that case, the Supreme Court of Canada, although upholding federal jurisdiction, cautioned that the courts prefer to deal narrowly with the issues before them and "to make decisions which resolve those issues rather than attempting to define the boundaries of a particular power once and for all or to exhaustively define or establish the scope of the terms used."

(b) Step 2: Classification- The Assignment of a Matter to a Head of Power

The second step in the analysis concerning which head of power within the Constitution provides the legislative authority for the matter is for the court to assign a matter.[78] The step to classify a matter is less of a science, but more of an art, and it is difficult to determine in advance to which head of power the court will assign a matter since law is also involved. The court may conclude that the matter is exclusively within one head of power and can incidentally affect a matter within the power of another. Alternatively the court can decide that a matter is properly, in pith and substance, in two houses concurrently. In such a case, federal and provincial legislation could both be valid and co-exist if they are consistent. In the event of inconsistency the doctrine of federal paramountcy applies.

An example of the two step analysis concerns the issue of fluoridation in drinking water. In *Millership v. British Columbia*,(1984)[79] provincial legislation enabled fluoridation of water

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[78] The court will consider factors such as whether the subject matter respects provincial boundaries (which at least transboundary water do not; some water – such as confined aquifers, if ascertainable can be clearly provincial matters); see *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] S.C.J. No. 50 at para. 30. In this case, the Supreme Court of Canada observed that "where the pith and substance of legislation relates to a tangible matter – i.e., something with an intrinsic and observable physical presence – the question of whether it respects the territorial limitations in s. 92 is easy to answer. One need only look to the location of the matter. If it is in the province, the limitations have been respected, and the legislation is valid. If it is outside the province, the limitations have been violated, and the legislation is invalid."

[79] *Millership v. British Columbia*, 2003 BCSC 82, [2003] B.C.J. No. 109 at paras. 56 – 57 [*Millership*]. That decision was upheld by the B.C. Court of Appeal in *Millership v. Canada (Attorney General)* (2004), 23 B.C.L.R. (4th) 198, and leave to appeal to the Supreme Court of Canada was denied in *Millership v. Kamloops (City)*, [2004] S.C.C.A. No. 73. See also *Re Upper Churchill Water Rights Reversion Act*, *1980*, [1984] 1 S.C.R. 297 at 335 [*Churchill*]. In this case the court, after conducting the first test to determine the pith and substance of the legislation concluded that Newfoundland legislation interfered with the rights outside the territorial jurisdiction of Newfoundland and was therefore *ultra vires*.

which admittedly could affect both food and water ingested outside the province. The Supreme Court of British Columbia heard the arguments and concluded that the matter was of a municipal nature properly within subsection 92(8) – municipal institutions, property and civil rights, local works and undertakings and all matters of a merely local or private nature – and therefore was valid provincial legislation. The fact that the fluoride could affect water outside the jurisdiction was considered to be an incidental effect of the legislation. If there had been valid federal legislation concerning fluoride, this case may have been decided differently, although only in the event of an inconsistency.

5. Exclusivity

Having applied the two step test, the courts must assign the matter to one of the heads of power. Within the Constitution, both the federal and provincial legislatures are given exclusive authority over certain matters. The rules of constitutional interpretation allow that if a matter is exclusive to one level of government, the same subject matter[80] cannot be legislated upon, "modified or extinguished"[81] by the other.

The possibility that a matter may be included in the powers of both is dealt with under the doctrine of paramountcy discussed below.

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[80] See e.g., *Quebec (Attorney General) v. Canada (Attorney General)*, [1921] 1 A.C. 401 (Q.P.C.) at 428. There it was decided that the affixing of a permanent structure to the solum is not within federal jurisdiction – the exclusive power to license the use of the solum is in the province.

[81] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para. 70 [*Friends*].

If in determining the pith and substance of legislation, it is determined that the subject matter is exclusively within federal responsibility, a province cannot legislate directly on the subject.[82] That is, if *FH IFN* is exclusively within federal responsibility for seacoast and inland fisheries then the Province cannot legislate on it. It is immaterial if the exercise of the exclusive federal jurisdiction affects provincial legislative authority over property and civil rights.[83]

Exclusive authority must be validly exercised and it ought not be colourable, that is, under the guise of legitimate authority the legislature cannot affect another different matter outside its jurisdiction.[84] It may be possible to argue that provisions of the *Water Act,* which set limits for instream flow below the amount of water required for *FH IFN*, undermine federal

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[82] *Mullaney v. Red Deer (County No. 23)*, 1999 ABQB 434, [1999] A.J. No. 648 [*Mullaney*]. This is a case in which the Alberta Court of Queen's Bench declared *ultra vires* the municipal by-law regulating setback requirements for land adjacent to an airport. The court referred to cases from the 1950s which established the subject of aeronautics "firmly and exclusively within the hands of Parliament under the section 91 power to make laws for the peace, order and good government of Canada." This conclusion was reached notwithstanding arguments in support of finding the regulation of land within the exclusive provincial legislative authority of "property and civil rights" under s. 92 (13). The court in this case considered two approaches it could take. The first approach would be to adopt the presumption that laws, such as this by-law regulating setbacks, are always valid and this law was valid unless it actually interfered with the federal legislative jurisdiction of aerial navigation. The second approach would be to strike the legislation down if it, in pith and substance, was aimed at the exclusive (Dominion) jurisdiction. The court chose the latter approach on the basis that the presumption of constitutionality means nothing unless the test is applied. The court decided that legislation must be *intra vires* in order to stand, whether or not there is federal legislation in the field. In *Mullaney* the Alberta court made the same observation the Alberta Court of Appeal made in *Reference re: Firearms Act (Canada)*, (1998) 164 D.L.R. (4th) 513 (Alta. C.A.) at para. 18; that with regard to determining the scope of constitutional legislative authority, "characterization is not a precise science … it (is) a contextual analysis heavily influenced by policy and value judgments."

[83] *Friends*, *supra* note 81 at para. 82.

[84] *Ward*, *supra* note 71 at para. 17. "The effects (or pith and substance) can also reveal whether a law is 'colourable', i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?" The test for colourabilty is set out in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at paras. 47-50; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273. Applying the test to the *Water Act*, it cannot be used as a colourable device to invade the area of federal jurisdiction –fisheries— nor can the *Fisheries Act* be used as a colourable device to invade provincial jurisdiction – the *Water Act.*

authority and the *Act* is therefore colourable[85], notwithstanding the absence of clear intent by the province to make it so. As shown in the discussion of the *Water Act* in Chapter 6 below, the provincial legislation purports to address the needs of a healthy aquatic environment but does not protect fish habitat by setting any meaningful water level limits. There does not appear to be any rationale for raising the matter of jurisdiction over the aquatic environment and dealing with it so lightly.

Federal parliament's exclusive legislative authority is found in the *Constitution Act, 1867* primarily section 91[86] which includes subsection 12 Seacoast and Inland Fisheries.[87] I argue that if Inland Fisheries is a matter exclusively within federal jurisdiction, *FH IFN* is within that exclusive jurisdiction and the Province is precluded from legislating directly on the subject.

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[85] See e.g. *Churchhill*, *supra* note 79.

[86] *Supra* note 2, s. 91 states "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, - 12. Sea Coast and Inland Fisheries….. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. And any Matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

[87] *Ibid.*, s. 91(12). The question is: what is the scope of the subject matter? The scope of seacoast and inland fisheries is discussed more fully in Chapter 4 below.

Exclusive provincial legislative authority is found primarily in section 92[88] which includes subsection 13, from which the province derives exclusive legislative authority over property and civil rights. If water is provincial property the question is the extent of the legislative scope the Province has over its property and whether that scope is limited by federal legislation.[89] If protection of fish habitat is exclusively within the jurisdiction of the federal Parliament, the Province cannot legislate on the subject matter.

An enacting legislature may incidentally impact on a matter outside its jurisdiction so long as the enacted legislation is valid: i.e., in pith and substance it deals with a matter that falls within the legislature's jurisdiction. As stated by the Supreme Court of Canada in its *Global Securities* decision, "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law."[90] In this thesis, the argument is that *FH IFN* is essential to the core of the fisheries power, as such it can validly impact provincial jurisdiction over property and civil rights under the necessarily incidental doctrine.

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[88] *Ibid.*, s. 92. The subsections most relevant to water are 92(5) - "the management and sale of public lands belonging to the province", 92(13) – "Property and civil rights in the province", 92(16) – "Generally all matters of a merely local or private nature in the Province", 92(10) – "local works and undertakings…", 92(8) - "Municipal institutions in the province", and section 95 – "Agriculture in the province … as far only as it is not repugnant to any Act of the Parliament of Canada."

[89] See e.g. *R. v. Fowler*, [1980] 2 S.C.R. 213 [*Fowler*] where a prohibition in the *Fisheries Act* regarding the deposit of "slash, stumps or other debris" into water frequented by fish was found to be *ultra vires* the federal government because it was not sufficiently linked to the federal power over fisheries and intruded upon provincial jurisdiction over property and civil rights.

[90] *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 at para. 23 [*Global Securities*]. See also *Millership supra*, note 79 which demonstrates that provincial legislation can incidentally impact federal authority until there is an inconsistency.

6. Reconciling the Division of Powers

It is possible for legislation enacted by one level of government to validly impact upon matters that are constitutionally reserved for the other level of government. This can occur in two main ways: First, as already discussed, a piece of legislation may intrude into the non-enacting legislature's jurisdiction incidentally; second, the legislation may deal with an issue that has a double aspect. Each of these situations is described briefly below. In both cases, however, whenever a conflict between validly enacted provincial and federal legislation dealing with the same subject matter arises, the doctrine of paramountcy tends to render the provincial law inoperative to the extent of the conflict.

(a) Incidental Impact

As has been discussed, despite the assignment of exclusive authority, constitutional law permits one legislature to incidentally impact the jurisdiction of another. According to this principle, if in the legitimate exercise of the seacoast and inland fisheries power, federal legislation has an incidental impact on a matter within provincial jurisdiction, it would still be valid law.[91]

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[91] *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225 at para. 117. Here, the Court states: "It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other."

Federal legislation can legitimately affect provincial legislation, even to the extent of removing the bricks which underpin provincial legislative authority. That is, if fish habitat is legitimately within federal jurisdiction, then provincial legislative authority over water may be validly affected. As with other multifaceted issues, there is no test which can be applied in all cases. There are numerous examples of federal jurisdiction impacting provincial authority such as in the *Mullaney*[92] case discussed above, in which valid federal legislation enacted pursuant to Parliament's jurisdiction over aeronautics had an incidental impact on local planning laws and land uses. The same principle arguably applies to the amount of water sufficient for fish to swim, thrive and survive. If the valid exercise of exclusive federal jurisdiction over fisheries has an incidental impact on property and civil rights, it would nonetheless be a valid law. It can also be argued that valid provincial law may apply to these waters under section 92, so long as there is no inconsistency with federal laws. This thesis argues that such an inconsistency of a provincial law, the *Water Act,* with a federal law, the *Fisheries Act,* exists where *FH IFN* is adversely affected.

(b) Double Aspect and Overlap

Although the subject matters enumerated in sections 91 and 92 are intended to be exclusive, there are circumstances in which a matter may be included in more than one head of power. Where the legislative authorities are concurrent, shared, and dual the double aspect principle applies and both federal Parliament and provincial legislatures can legislate. This concept was originally introduced by the Privy Council in *Hodge v. The Queen* (1883) where it said,

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[92] *Mullaney*, *supra* note 82.

"subjects which in one aspect and for one purpose falls within 91, may for another aspect and for another purpose fall within 92."[93]

(c) Paramountcy

If, then, there are circumstances when both federal and provincial governments can validly enact laws that impact upon the same subject matter, the question arises: What happens when the two laws conflict? The doctrine of paramountcy is designed to resolve such conflicts. Hogg, a leading constitutional author, describes this doctrine in the context of incidental effects by saying, simply:

> where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails….The doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent.[94]

The Court has recognized two types of inconsistency for the purposes of the doctrine of paramountcy. First, the Court in *Multiple Access Ltd. v. McCutcheon (1982)* recognized an operational inconsistency where "the same citizens are being told to do inconsistent things; … compliance with one [statute] is defiance of the other."[95] This type of impossibility of dual compliance is contrasted by the Court in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*

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[93] *Hodge v. The Queen* (1883), 9 App. Cas 117 at 130.

[94] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. looseleaf (Toronto: Thomson Carswell, 2007) at 16.2-16.3 [Hogg, *Constitutional Law of Canada*].

[95] *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at para. 48.

(2005) with a second kind of inconsistency where the law in question must "not frustrate the purpose of a federal enactment".[96]

It can be argued that water withdrawal authorizations that negatively impact fish habitat, made pursuant to the *Water Act*, are inconsistent with the federal *Fisheries Act*. If this renders the *Water Act* inconsistent with the *Fisheries Act* either operationally or by frustration of purpose, the *Water Act* is inoperative or invalid to the extent of the inconsistency and must to be read down.[97] The actual operation of the *Water Act* to this extent is demonstrated in the discussion in Chapter 6.

It is important to note, however, that there is no inconsistency if a valid provincial law is proclaimed in the absence of valid federal law. This principle was enunciated in 1896 *Re Jurisdiction over Provincial Fisheries*[98]. The Supreme Court of Canada found in this case that in the absence of inconsistent federal legislation the provincial legislation at issue was valid:

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[96] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 at para. 14 [*Rothmans*]. In this decision the *Federal Tobacco Act* essentially permitted promotion of tobacco products at retail outlets. Subsequently, the province of Saskatchewan passed a more stringent act restricting retailers by the *Tobacco Control Act* which banned advertising by retailers which permitted persons under 18. The case was brought to court by retailers who argued that the paramountcy doctrine applied and that compliance with the federal act prevented them from complying with the provincial act. The Supreme Court found that the two pieces of legislation could operate concurrently. It was also concluded that the federal government did not 'occupy the field' in the absence of 'very clear statutory language to that effect' which is necessary as the courts exercise restraint in the application of the doctrine of paramountcy.

[97] See e.g., *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113. The provincial law at issue in this decision provided that only lawyers could practice law. The federal *Immigration Act* provided that a party could be represented by a non-lawyer before the Immigration and Refugee Board. The Supreme Court held that although compliance with the most stringent law would be compliance with both laws, the purpose of the federal Act would be defeated. That is, the federal act intended to provide for representation without the cost of a lawyer which the provincial act prevented therefore the latter was invalid.

[98] *Re: Fisheries, supra* note 14.

> So far as the provincial legislation mentioned in this question was not inconsistent with previous laws of the Dominion Parliament on the same subjects and has not been superseded by subsequent legislation of the Dominion, I am of opinion that the provisions mentioned in this question were within the power of the provincial legislature, under the authority conferred upon it by section 92 of the *British North America Act* to make laws respecting property in the Province. So far as these enactments in any way conflict with prior dominion legislation they were *void ab initio*, and so far as the Dominion has since legislated in any manner inconsistent with these provisions they became upon such subsequent legislation, *ipso jure*, *void*. In a judgment delivered in a case now before the Judicial committee of the Privy Council, I enunciated the principle that for the purpose of executing distinct legislative powers, one conferred upon Parliament by section 91, and a different power conferred upon provincial legislatures by section 92, of the *British North American Act*, the same measures of legislation might be open to both legislatures. That in such a case, so long as the Dominion has not legislated a provincial legislature, in the exercise of its own distinct authority, might legislate, but that the federal legislation being necessarily paramount, so soon as Parliament enacted a law in any way inconsistent with the prior provincial legislation the latter would be thereby superseded and become void. My answer to the present question is based on the same principle. [99]

This case also provides authority for the proposition that a provincial law may cease to operate if federal legislation changes or is interpreted by the courts more expansively, (see also the living tree principle discussed above).

For purposes of my thesis, I suggest another approach – inconsistency of the approach to water management under the *Water Act* with the Constitution. In this case, if a law is inconsistent with the Constitution it is clearly of no force and effect, as stated within the Constitution itself:

> 52(1) The "Constitution of Canada" is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[100]

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[99] *Ibid.*

[100] *The Constitution Act, 1982, supra* note 2, s. 52(1). This thesis recognizes that the provision has been mainly applied regarding Charter matters. However recent jurisprudence suggests a broader application. See *Morton v. British Columbia (Minister of Agriculture and Lands)*, [2009] B.C.J. No. 193 [*Morton*]. In this case the

Thus, if the *Water Act* is clearly inconsistent with the Constitution, it would arguably be invalid. The remedy set out in this section ought to be considered more fully in relation to the issue raised in this thesis.

One solution to an inconsistent statute is to remove the inconsistent law from the books altogether. The courts do not support a case by case application and interpretation of the inconsistent laws as articulated by McLachlin C.J. in *R. v. Ferguson(2008)*,[101] concerning inconsistency, albeit concerning the Charter,

> The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the Charter that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies: see *Osborne*, per Wilson J. In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole: *Vriend*; *Sharpe*. Where this is not possible – … the unconstitutional provision must be struck down. The ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects. In either case, the remedy is a s. 52 remedy that renders the unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is

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petitioners were wild salmon fishers sought declarations that certain sections of the *Fisheries Act*, R.S.B.C. 1996, c. 149, inter alia, were *ultra vires* the Province of British Columbia. Essentially the laws that were challenged permitted discharges from fish farms which affected the wild fish habitat. One argument made was that the challenged sections invalid and of no force or effect pursuant to s. 52 of the *Constitution Act, 1867*. The court identified the argument but, according to my interpretation, concluded that as only portions of the legislation were at issue, the pith and substance test could be applied and not s. 52. In this case the court concluded that the province had exceeded its constitutional authority by interfering with an exclusive federal power and the doctrine of Interjurisidictional Immunity ought to apply.

[101] *R. v. Ferguson*, 2008 SCC 6, [2008] S.C.J. No. 6.

> not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books.[102]

In this thesis I argue for a section 52 remedy which will direct the provincial legislature to revise the *Water Act* to remove the inconsistencies with the fisheries power. I acknowledge that this section 52 has not been considered by the courts in this manner, it has been applied by the courts in reference to Charter issues.

This concludes the discussion of the division of powers.

7. Interjurisidictional Immunity

In addition to the potential for the Water Act to be read down under section 52, there is a second way in which it can be read down. That is, by the application of the Interjurisdictional immunity doctrine. This is a doctrine which protects the core of federal undertaking from the effects of provincial legislation so that the federal undertaking can be viable. It is my argument that fisheries in as undertaking and fish habitat is at the core of this undertaking to which this doctrine ought to apply. The application of the doctrine, as described by Hogg would result in the *Water Act* being read down to exclude from its reach the amount of water necessary for federal fisheries:

> … If this argument succeeds, the law is not held to be invalid, but simply inapplicable to the extra-jurisdictional matter. The technique for limiting the

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[102] *Ibid.* at para. 65 referring to *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, *Vriend v. Alberta*, [1998] 1 S.C.R. 493, *R. v. Sharpe*, [2001] 1 S.C.R. 45.

> application of the law to matters within jurisdiction is the reading down doctrine.[103]

In this section I argue this doctrine applies to the amount of water necessary for a fishery and that a provincial law may be otherwise valid but it cannot apply to a federal undertaking or a federal power, such as fisheries, so as to sterilize it in the worst case, or affect a vital part.[104] This principle was discussed in *Reference re: Waters and Water-Powers* (1929) in relation to the railway passing through provincial lands which is quoted extensively because it seems so analogous to water:

> In legislating for railways extending beyond provincial limits, it has been held, that it is of the essence of the Dominion authority to define the course of the railway, and to authorize the construction and working of the railway along that course, without regard to the ownership of the lands through which it may pass (*Attorney General for Quebec v. Nipissing Central Ry. Co.* [[1926] A.C. 715]). …'railway legislation, strictly so called' (in respect of such railways), is within the exclusive competence of the Dominion, and such legislation may include, *inter alia* (*Canadian Pacific Ry. v. Corporation of the Parties of Notre Dame de Bonsecours* [[1899] A.C. 367, at p. 372]), regulations for the construction, the repair and the alteration of the railway and for its management. In the circumstances of this country, a provincial right of interdiction upon the occupation of provincial Crown property lying upon the route of the railway is incompatible with either a plenary or an exclusive Dominion authority over the construction or working of such railways; and this would have been even more strikingly evident, in 1867. On the other hand, the authority granted by section 91, head 4, 'Indians and lands reserved for Indians,' while it enables the Dominion to legislate fully and exclusively, upon matters falling strictly within the subject 'Indians', including, *inter alia*, the prescribing of residential areas for Indians, does not, as we have seen, embrace the power to appropriate a tract of provincial Crown

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[103] Hogg, *Constitutional Law of Canada, supra* note 94 at 261.

[104] See e.g. *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, 2003 BCSC 249,[2003] B.C.J. No. 361.

> land for the purposes of an Indian reserve, without the consent of the province, (*Seybold's* case [[1903] A.C. 73]).[105]

The reverse applies. It was obvious that it affected the Railway in 1864. It is now obvious that if affects *FH IFN* in the 21st century.

If the Province cannot prevent the railway from passing through provincial lands due to exclusive federal authority to design and implement the national railway, neither can it prevent a federal fisheries by diverting provincial waters. In further support of this argument, reference is made to the Canadian Senate discussions prior to the proclamation of the *NWIA* which concluded with this comment: "all necessary precautions are being taken. … For expropriation the principles that are followed in building a railway are adopted in this bill, so that no possible injustice can be done if the bill is accepted."[106] Therefore it can be argued that the Senate considered the issue of compensation by expropriation as a means to prevent any injustice arising from the exercise of federal power. That solution is still available.

As mentioned above, Hogg describes interjurisdictional immunity as applying to a federally regulated undertaking. In order to apply the principle to *FH IFN* it is necessary to establish first that federal fisheries in an undertaking and second that *FH IFN* is an integral part of that undertaking. This nature of fisheries as an undertaking is discussed more fully in the next chapter.

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[105] *Reference re: Waters and Water-Powers*, [1929] S.C.R. 200 at para. 8 [*Water Powers Reference*]. See also *Canadian Pacific Railway v. Toronto (City)*, [1908] A.C. 54 in which the jurisdiction of the federal government to dictate to municipalities the standard of maintenance for level crossings and receive financial contributions is at issue. The court held that the railways were within the exclusive jurisdiction of the federal government which has the jurisdiction to safeguard the public interest.

[106] *Senate Reports*, *supra* note 22 at 682.

The principle of interjurisdictional immunity has also been considered in relation to Aboriginal title and the courts have concluded, as in *Delgamuukw v. B.C*. (1997), that to the extent provincial laws relate to the use and possession of lands, such provincial laws cannot apply to Indian lands.[107] In a similar manner, I argue that to the extent that provincial laws relate to the use and possession of water necessary for fish habitat, they cannot apply and must be read down.[108]

The principle of interjurisdictional immunity originally considered provincial laws that "sterilized" or "impaired" federal undertakings.[109] The Supreme Court of Canada relaxed this in 1966 so that the doctrine would apply in respect of provincial legislation which merely "affects" federal undertakings.[110] Specifically, if the provincial law affected a vital part of a federal undertaking, it was to be deemed inapplicable.[111] This test has been revised once again by the Supreme Court of Canada in its 2007 *Canadian Western Bank v. Alberta (2007)*

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[107] *Delgamuukw v. B.C*., [1997] S.C.J. No. 108 at para. 117-183. See also Nigel Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights", Case Comment on *Delgamuukw v. B.C.*, (1998) 32 U.B.C.L. Rev. 317.

[108] See *R. v. Kupchanko*, 2002 BCCA 63, [2002] B.C.J. No. 148 [*Kupchanko*]. In this case a provincial law purporting to prohibit certain vessels in the Columbia Wetlands Wildlife Management Area was held to be inapplicable to those vessels operating in what was considered to be navigable waters.

[109] Hogg, *Constitutional Law of Canada*, *supra* note 94 at 15-30.

[110] *Québec (Commission du Salaire Minimum) v. Bell Telephone Co. of Canada*, [1966] S.C.J. No. 51 [*Bell 1966*].

[111] *Mississauga (City of) v. Greater Toronto Airports Authority* 192 D.L.R. (4th) 443 (O.C.A) at para. 41 [*Mississauga v. GTAA*]. The court held that provincial laws were inapplicable to construction activities at the Pearson Airport because such laws affected a vital or essential or integral element of federal public property. The Court also held the provincial laws inapplicable to the aeronautics power (peace, order and good government) and the federal undertakings power. The court states that the relevant test is whether it "affects a vital or essential or integral element of a federal power rather than the older and more restrictive tests of 'impairs,' 'interferes,' or 'paralyzes' or 'sterilizes'." See also *Mullaney*, *supra* note 82.

decision.[112] The court has narrowed the test once again so that the provincial law must "impair" the federal undertaking. The overall concept of interjurisdictional immunity is based on the "principle that each head of federal power possesses an essential core which the provinces are not permitted to regulate indirectly."[113] It seems obvious that at the core of the seacoast and inland fisheries 'power' is enough water for fish to survive, similar to the need for enough land for the rails for railway rolling stock.

In this thesis I argue that the application of the *Water Act* does indeed impair the essential core of the management of fisheries, which is a federal undertaking. The question is whether the *FH IFN* is a subject matter to which this principle ought to apply. The answer seems to be captured in this important statement made by Laskin:

> The interjurisdictional immunity principle holds that "a basic minimum and unassailable content" must be assigned to each head of federal legislative power. Because federal power is exclusive, provincial power cannot affect that essential core. A provincial law, valid in most of its applications, must be read down not to apply to the core of the exclusive federal power.[114]

Thus it must be argued that fish habitat IFN is an 'unassailable content'[115] of the federal fisheries power – that it is within the exclusive jurisdiction of the federal power to the extent

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[112] *Canadian Western Bank v. Alberta,* 2007 SCC 22, [2007] 2 S.C.R. 3 at para. 48 [*Canadian Western Bank*]. The Supreme Court of Canada in its decision agreed with the Alberta Provincial Court of Appeal with the application of the higher standard of impairment rather than merely affecting the vitality of the federal undertaking. See also *Morton, supra* note 100 at para.190.

[113] *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 83.

[114] *Mississauga v. GTAA*, *supra* note 111 at para. 39.

[115] *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at para. 250.

that a certain quantity and quality of water are essential for healthy fish habitat. That same quantity of water must not be impaired or adversely impacted by provincial legislation. If it is impacted the doctrine ought to apply.

It is possible that the Province would also want to apply this doctrine to provincial authority, such as in subsection 92(5) Management and Sale of Public Lands, or subsection 92(13) Property and Civil Rights so as to render otherwise valid federal laws that interfere with these provincial matters. Hogg's position on this point is as follows:

> There is no case applying the doctrine of interjurisdictional immunity to federal laws in order to protect provincially-incorporated companies or provincially-regulated undertakings. The doctrine ought to be reciprocal, because the provincial heads of legislative power are just as exclusive as the federal heads of legislative power, although it is true that the federal heads are paramount in the event of a conflict between federal and provincial laws. There have occasionally been suggestions that the doctrine is reciprocal, but the weight of authority is the other way. Probably, therefore, a federal law in relation to a federal matter may validly extend to the status or essential powers of a provincially-incorporated company, or to the vital part of a provincially regulated undertaking.[116]

While there is a reason to believe the federal government's control of fish habitat is a stronger claim than provincial authority over water, there are issues to consider. Proving what constitutes the appropriate amount of water for fish habitat is a practical, scientific and legal nightmare. The scientific *FH IFN* is difficult to establish because it changes according to the species, the season, the river, the reach of the river, and other scientific conditions which are beyond the scope of this thesis. As *FH IFN* does not fit neatly into either a federal

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[116] Hogg, *Constitutional Law of Canada*, *supra* note 94 at 15-34**.**

or provincial subject matter, it may be necessary to determine in each case the amount of water actually required for fish habitat – similar to the evidentiary standard required of an offence of the *Fisheries Act* by which an hazardous alteration, disturbance and destruction of fish habitat (HADD)[117] is committed. Notwithstanding the evidentiary problems, if provincial water management has the effect of impairing fisheries then the principle of interjurisdictional immunity ought to apply. The argument that provincial law is inapplicable to portions of water necessary for fish habitat ought to be made in an authoritative forum. The federal legislative authority must not be stripped of its effectiveness; however, this will happen if there is no fishery to conserve or no fish habitat to protect.

Where the immunity test applies, provincial legislation must be read down.[118] The argument then is that the *Water Act* must be read down with respect to the amount of water necessary for *FH IFN*. Where there is valid federal law, there is no immunity needed because of the applicability of the paramountcy doctrine.[119] That is, if the *Fisheries Act* is a valid federal law concerning *FH IFN* then it ought to apply. In cases where the provincial *Water Act* is inconsistent with the federal *Fisheries Act*, the provincial *Water Act* will be inoperative to that extent.

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[117] *Supra* note 6, s. 35.

[118] *Taylor v. Alberta (Registrar, South Alberta Land Registration District)*, 2005 ABCA 200, 255 D.L.R. (4th) 457 at para 32.

[119] See e.g. *Kupchanko*, *supra* note 108. Provincial regulations cannot control vessels on navigable waters which are matters within federal jurisdiction.

One question yet unanswered is whether the theory of interjurisdictional immunity or any of the above discussion applies where there is no distinct provincial legislative Act which can be identified. If the impact on a federal undertaking is merely a provincial administrative act of an agent dealing with property not under the auspices of enabling provincial legislation, it raises the question whether provincial jurisdiction has in fact been exercised. This question may be answered if, as in the case of *Roncarelli v Duplessis(1959)*,[120] a decision of an officer of the Crown such as a licensing officer, or a Director, can be successfully challenged as being a decision of the provincial legislature. In the situation described in this thesis, the water levels which are inconsistent with federal power are set by the Province which *must* be considered by the Director when making decisions to grant or continue diversion rights, inter alia.[121] It is arguable that a Director's decision to authorize a diversion below *FH IFN*, is the point at which the *Water Act* is either inconsistent with the federal jurisdiction or impairs the essential core of the federal undertaking. The 'regulation' is not categorized as such by the *Water Act* but I argue that it has the same result.[122]

8. Conclusion

In this chapter I provided a brief overview of the structure of the division of powers in the Canadian Constitution. I discussed the Living-tree principle which allows the court a means to adapt the law to changing societal norms. I then set out the steps to constitutional

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[120] *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

[121] *Supra* note 7, s. 51(4). This subsection of the *Water Act* relates to issuance of licenses and states that the Director *must* consider an approved water management plan which I argue is tantamount to a regulation.

[122] The matter of the provincial regulation will be discussed more fully in Chapter 6 below.

interpretation whereby a matter is assigned to either federal or provincial authority which were expanded upon by a discussion of the determination of the pith and substance of legislation. I also discussed the exclusive powers of the federal and provincial governments and the fact that the federal government's jurisdiction is paramount. Finally I discussed the concept of interjurisdictional immunity which I believe stretches the jurisprudence to include the issue in this thesis.

As a result of this constitutional analysis, a fundamental question is whether *FH IFN* falls within exclusive federal legislative authority, either directly or incidentally. The next Chapter 4 considers this question by looking at the scope of the seacoast and inland fisheries power, primarily as it is set out in the cases. Another question this chapter raises is whether an adequate water supply is so essential to the vitality of the federal power that it is beyond the scope of, and cannot be incidentally impacted by, the exercise of provincial authority.

A further question that needs to be answered is whether there are any inconsistencies such that the provincial law – the *Water Act* – is no longer operative due to changes in the scope of the federal fisheries power as a result of changes in society and the environment. These questions will be addressed in subsequent chapters, beginning with the examination of the *Fisheries Act* in the Chapter 4.

CHAPTER 4: THE SCOPE OF THE FEDERAL FISHERIES POWER

> The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.[123]
>
> Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except as they may be modified by legislation, are precisely the same.[124]

1. Introduction

The purpose of this chapter is to apply the principles of constitutional interpretation and application discussed in Chapter 3 to determine the scope of the *Constitution Act, 1867*, subsection 92(13) Seacoast and Inland Fisheries power as it relates to the amount of water necessary for *FH IFN*. In this Chapter I first consider the meaning of fisheries by reviewing definitions, cases and legislation. Then I consider the scope of federal constitutional power. I do this by studying various cases, and paying particular attention to the extent to which the fisheries' power is exclusive and therefore paramount to the exercise of provincial powers. Next, I consider the scope of inland fisheries power in relation to *FH IFN*. I also explore whether and to what extent this power has been considered in relation to provincial legislative authority, particularly property and civil rights. Lastly, I discuss the questions

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[123] *Friends*, *supra* note 81 at para. 80. La Forest J. delivered the judgment for Lamer C.J., L'Heureux-Dube,Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. By analogy to navigable waters, protection of the fish habitat from pollution would be ludicrous if the water is being systemically drawn down to effectively eliminate the habitat altogether.

[124] *A-G Canada v. A-G Ont*., [1898] A.C. 700 at para. 4 [*Fisheries Case*].

concerning instream flow needs in relation to dilution which also affects fish habitat across provincial boundaries. I conclude with a summary of the scope of federal power in relation to *FH IFN*.

2. Scope of the Fisheries' Power

As set out in the *Constitution Act, 1867* subsection 91(12) [125] the exclusive power over seacoast and inland fisheries is granted to the federal government and is therefore expressly excepted from those subjects granted exclusively to the province.[126] It is clear from the cases that federal legislation must remain within the narrow bounds of that power.[127] Staying within the boundaries is the challenge and is the question posed by this thesis – whether water necessary for *FH IFN* is exclusively within federal domain.

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[125] See *Constitution Act, 1867, supra* note 2, s. 91(12).

[126] *Fisheries Case*, *supra* note 124 at para. 19. Lord Herschell, delivering the judgment of the court on several questions concerning federal and provincial powers in relation to waters, fish and navigation concluded that " any legislation falling strictly within any of the classes specially enumerated in s.91 is not within the legislative competence of the Provincial Legislatures under s.92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent." See also *R. v. Breault* 198 D.L.R. (4th) 669. In this case, the New Brunswick court found that all provincial authority over fish is suspended while federal authority is exercised. The accused were charged with failing to display a provincial permit. The court found that the legislation governing the payment for the permit was a tax outside the provincial authority.

[127] *Attorney General for Canada, appellant, and Attorney General for British Columbia and others, respondents* [1929] J.C.J. No. 1 [1930], 1 D.L.R. 194, [*Reference as to the Constitutional Validity as to Certain Sections of the Fisheries Act]* In this decision of the Judicial Committee of the Privy Council considered the validity of federal legislation dealing with the licensing of fish-curing operations. The Privy Council found the legislation to be *ultra vires* federal parliament because it related more to the regulation of commercial operations. The court impugned the federal legislation. The court did acknowledge that so long as federal government legislation strictly relates to subjects of legislation expressly enumerated in sec. 91, it is of paramount authority even though it trenches upon matters assigned to the provincial Legislature by s.92 (relying on *Tennant v. Union Bank of Canada*, [1894] A.C. 31, 63 L.J.P.C. 25).

Notwithstanding the apparent clear word 'fisheries' in the Constitution, the scope of the fisheries power is not clearly defined despite many years of jurisprudence. It's scope has been tested against the provincial power over property and civil rights which also has murky boundaries.[128] This state of the law was noted in *Ward,* a case discussed extensively in Chapter 3, wherein the Chief Justice concludes:

> no bright line can be drawn …. for the purposes of defining the scope of the federal fisheries power"…"the fisheries power must be construed to respect the provinces' power over property and civil rights under s. 92(13) of the *Constitution Act, 1867* … (which) is a broad, multi-faceted power, difficult to summarize concisely.[129]

In order to establish the scope extrinsic to the fisheries power, it is necessary to use interpretive aids, including dictionaries and case authority. I begin by examining common or dictionary meanings of the words 'fishery' and 'fisheries'.

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[128] See *A-G Canada v. A-G Ont*., [1898] J.C.J. No.1 and [1898]A.C. 700 at 11. "Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, 'Sea-Coast and Inland Fisheries' in s. 91. .. (i)t must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights." The court in this case was concerned with private fishery rights which were in place prior to s. 91. The principle however applies to water as well as to fish.

[129] *Ward*, *supra* note 71 at paras. 40-42.

3. Fishery Defined

Black's Dictionary defines 'fishery' as 'not a tangible thing, but as a right'. The first definition given is 'A right or liberty of taking fish. Fishery was an incorporeal hereditament under old English law.' Under the term 'Free Fishery' it says "an exclusive right of fishery, existing by grant or prescription from the monarch, to take fish in public water such as a river or an arm of the sea. We then move to the term 'right of fishery' which is 'the right of persons to fish in public waters, subject to federal and state restrictions and regulations, such as fishing season, licensing, and catch limits.' Lastly, the term 'several fishery' is said to be a 'fishery' of which the owner is also the owner of the soil, or derives his right from the owner of the soil'. The second definition examines the term 'a fishing ground' which is 'where all persons have a right to take fish.' [130]

In conjunction with these definitions, an understanding of the scope of fisheries is understood by looking at the cases. The historical definition of fisheries is referred to in *R. v. Fowler*[131] which, in turns, refers to *Patterson* on the Fishery Laws (1863) which defined fishery as follows:

> A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.[132]

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[130] *Black's Law Dictionary*, 7th ed., *s.v.* "fishery".

[131] *Fowler*, *supra* note 89.

[132] *Ibid.* at 223.

This definition includes both the right and the place of catching fish. Without sufficient water, there can be neither. Moving on to Dr. Murray's New English Dictionary, the leading definition which is also cited in *Fowler*, it defines a 'fishery' as 'the business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.' The definition set out in *Fowler* has been frequently considered and applied in the cases as illustrated below.

4. Fishery as set out in the Jurisprudence

Case law, or jurisprudence, illustrates and expands the above definitions of the various aspects of fisheries.[133] One of the significant early cases dealing with exclusive federal jurisdiction over non-saline, non-tidal, seasonally variable inland waters was *Robertson*.[134] In this case, the Supreme Court of Canada was asked to decide whether the federal power over seacoast and inland fisheries included the right to grant an exclusive fishing license in an upper reach of the Miramichi River, the second largest river in New Brunswick. The reach, or section, of the river in question was similar to the rivers in southern Alberta – navigable during the spring runoff and spring rains, but shallow with exposed bars in the summer

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[133] The meaning of the word 'fishery' as defined in *Fowler, ibid*., with reference to *Patterson* and *Murray*, was also considered in the following cases confirming that the definitions quoted continue to be applicable and relevant.. *Reference re Certain Sections of the Fisheries Act*, *supra* note 135 at 472. *International Fund for Animal Welfare Inc. v. Canada (Minister of Fisheries & Oceans)* (1986), [1987] 1 F.C. 244 (Fed. T.D.) (aff'd [1989] 1 F.C. 335 (Fed. C.A.)) para 55. In *R. v. Northwest Falling Contractors* [1980] 2 S.C.R.292 [*Falling*].at 298 Martland J., considered fisheries to be legislative power over a resource as follows: "… Federal legislative jurisdiction under s. 91(12) of the *British North America Act* is not a mere authority to legislate in relation to 'fish' in the technical sense of the word. The judgments in this Court and in the Privy Council have construed 'fisheries' as meaning something in the nature of a resource". The court also in this case noted at p.299 that the decision in *Mark Fishing Co. v. United Fishermen & Allied Workers Union* [(1972), 24 D.L.R. (3d) 585.], at pp. 591 and 592 extended the definition "The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised."

[134] *Robertson*, *supra* note 14.

months. In deciding where the boundaries lay between the matters of federal fisheries and provincial property and civil rights, the court in *Robertson* asked whether the federal power was intended to directly affect vested rights of property and whether it authorized Parliament to affect provincial property rights by legislation?"[135] The answer was yes, and in this decision the highest Canadian court set out the scope of the federal government's exclusive power and the way it could impact provincial property. I quote from the case extensively because it sets out many aspects of the fishery power which are discussed in this Chapter 4.

> …I am of the opinion that the legislation in regard to Inland and Sea Fisheries' contemplated by the *British North America Act* was not in reference to "property and civil rights ... that is to say, not as to ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words , laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water.[136]

In this historical decision, the Supreme Court of Canada set out the broad parameters of the Federal fisheries power. The right to regulate belongs to the federal parliament and includes protection of fish habitat, preservation of the amount and quality of water necessary to

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[135] *Ibid.* at para. 59.

[136] *Ibid.* at para. 36.

preserve the fishery, the improvement and enhancement of the fisheries as a source of national or provincial wealth, and laws that relate to the fisheries. Thus *Robertson* can be said to succinctly state the core of the federal fisheries power.

This core of the federal power as set out in *Robertson*, has, at its centre, the concept that fisheries is a system.[137] This concept was reiterated in *Fowler*:[138]

> Shellfish, crustaceous, and marine animals, which are included in the definition of "fish" by s. 2 of the Act, are all part of the system which constitutes the fisheries resource. The power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system.[139]

A fishery under federal jurisdiction is a system which includes the resource, the right to exploit that resource and the place where that resource can be exploited. For purposes of this thesis, an example of a fisheries is South Saskatchewan River Basin and its sub-basins – the Bow, the Oldman, the Elbow – which are discussed more fully in Chapter 6.

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[137] For an example of the recognition of the existence of a system in our rivers see *Canada, U.S. Great Lakes Water Quality Agreement of 1978* http://www.ijc.org/php/publications/pdf/ID1601.pdf (last visited March 15th 2008). An agreement in which "Canada and the United States signed the first Great Lakes Water Quality Agreement, declaring their determination and commitment to "restore and enhance water quality in the Great Lakes System," including the international section of the St. Lawrence River through which the lakes drain. Through a new agreement in 1978, the two governments made a clear commitment to "restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem."

[138] *Fowler*, *supra* note 89.

[139] *Ibid.* at 223.

The cases establish the scope of fisheries include, within federal jurisdiction, the power to conserve,[140] enhance,[141] maintain,[142] preserve, protect,[143] regulate, restore, sustain[144]

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[140] See *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at para. 37 [*Comeau*] The court confirmed that "Under the Fisheries Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest." See also *Ward*, *supra* note 71 at para. 41. "These cases (which include *Comeau*) put beyond doubt that the fisheries power includes not only conservation and protection, but also the general 'regulation' of the fisheries, including their management and control." An early case which addressed conservation was *Re Provincial Fisheries* (1895), 26 S.C.R. 444 p. 519. In this case the Supreme Court of Canada stated that "...the legislative authority of Parliament under section 91, subsection 12, is confined to the conservation of the fisheries by what may conveniently be designated as police regulations." (I note that the province also has the mandate to conserve fish in a different manner, i.e. as to the number of fish that may be caught as set out in *Smith v. British Columbia (Regional Manager)* [2006] B.C.W.L.D. 1509 at para. 13. In this case the court concluded that the province had the authority under the wildlife legislation to manage angling and conserve fish stocks, and produce an angling management plan. This case illustrates the authority in the Province to protect the number of fish caught, as distinguished from fish habitat.) See also *R. v Jack*, [1980] 1 S.C.R. 294. In this case the Supreme Court of Canada found that the First Nations' right to fish was subject to the conservation of the resource which was identified by the DFO. This case ensures that the fisheries power is of a higher order than Aboriginal rights in certain circumstances.

[141] *R. v. BHP Diamonds Inc.*, [2002] N.W.T.J. No. 91 NWTSC [*BHP*] at para. 40, contemplates the enhancement of fish habitat. "The trier of fact might also find that the channel, over time, will enhance fish habitat, leading to a more vigorous sport fishery than was the case before *BHP* began moving earth and draining lakes. And at para. 42: "Potential fisheries are included because the fertilized eggs of today are the adult fish of tomorrow. Where the young and adult fish will end up in later years cannot always be known with certainty, especially in places like the expansive Koala Watershed. To disregard the potential of present day fish as the foundation for the fishery of tomorrow is to view the powerfully evolving forces of nature with limited vision and with lack of foresight." The court does not elaborate on what is meant by a 'potential' fisheries. See also *835039 Ontario Inc. v. Fram Development Corp.*, [1994] O.J. No. 1725. In this case, the process for the approval of a development along a riparian area did not involve the DFO until very late in the process. The court confirmed that the objective of the DFO was to ensure that it cared for the public interest in mitigating the destructive effect of the development on the fish habitat of the Creek if, indeed, it did not enhance it. See *Comeau*, *ibid.* at 26 concerning the broad discretion of the Minister under the Act, particularly to enhance fish producing streams. The court found that the *Fisheries Act* s. 43(h)(i) authorized the Minister to enhance the fisheries and that the authorization was not challenged under any constitutional authority. See also *B.C. Hydro v. Canada*, [1998] FCJ No. 748 at para 55, in which the FCC concluded that the *Fisheries Act* included the authority to set instream flow that "was necessary to protect fish and their ova … the spawning stocks that would be utilizing the river in the months ... and for the protection of the fish and ova downstream of (the dam)". All of which concerns maintaining and enhancing the fisheries.

[142] *Black's Law Dictionary*, 7th ed., *s.v.* "maintain": 1. To continue (something). 2. To continue in possession of (property, etc.). 4. To care for (property) for purposes of operation productivity or appearance; to engage in general repair and upkeep. The maintenance of fisheries would be to continue to care for and maintain the productivity of the fisheries – which must include FH IFN.

[143] *Fowler*, *supra* note 89; *R.* v. *Northwest Falling Contractors* [1980] 2 S.C.R.292.

[144] *Black's Law Dictionary*, 7th ed., *s.v.* "sustain": 1. To support or maintain, esp. over a long period 2. To nourish and encourage; lend strength to … See also *BHP, supra* note 141 paras. 66 *et seq*. In BHP the court did not require proof that the fisheries is sustainable in order that it be entitled to federal protection, stating: "… Despite BHP's strong submissions regarding the lack of evidence of a sustainable fishery, I find that there is no requirement in the *Fisheries Act* or the regulations regarding sustainability. In addition, I accept the evidence of

manage,[145] and maintain the fisheries,[146] whether potential, sustainable, or fragile – including each component, for the public benefit and in the interests of the public at large[147] as a source of national or provincial wealth, and to yield economic benefits,[148] even to the point of restricting the owners' rights of utilization.[149] This enumeration of aspects of fisheries set out in the cases supports the argument in this thesis, that the federal jurisdiction includes the power to exclude provincial jurisdiction over water necessary for *FH IFN*.

(the DFO), to the effect that fish migrate between Lac de Gras in the south as far as Kodiak Lake to the north, and I find that one can also say that the waters of Kodiak, Little and Moose Lakes are part of a larger fishery, i.e., the Lac de Gras fishery." This case supports the finding that the bar of sustainability is very low, which will support an argument that the part of the fisheries in the lower reaches of the South Saskatchewan River Basin, are worthy of protection.

[145] *Comeau*, *supra* note 140 at para. 37. Major J. said: "Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest." This statement raises the issue of whether the fish are held in a public trust for the people, and if so, the extent of that public trust. See also *Prince Edward Island v. Canada*, [2005] P.E.I.J. No.77 at para. 5 et seq. In this case, the province of P.E.I. raised the issue of the public trust obligations of the Minister under the *Fisheries Act* albeit in respect of the protection of fish habitat in marine waters. It is a beginning of the concept. The case had not proceeded beyond preliminary matters at the time of writing.

[146] See *Ward*, *supra* note 71 at para. 38. MacLauchlin C.J., the preponderance of authority to determine the scope of fisheries and confirms that it goes beyond management and conservation, citing Comeau's."

[147] See *Comeau*, *supra* note 140 at para. 38. In this case the court found that the federal duty was to manage, conserve and develop the fishery on behalf of Canadians in the public interest.

[148] *Ward*, *supra* note 71 at para. 32. The court states: "The federal power over fisheries is not confined to conserving fish stocks, but extends to the management of the fisheries as a public resource. This resource has many aspects, one of which is to yield economic benefits to its participants and more generally to all Canadians." See Hogg**,** *Constitutional Law of Canada*, *supra* note 94 at 29-15 fn. 68a In that fisheries is a public resource for all Canadians, Hogg, in discussing *Ward* notes that: "MacLachlin J. (as she then was) writing unanimously for the Court drew a distinction between preserving the numbers of fish and preserving the resource in a larger economic sense." This statement emphasizes the argument I make in this thesis that water is necessary for the fishery to exist. In that case it was argued that the federal government prohibited the killing of young seals to placate the international boycotts of Canadian fish due to perceived violence inflicted during the catch. The court elevated the issue to the protection of the fisheries in the economic interests of the country – a national concern." See also *Ecology Action Centre Society v. Attorney General of Canada*, 2004 FC 1087, 9 C.E.L.R. (3d) 161 at para. 18: In this case the court acknowledges that the Minister is responsible for managing, conserving and developing the fisheries in the public interest.

[149] *Ward*, *ibid.* at para. 32.

The scope of fisheries in relation to or arising from Aboriginal rights or entitlements including sustenance fishing the protection of endangered species and similar matters relevant to *FH IFN* are not explored in this thesis.

5. Limitation - Connection of Fisheries Power with an Economically viable Fishery

This section discusses the scope of the fisheries' power in relation to the economic aspect of the fish in the water. A narrow interpretation of the scope of the fishery power limits the power to waters in which commercial fish are found, or where there is a commercial or economic outcome related to the fish. An example of this narrow interpretation crystallized in *R. v. MacMillan Bloedel Ltd*. (1984)[150] in 1984 when the British Columbia Court of Appeal decided, adopting the reasoning of the trial division, that in order for water "to be identified as a fishery the area involved … would have to contain fish having a commercial value, or perhaps a sporting value, or would have to form part of the habitat of the anadromous fish …"[151] This definition narrowed the scope of federal power to waters which contained fish with commercial, sustenance, or sports fishing value. However, this definition of fishery is too narrow based on subsequent cases which do not put the emphasis on the

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[150] *R. v. MacMillan Bloedel Ltd*., [1984] B.C.J.No. 1395 (B.C.C.A.) [*Bloedel*]. The court in this case considered whether the company's logging operations resulted in the harmful alteration, disruption or destruction of a long term fish habitat in a small tributary of a River in British Columbia. The small (less than 6 inches) fish were considered to have no commercial or sporting value. The passage of the fish was blocked to waterfalls which created barriers between the habitat of these small fish and the sea. Although the trial judge considered that the small fish were part of system which would cease to exist, the Court of Appeal held that the *Fisheries Act* was applicable only to a fishery and that the particular portion of the stream where these small fish are found is not a fishery or a part of one.

[151] *Ibid.* at para. 24. Note Craig J in this case dissented stating at para. 30 " … I do not think 'public resource' or 'fisheries resource' means simply fish having commercial or sporting value." Subsequent cases, such as *BHP, supra* note 141, validated his dissent.

commercial aspect of the fisheries. Later cases find federal jurisdiction even where only part of the fish system exists.[152] However, for purposes of this thesis the rivers of southern Alberta, particularly the South Saskatchewan River Basins (SSRB), meet the criteria for commercial and sporting fish as described in Chapter 2 section 8 above. That is, exclusive federal jurisdiction over fisheries ought to apply to the viable fisheries in the South Saskatchewan River basin.

Further, in *R. v. BHP Diamonds Inc.*, (2002) [*BHP*],[153] the court considered whether the *Fisheries Act* applied to dewatering (removing a significant amount of the water) cold isolated northern lakes in which there was little evidence of fish; however during the baseline studies, lake trout, round whitefish and Arctic grayling were found. BHP Diamonds Inc. itself, in its 1994 Project Description, stated

> Although aquatic productivity is relatively low, the lakes within the claim block sustain modest fish populations. Aquatic productivity is relatively low in arctic lakes. However, sufficient nutrients are present in the lakes within the N.W.T. Diamonds Project claim block to support the phytoplanktonic food base for populations of zooplankton and aquatic macro-invertebrates and to sustain modest fish populations consisting of lake trout, round whitefish, arctic grayling, slimy sculpin and longnose sucker.[154]

In this case, it was shown the lakes would be affected by a diversion channel which would include dewatering. The plan approved by the DFO included the construction of a canal to empty water from a few small lakes into an adjacent larger lake. During the dewatering

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[152] *BHP*, *supra* note 141.

[153] *Ibid*.

[154] *Ibid.* at para. 59.

process, an inordinate amount of silt was deposited into the larger lake, and as this was not included in the dewatering plan approval it was considered to be an offence under the *Fisheries Act*. *BHP's* defence when charged under the *Fisheries Act* subsection 35(1), was to claim that the section applied only to fisheries, not to fish or fish habitat, and there was none. (The argument concerning subsection 35 is argued at length in next Chapter of this thesis). In *BHP* The NWT Supreme Court found on the evidence that there was in fact a sport fishery, albeit fragile and in spite of this fragile nature, the *Fisheries Act* applied as noted in the decision:

> …. with respect, I am in disagreement with the narrow approach taken by the majority in MacMillan Bloedel (1984). In my view the fish and fish habitat of Kodiak Lake, Little Lake and Moose Lake are afforded the protection of the federal *Fisheries Act* for the reason that they are part of the fisheries resource, a natural resource and a public resource of this country. To protect fish and fish habitat is to protect the resource (fishery).….In any event, there is ample evidence of the existence of a fishery in these lakes in the Koala watershed….This watershed is distinguishable from the small isolated stream which the court rejected as a fishery in MacMillan Bloedel (1984).[155]

Therefore, in spite of the fragile nature of the resource and the sparse fish population, the court found that the cold northern lakes with little evidence of fish were part of a natural and public fisheries resource. In addition, the court found "… for the Act to apply, the waters in question must be a fishery, part of one, or a potential one. I find support for this conclusion not only from the case law, but also from the title of the Act."[156] Further the court stated that "the submission of Crown counsel based on the statement of Martland J. in *R. v. Northwest*

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[155] *Ibid.* at para. 57.

[156] *Ibid*. at para 36.

Falling Contractors (1980) commends itself to me because I do not think 'public resource' or 'fisheries resource' means simply fish having commercial or sporting value."[157] In this case, the court clearly established that it is not necessary for fish to be present all the time in water under federal jurisdiction.

The *BHP* case provides authority for the proposition that federal fisheries jurisdiction is not limited to water containing fish with commercial or sport value but extends also to fish habitat which includes the place of the food base. It is sufficient if the water is frequented by fish common to sport fishing, or if there is a single component of a fisheries present.

BHP also provides an example of the living-tree principle (discussed in Chapter 3 above.); in this case the court extended the scope of constitutional power beyond the limitations of a commercial fishery. The disruption of a fragile northern lake system now falls within the ambit of federal fisheries' power. Consistent with this reasoning is my opinion that water necessary for *FH IFN* is within federal jurisdiction. Further it is clear from BHP that dewatering of lakes having the attributes, or better, of the northern lakes disrupts the federal fisheries which is inconsistent with the *Fisheries Act*. I show in Chapter 6 below that the current water strategy of Alberta permits systemic dewatering of rivers to levels which destroy fish habitat.[158]

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[157] *Ibid*. at para 44. *R. v. Northwest Falling Contractors, supra* note 133.

[158] See also M. Wenig, *The Fisheries Act as a Legal Framework for Watershed Management* (LL.M. Thesis, University of Calgary Law School 1999) [unpublished] at 49 [Wenig, *Fisheries Act as a Framework*]. Wenig discusses at length the concept of fisheries as a system.

In *BHP*, the court referred to *Macmillan Bloedel* in which the court found the federal authority extended to " 'water frequented by fish'. To restrict the word 'water' to the few cubic feet into which the oil was poured would be to disregard the fact that both water and fish move."[159] The fact that the court took judicial notice of the movement of fish and water supports the argument that dewatering in one reach of the river can impact another reach, as suggested in the questions heading this Chapter concerning navigable waters.

It is arguable that if commercially valuable fish are, were or could potentially be present at any time in a stream, or could be present except for a reduced instream flow due to a reduction in available water, federal fisheries has jurisdiction over the stream. The federal Parliament has the Constitutional power to prevent diminishment of the *res* of the Constitutional power.[160] The step this thesis does not take is the determination of whether the

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[159] *R. v. MacMillan Bloedel (Alberni) Ltd*., [1979] 4 W.W.R. 654. In this case the company was charged with depositing crude oil in water frequented by fish. The company argued that it was not an offence because the spill was directly below the dock where there were no fish ever seen. The court did not agree with the restricted definition of the location of fish and the conviction was upheld.

[160] *Illinois Central PP v. Illinois, 146 U.S.* 387. In this American case of 1892, the waterfront was considered to be held by the government in a public trust and could not be used for private purposes. It was held that a disposition that breaches the obligation to hold the land for the public is void. The loss of the opportunity to acquire the rights was not compensated because the rights could never be acquired. In Canada, see *B.C. v. Canadian Forest Products Ltd.,* 2004 SCC 38 [*Canfor*]. In this case Canadian Forest Products Ltd. (Canfor) held the rights to log a certain forested area in British Columbia. Canfor was sued by the Province as a result of a fire which destroyed a significant amount of the forest and was found negligent. The suit included, inter alia, a claim for damages for loss of trees which were considered to be set aside for various environmental reasons (non-harvestable or protected trees). Although the majority of the nine judges of the Supreme Court of Canada found these damages was not compensable in the manner in which it was plead, the Crown was invited by the Court to pursue claims for environmental damages in the Crown's role of *parens patriae.* It is possible that this invitation can be pursued by the argument made in this thesis.

public interest fisheries is a resource which the federal Parliament, and potentially the provincial Legislature, has a duty to protect.[161]

The cases decided prior to *BHP* discussed above lay the foundation for the legal concept of fisheries adopted in this case.

A further example of the exercise of federal jurisdiction over the amount of water in a stream comes from northern Alberta. We understand that due to the vagaries of nature, the quantity of water in a river or stream may fluctuate naturally with the seasons and the amount of precipitation, snow and ice melt and infiltration from groundwater. It is when the quantity of water in a stream fluctuates unnaturally with diversions from the river for human needs such as municipalities, industries, commerce, and agricultural uses which impact a fisheries that jurisdiction is called upon. When these diversions deplete the stream of the amount of water necessary for *FH IFN* the stream has been dewatered below appropriate levels. Dewatering for industry was considered in *BHP*, above, and by the federal court and the S.C.C. in a case concerning the development of the tar sands in the 2004 case *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*[162] [*True-North*]. In this case the True North Energy Corporation proposed to dewater Fort Creek for a mining project. The DFO scoped the environmental impact assessment to include the dewatering of the stream. The issue was whether the DFO could limit the scope of the project to the fish-bearing stream to be

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[161] See *Fisheries Case*, *supra* note 124. See also, as per Binnie, J. in *Canfor Ibid*., at paras. 150 and 153. Although the court was not prepared to determine whether the Crown had a trust like duty to protect publicly held resources, the court mentioned this as a possibility.

[162] *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265, [2004] F.C.J. No. 1518 [*True-North*]. Aff'd 2006 FCH 31, D.L.R.(4th) 154, leave to appeal to S.C.C. refused 357 N.R.398.

destroyed[163] or whether the project ought to be the entire tar sands mine. The argument raised by the environmental intervenors was that the DFO ought to scope the project to include the entire tar sands mine rather than limiting the project scope to the creek at risk. The courts concluded that the DFO was entitled to limit the scope of the project to dewatering the stream as it was the court's preference to ensure any decision made by the administration is clearly tied to a head of federal authority in the *Constitution Act*.

It is clear that the federal government considers that it has the authority to prevent dewatering of fish habitat. In *True-North* the DFO considered the dewatering of the stream to be clearly a federal matter as set out in the following quote from the affidavit filed by the representative of the DFO: "The scope of the project should be limited to those elements over which the federal government can validly assert authority, either directly or indirectly."[164] In this case, as we have seen, the issue was the stream. The courts accepted the decision of the DFO that dewatering a stream was within federal jurisdiction, even though the entire tar sands mining project may not have been with the authority of that particular Minister under the *Fisheries Act.*

In *True North*, the federally regulated undertaking was fisheries which gave the DFO the authority to deal with the issue of dewatering the stream where it directly affected the fisheries. Therefore, this case arguably removes any doubt that the federal legislature has exclusive jurisdiction over dewatering of inland waters containing a fisheries or a component

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[163] *True-North, ibid.* at para. 2.

[164] *Ibid.* at para. 185.

of fisheries. There was little discussion in the reported decision of this case concerning the presence or absence of fish. It is my opinion that this case if a very strong authority for the proposition that the federal government has jurisdiction over the dewatering of provincial rivers to the extent that fish habitat may be impacted.

Although the *Water Act* of Alberta and related strategy does not contemplate complete dewatering, the removal of water essential for fish habitat is arguably within federal jurisdiction based on the cases discussed in this Chapter 4. *True North* also makes it clear that dewatering is within the scope of the federal fisheries power and it is a hazardous alteration, disturbance or destruction of fish habitat and prohibited unless expressly authorized under subsection 35(2), which in turn triggers an environmental assessment. As the argument in this thesis is developed, I will show that there is at least an argument that the exercise of provincial authority – such as the provincial water management strategy and corresponding licensing – which results in dewatering of a steam to the detriment of fish habitat requires a subsection 35(2) approval. This case suggests that the entire water management strategy of the Province ought to trigger a full environmental impact assessment. The outcome could trigger an opportunity for the province to rectify the inconsistencies with the federal power.

The scope of the fisheries power reflected in the *Fisheries Act* can also be examined in terms of the practices related to the fisheries policy of no net loss. That policy means that parties adversely affecting fish habitat can make arrangements with the DFO to enhance other existing fish habitat in order to meet the ‘no net loss’ criteria of the DFO. This practice was

considered by the Court arising from the litigation concerning the dam on the Oldman River in Alberta.[165] The DFO accepted an arrangement which created compensation – alterative fish habitat – for a change in flow when the dam was constructed. The jurisdiction of the DFO to seek compensation for a change in flow was not challenged and thus, again, established federal authority over the issue of *FH IFN*.

7. *FH IFN* as incidental to the Fisheries Power

In addition to arguments supporting federal authority over *FH IFN*, it is also worth considering arguments that the federal government has ancillary, or necessarily incidental power over sufficient water for fish habitat. To the extent that *FH IFN* is not exclusively within federal authority, the legislative authority may be ancillary or necessarily incidental to fisheries as discussed in *Reference re: Waters and Water-Powers*[166] – which concerns

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[165] *Kostuch v. Alberta (A.G.)*, [1995] 128 D.L.R. (4th) 440 at para. 10 *et. seq*.. In this case the court concluded that the correspondence on the Oldman Dam constituted a s. 35(2) approval. The court further noted at para. 20 that "On January 9, 1987, Her Majesty the Queen in Right of Canada, represented by the Minister of Fisheries and Oceans, and her Majesty the Queen in Right of Alberta, represented by the Minister of Forestry, Lands and Wildlife, entered into the Canada Fisheries Agreement whereby "subject to constitutional and statutory constraints", certain administrative responsibilities under the Fisheries Act were transferred to the Province of Alberta. The effect of the agreement, as understood by the parties, is conveniently set out in a press release issued by them as follows: The Canada/Alberta Fisheries Agreement reaffirms assignment of fisheries administrative responsibilities from Canada to Alberta and establishes a framework to address issues related to fish habitat management, aquaculture, and fish health, sport fisheries development, commercial fisheries development, fish inspection and small craft harbours." This quote again confirms that the parties to the agreement acknowledged constitutional constraints.

[166] *Water Powers Reference, supra* note 105 at para. 10. In this case one of the issues was the extent to which the authority given to the Dominion under s. 91(10), "Navigation and shipping," includes the right of permanent occupation of provincial lands for harbour works. The court held that "such a power, if it exists, is in the nature of an ancillary power, and can only be exercised upon the condition of paying compensation to the province." The question this case raises is whether FH IFN may be considered to be ancillary to the fisheries power, and if so, whether compensation would then be payable to the province.

navigable waters) – and *Ward*[167] – (which concerns the protection of baby seals). As discussed in Chapter 3, enumerated powers may include the right to legislate directly on matters indirectly related such as the land necessary for a federal harbor office or a matter "reasonably incidental to carrying on a fishing business (or a fisheries), such as labour relations and disposition of the products of the business, when such things do not in themselves fall within the concept of 'fisheries'."

As discussed in Chapter 3, a railway cannot exist without land and in many cases the land is provincial land. Because land is necessarily incidental to the railway's operation it is essential to the core of the federal power. There cannot be a fishery without waters, just as there cannot be a railway without land. It is difficult to envision how a court would conclude that sufficient water or habitat is not a fundamental and vital aspect of a fishery.

Whether or not instream flow is an integral part of the subject matter of fisheries in the Constitution Act, 1867 subsection 91(12), or necessarily incidental to the fisheries' power and therefore within the exclusive jurisdiction of the federal Parliament was discussed in line of cases illustrated by *Carrier-Sekani Tribal v. Canada (Minister of the Environment)1992.*[168] In this case the DFO was dissatisfied with the flow of water in the Nechako River, which was controlled by the Alcan, a multinational mining company. Alcan operated its dams according to its licenses which had been granted under the auspices of provincial legislation. When the DFO requested that Alcan increase the flow of the river for

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[167] *Ward*, *supra* note 71 at para. 40.

[168] *Carrier-Sekani Tribal v. Canada (Minister of the Environment)*, [1992] 3 F.C.316 (F.C.A.) [*Carrier-Sekani*].

fish habitat, Alcan refused to do so, and challenged both the amount of water requested and the federal government's jurisdiction to make the request. As a result of Alcan's failure to comply with its request to restore instream flow, the DFO applied for an injunction. Berger J. granted an injunction without deciding conclusively whether the instream flow was within federal jurisdiction. The issues were never judicially decided because the parties in the action – the Queen in Right of Canada, the Queen in Right of British Columbia and Alcan – reached an agreement that effectively amended Alcan's license rights to divert water according to the amount and quality of water sufficient for safe spawning of fish. The DFO won a partial victory for *FH IFN* but the issue of the jurisdiction of the federal government to direct the amount of water flowing in the river was not decided conclusively.[169]

Related to the same case, a subsequent lawsuit was initiated by Aboriginals who objected to the newly agreed upon flow of the river. The Aboriginals living downstream on the same river argued both the *Fisheries Act* and the *Navigable Waters Protection Act* applied and the agreements triggered an environmental impact assessment under the federal guidelines. Marceau J. of the Federal Court of Appeal concluded that the agreements were not a legislative act or an exercise of the paramount will of parliament. The agreements were an executive decision made to settle a lawsuit without any independence on the part of the

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[169] *Ibid*., para. 9 *et. seq*. The Minister of Fisheries and Oceans approved the remedial measures taken and representatives the federal and provincial governments and Alcan of the parties formed a committee to manage the water flows on the Nechako River. The agreements were approved by the Governor in Council by Orders in Council P.C. 1987-2481 and 1987-2482. The first Order, passed pursuant to s. 6 of the *Government Organization Act*, 1979, S.C. 1978-79, c. 13 the second Order, passed pursuant to para. 33.1(3)(b) (now para. 37(3)(b)) of the *Fisheries Act* directed the Minister to exercise his powers under subs. 33.1(2) (now subs. 37(2)) of the Act in a manner consistent with the settlement agreement and the written opinion under s. 20(10). Note - Alcan has changed its main business or profit centre from smelting to the sale of hydro power generated pursuant to its water license.

Minister.[170] Therefore, the agreements did not trigger a federal environmental assessment or consultation with the Aboriginals. The Aboriginals were unsuccessful in challenging the validity of the agreements described above and ultimately failed in the quest to increase *FH IFN* beyond the amount set out in the agreements.

9. Conclusion on the Scope of fisheries

In this chapter, I consider the scope of the inland fisheries power, including definitions and cases, demonstrating that the power includes the authority to conserve, enhance, maintain, preserve, protect, regulate, restore, and sustain the fisheries for public benefit and in the interests of the public at large as a source of national or provincial wealth to yield economic benefits. Without water in sufficient quantities and quality, none of these would be possible.

I also showed that scope of the fisheries power may legitimately encroach on provincial power over property and civil rights. I also argue that the scope of the fisheries power must include instream flow if not directly, then as ancillary to the federal subject matter. It may be that provincial legislation affecting *FH IFN* may be initially valid but is inoperable to the extent of any inconsistency and must be read down to the extent that it is inconsistent with and frustrates federal legislation. That is, the Province may be entitled to exercise authority to manage water but not in a manner inconsistent with federal power.[171]

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[170] *Ibid*., at para.45.

[171] See *Friends*, *supra* note 81 at para 80. By analogy, protection of the fish habitat from pollution would be ludicrous if the water is being systemically drawn down to effectively eliminate the habitat altogether.

In this chapter I also show that there are no categorically right answers to the question of the scope of the powers over the subject matters in section 91 and section 92; the result of each case will depend on how the judges interpret all of the facts and legislation at issue. The courts have been asked to decide the issue of sufficient water for *FH IFN*, as in *Carrier-Sekani*, but they have not decided the issue directly. In the absence a clear decision, an analogy can be made between *FH IFN* and navigable waters.[172] There is no point in protection of the habitat in one way if it is being destroyed in another. That is, if part of the fish habitat is protected from road construction but it is being destroyed by excessive diversion of water causing increased water temperature and reduced water quality, there is no need for the protection.

In this chapter I make a strong case that the Province must not interfere with the management of fisheries which is reserved exclusively to the Federal parliament. It must not destroy fish habitat by systemic over allocation of waters.

Finally, this chapter also showed that the pith and substance of the federal fisheries determined by the cases includes *FH IFN* as a matter which directly affects every component of fisheries – whether existing or potential, whether fragile or sustainable – including its conservation, enhancement, maintenance, preservation, protection, regulation, restoration, for

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[172] *Reference re: Waters and Water-Powers*, *supra* note 105 at 205. "the authority of the provinces to 'control, regulate and use' such waters, in the circumstances mentioned, is subject to the condition that, in the exercise thereof, the provinces do not interfere in matters the control of which is reserved exclusively for the Dominion, and that all valid enactments of the Dominion, in relation to navigation works, or in relation to navigable waters, be duly observed.

and in the interests of the Canadian public at large as a source of national or provincial wealth and to yield economic benefits even to the point of restricting the owners' rights of utilization over water.

CHAPTER 5: THE SCOPE OF THE *FISHERIES ACT* AND *FH IFN*

1. Introduction

The purpose of this chapter is to review certain sections of the *Fisheries Act* to show the extent to which the federal parliament has exercised its legislative authority over the fish habitat, particularly the amount of water necessary for *FH IFN*.[173] I will show how provincial legislation is inconsistent with the federal legislative authority in this Chapter. The *Fisheries Act* is discussed generally but emphasis is placed on section 35,[174] the hazardous alteration, disruption and destruction (HADD) section of the Act frequently enforced by the federal government for the protection of fish habitat. The majority of the Chapter will focus on each element of section 35 as interpreted and applied by the courts.[175]

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[173] On December 13, 2006 the federal government tabled the following bill for first reading: Bill C-45, *An Act Respecting the Sustainable development of Canada's Seacoast and Inland Fisheries*, 1st Sess., 39th Parl., 2006 [*Federal Fisheries Act Bill*]. The Bill is substantively similar to the *Fisheries Act* discussed in this thesis. It has as its purpose the provision for the sustainable development of Canada's seacoast and inland fisheries, through the conservation and protection of fish and fish habitat and the proper management and control of fisheries. Fish habitat is defined in a similar manner to the Act currently in force in s.3 as follows: "fish habitat" means any area on which fish depend directly or indirectly in order to carry out their life processes, including spawning grounds, nursery areas, rearing areas, food supply areas and migration areas" and in s. 59 prohibits any unauthorized harmful alteration or disruption, or the destruction of fish habitat. There are changes to the sections but the intent of Bill C-45 is consistent with the argument with respect to the *Fisheries Act* raised in this thesis.

[174] *Supra* note 6, s. 35. Subsection 35(1) reads "(1) No person shall carry on any work or undertaking that results in harmful alteration, disruption or destruction of fish habitat."

[175] See *ibid.*, s. 3(2) which reads "This Act is binding on Her Majesty in right of Canada or a province." Note also that a HADD can be committed by the province acting in its executive capacity.

2. The *Fisheries Act*

Although the *Fisheries Act* does not include a purpose section, the federal government has provided a summary of purposes for the edification of the hydroelectric industry as follows:

> The *Fisheries Act* is designed to protect fish habitats, provide upstream and downstream migration, guard against the destruction of fish other than by fishing, and prohibit the deposit of deleterious substance in water frequented by fish.[176]

This statement is consistent with the purpose of the sea-coast and inland fisheries power set out in the cases discussed in Chapter 4: to regulate, conserve, preserve, protect, and maintain the fisheries.[177] The distinction between the scope of the fisheries power and the scope of the *Fisheries Act* are often not distinguished in the cases. Generally though, the *Fisheries Act* and regulations protect and preserve fisheries[178] as a public and common resource.[179]

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[176] *Natural Resources – Hydroelectirc Energy*, online: Government of Canada <www.canren.gc.ca/hydro/portal /index.asp?Cald=199&Pgld=1351> (last accessed 16 April 2006).

[177] *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 40. The court concluded that the paramount regulatory objective of the *Fisheries Act* was the conservation of the resource.

[178] *R. v. N.T.C. Smokehouse Ltd*., [1993] B.C.J. No. 1400 (B.C.C.A.) at para. 70. In this case the court considered that the regulations under the *Fisheries Act* are primarily concerned with the protection and preservation of the fisheries as a public resource.

[179] *Comeau*, *supra* note 140 paras. 37-38. "Canada's fisheries are a 'common property resource', belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). … Under the *Fisheries Act*, the Minister has the additional authority to open and close fisheries (s. 43(a)), identify and prosecute those who damage or destroy fishery habitat (ss. 35-40), order the construction of fish-passes over fish-producing streams (ss. 20-22), or act to enhance fish-producing streams (s. 43(h) and (i))."

The *Fisheries Act* claims jurisdiction over all Canadian fisheries waters including '... all internal waters of Canada' so the scope if broad and encompassing.[180] The definition of fish in the *Fisheries Act* is also broad and is not limited by the aspects of commercial recreational values, it reads as follows:

> 'fish' includes (a) parts of fish,(b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans, or marine animals, and (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.[181]

In this definition, no distinction is made between a native species and non native species although there is often a difference between the habitats needs of each. For example, an introduced species may survive in warmer, shallower water in which case a Province can reduce the amount of water in a river to meet the needs of the introduced species. For purposes of this thesis, the definition of "fish" includes both the introduced and native species which are now part of Canada's recreational fisheries. I leave it to another research project to determine the appropriate way in which to deal with native and introduced species.[182]

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[180] *Supra* note 6, s. 2. "Canadian Fisheries Waters" is defined in section 2 of the *Fisheries Act* in the following words: "In this Act… 'Canadian fisheries waters' means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada."

[181] *Ibid.*, s. 2.

[182] See *Alberta Fishery Regulations,supra* note 4. Schedule 1. The schedule lists the following species of game fish (common name) – Arctic grayling, Goldeye, Lake sturgeon, Lake whitefish, Mooneye, Mountain whitefish, Northern pike (Jackfish), Sauger, Trout – Brook, Brown, Bull trout (Dolly Varden), Cutthroat, Golden, Lake, Rainbow – Tullibee (Cisco, Lake Herring) Walleye, Yellow Perch, Burbot (Ling) et al. Rainbow Trout are an introduced species and an important recreational fish.

One of the most significant parameters on the definition of fish is the test of commercial value which was raised in and discussed at length in Chapter 4. However, in recent cases, such as *Prairie Acid Rain*[183] the courts – the Federal Court, the Federal Court of Appeal and Supreme Court of Canada – accepted the streams in question as 'fish-bearing stream[s]" without defining the term or applying any test such as whether the fish constituted a commercial or recreational fishery. There appears to be a willingness of the court to soften the commercial test, supporting the application of the *Fisheries Act* even where the existence of commercial fish are tenuous, where the waters may be merely on the migratory route for the fish and where the commercial fish are demonstrably sustainable.[184]

3. Fishery

The *Fisheries Act* defines "fishery" as the area in which a fishing device is used or placed to catch fish.[185] To include the device used for fishing links the fishery to the act of catching the fish, which in turn links it to the water necessary for its habitat. In order to have a fishery there must be fish habitat –the fish must spawn, nurse, rear, eat, breathe, migrate and generally have sufficient water to carry out their life processes.[186]

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[183] *True-North*, *supra* note 162 at para. 2.

[184] *BHP*, *supra* note 141 at para. 66. "To examine the likely harvest, e.g., the number of trophy fish per season, is only a question of degree. A sports fishery, albeit fragile, is a sports fishery. Despite BHP's strong submissions regarding the lack of evidence of a sustainable fishery, I find that there is no requirement in the *Fisheries Act* or the regulations regarding sustainability."

[185] *Supra,* note 6, s. 2. "'fishery' includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith."

[186] See definition of "fish habitat" *supra,* note 6, s. 34.

Thus, scope of the *Fisheries Act* includes anywhere fish may be caught, which includes the waters of the river, in this case – the waters of the South Saskatchewan River. The question is whether the Province of Alberta is acting in a manner inconsistent with section 35 and harmfully altering, disrupting or destroying the fishery in this river basin. In order to answer this question a more detailed analysis of section 35 is required.

4. Fisheries Act – Section 35 Analysis

The primary section of the *Fisheries Act* which protects fish habitat reads as follows:

> 35(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in council under this Act.[187]

For purposes of discussion, I consider whether a) the Province is a person to whom the Act applies, b) whether it has carried on a work or undertaking c) and whether that work or undertaking results in the harmful alteration, disruption or destruction of fish habitat, and finally, d) a further elaboration on what is meant by fish habitat.

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[187] *Supra*, note 6, s. 35.

5. The Province as a 'Person' Under the Act

The province, acting in its executive capacity, is a person to which the Act applies as clearly stated in the Act itself.[188]

6. Work or Undertaking –

The terms 'work' and 'undertaking' are not defined in the Act. They are vague, organic,[189] often used interchangeably and can be used either as a verb or a noun, depending on the context. In the context of subsection 35(1), the words are nouns which are defined in *Black's Law Dictionary* as follows:

> **Work** n. 1. Physical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labour.[190]
>
> **Undertaking**, n. 1. A promise, pledge, or engagement.[191]

What are the first criteria for determining whether a matter is a work or undertaking? To begin this discussion I turn to the often-cited definition, first set out by the Privy Council,

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[188] *Supra*, note 6, s. 3(2).

[189] See *Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 [*Bibeault*]. As described by the Supreme Court of Canada in *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*, 2001 SCC 47, [2001] 2 S.C.R. 565 at para. 66 [*Ivanhoe*], the Court in *Bibeault* adopted the principle that "the weight to be given to the different factors to be considered, based on an organic definition of an undertaking, varies depending on the specific circumstances in an undertaking or an economic sector." It was acknowledged by the Court in *Ivanhoe* that administrative tribunals that apply such provisions enjoy a wide discretion in determining and weighing the factors that apply in defining an 'undertaking'.

[190] *Black's Law Dictionary*, 7th ed., *s.v.* "work".

[191] *Black's Law Dictionary*, 7th ed., *s.v.* "undertaking".

which states that an undertaking is "not a physical thing, but an arrangement under which … physical things are used."[192] Based on this definition, water can be argued to be a physical thing used pursuant to a non-physical thing – a plan, an arrangement, an Act (the *Water Act*), a regulation, a policy, an Order in Council. Therefore the water-management strategy of the Province of Alberta and related activities can be considered an undertaking.[193]

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[192] *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at para. 28. This case looked at the use of the word "undertaking" for the purposes of s. 92(10)(a) of the *Constitution Act, 1867*. It was found that there was no physical work unless the flow of an electrical charge across the frontier of a Province is to be regarded as a physical connection. The diversion of the flow of water can be a physical work, but the authorization for the same comes in the way water use is arranged. See also *Westcoast Energy v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 at para. 48 where the Supreme Court of Canada adopted the same definition of "undertaking" and also cited Dickson C.J. where he said "[t]he primary concern is not the physical structures or their geographical location, but rather the service (use of water - water licenses) which is provided by the undertaking (water conservation objective) through the use of its physical equipment (Physical objects – water)." See also *Bibeault, supra* note 189 at para. 173. This case is so often cited that it is arguably the leading case on the definition of undertaking; it described it as follows: "The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. These resources may, according to the circumstances, be limited to legal, technical, physical, or abstract elements. … when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundations of the undertaking exists. See also *Rogers Communications Inc. v. Canada (Attorney General)*, [1998] F.C.J. No. 368 (F.C.T.D.) at para. 21 where the Court says "… the *Broadcasting Act* does make clear distinctions between the broadcasting system as a whole and the individual undertakings which comprise the system. Within the statutory scheme the 'Canadian broadcasting system' is distinct from its components. Section 2 of the *Broadcasting Act* defines 'broadcasting undertaking' and 'distribution undertaking' respectively as follows: 'broadcasting undertaking' includes a distribution undertaking, a programming undertaking and a network; 'distribution undertaking' means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking; A reading of the *Broadcasting Act* and in particular of subsection 3(1) leaves me with no doubt that the broadcasting system and its individual components are distinct. For example, subparagraph 3(1)(b) is to the effect that the Canadian broadcasting system comprises 'public, private and community elements'."

[193] One of the issues is whether the relevant portions of the water management strategy is a legislative act or an administrative act. That issue is considered in the next chapter on the *Water Act*. How to categorize it is relevant to this issue – if the act of the province is legislative, then it arguably is not an offense under the *Fisheries Act*. If it is an executive action or an administrative directive which cannot confer enforceable rights, then it is not law, particularly if the Director could make the decision on the level of water in a stream independently of the Approved Water Management Plan. The Supreme Court of Canada considered this issue in *Friends*, *supra* note 81 at para. 35 concerning the nature of the Guidelines Order which they categorized as law because the wording "indicates a clear intention that the Guidelines shall bind all those to whom they are addressed, including the Minister of the Environment himself." In addition, the Guidelines Order was approved by the Governor in Council.

Another criterion of an undertaking is that it must be an arrangement with a commercial aspect.[194] Arguably, the provincial water management strategy in general, the *Water Act*, and any management of water by mechanisms such as an approved water management plan meet this test of a commercial aspect. The province's water strategy is primarily a tool to allow for the diversion of water for commercial, industrial and municipal uses. It is a resource the management of which has a direct financial benefit to the economy of the Province in the payment of user fees, and an indirect benefit through the establishment and operation of businesses and communities requiring water. The focus of the management strategy is efficient use of water.

It is possible that in most cases the management of water in the streams at a level less than the amount necessary for fish does not require any physical work on the part of the province. The physical work, including pipes and other infrastructure, are the responsibility of the licensees. Therefore, my argument concerning the provincial water management focuses on the meaning of 'undertaking'. There is no real consistency in the use of the word 'undertaking' by legislative draftsmen. In matters relating to fisheries, the undertaking must be a matter related to or impacting on the management of the fisheries resource. For example, an undertaking can also be interpreted to mean a level of commitment,[195] the terms of which

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[194] *Regina v. Communicomp Data Ltd. (1975)*, 6 O.R. (2d) 680. "The matter becomes an undertaking when there is a commercial aspect about it."

[195] See e.g. *Lavoie v. Canada (Minister of the Environment)*, [2000] F.C.J. No. 1238 [*Lavoie*] concerning a run of river hydraulic power generating station resulting in loss of fish habitat - at para. 60 prior to issuing authorizations for the run of the river operation, in accordance with the DFO's policy for the management of fish habitat, the DFO obtained from the operator an undertaking outlining the mitigation and compensation measures to be undertaken to ensure there would be no net loss of the production capacity of the affected fish habitat and these measures were incorporated into a letter of intent. In this case, undertaking was considered to be a commitment or a promise, not an arrangement. According to the DFO they do not authorize the harmful

must fit the section and intent of the *Act*. Undertaking has also been included in genres of "initiative, undertaking or activity"[196] and "business."[197]

For purposes of the *Fisheries Act*, strategic management of water in a manner harmful to fish habitat is arguably an undertaking, an initiative, and an activity. A water-management plan which results in the dewatering of a stream can be considered to lie within the mandate of the DFO under section 35 of the *Fisheries Act*, according to the decision in *True North*.[198]

The plaintiffs in the case argued that the dewatering of Fort Creek, affected by the decision of the DFO, was only a part of the "Fort Hills Oil Sands Project" (oil sands undertaking),

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alteration, disruption or destruction of fish and/or fish habitat where the loss of fish habitat is determined to be unacceptable unless measures are taken to compensate for the loss of the productive capacity of fish habitat.

[196] See e.g. *Friends*, *supra* note 81 at para. 25. Reference is made to the Court of Appeal judgment of Stone, J. A. in which the issue is whether the DFO had notice of a proposal: "Proposal…is used in a far broader sense than its ordinary meaning. In particular it is not limited to something in the nature of an application. An application is but one way in which an "initiative, undertaking or activity" can come to the attention of the Minister but it is not the only way. Another way is for an individual to request that the Minister take action under the appropriate statute, as was done here, and since the Minister was aware of an initiative within a federal area of responsibility, there was a "proposal" as defined in the Guidelines Order. Moreover, the Minister's decision not to intervene constituted him as a "decision making authority" and thus triggered his obligations under the Guidelines Order."

[197] See *Canada (Labour Relations Board) v. Yellowknife (City)*, [1977] 2 S.C.R. 729; *United Fishermen and Allied Workers' Union v. British Columbia Packers Ltd.*, [1977] S.C.J. No. 116. In these cases the application of the *Labour Code* to employers and employees was at issue. Particularly, section 108 of the *Code* set out, "108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers."

[198] *True-North*, *supra* note 162. The Governments of Canada and Alberta are parties to agreements that express this policy. The *Canada-wide Accord on Environmental Harmonization* (January 29, 1999) online: Canadian Council of Ministers of the Environment <www.ccme.ca/assets/pdf/accord_harmonization_e.pdf> and the *Sub-agreement on Environmental Assessment* (January 29, 1999) online: Canadian Council of Ministers of the Environment <www.ccme.ca/assets/pdf/envtlassesssubagr_e.pdf> share the objectives of efficiency and effective use of resources. The Sub-agreement on Environmental Assessment states as its objective ensuring that there is a "single environmental assessment and review process for each proposed project". The DFO remains responsible for the *Fisheries Act* s. 35, Environment Canada is responsible for the enforcement of s. 36.

which included an open pit mine, an extraction plant, a processing plant, a terminal to deliver oil sands to a pipeline system and utilities, and off-site facilities to support the mining and processing operations which had an environmental impact beyond the stream. The court supported the authority of the DFO to determine the scope of the project and acknowledged the DFO's preference within federal jurisdiction. Therefore, the actual dewatering is a physical activity and a work contemplated by subsection 35(1). The strategy, plan, decision, guidelines and the approved water-management plan are undertakings pursuant to which the physical act is committed and therefore could have been included by the DFO in their CEAA assessment. For whatever reason, however, it was decided not to do so. As in *True-North*, the function or purpose for which the creek was dewatered was not given much weight by the DFO; therefore it is arguable that function or purpose of the dewatering of the rivers in southern Alberta is not as important as the fact that dewatering is occurring.

The way in which the Province manages its water is arguably an arrangement, which is a non physical thing,[199] pursuant to which a physical thing – water – is managed for use. The use of water will usually be in the form of a diversion which is the actual work or project. In some cases water can be diverted without any physical labour or materials on the part of man – gravity and the flow of water itself can be sufficient. It is arguable then that Alberta's water

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[199] *Lavoie v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 775 at para. 28. This case concerns a motion to strike an application for judicial review regarding a run of river power plant. The challenge came from a single member of an Indian Band – Mr. Lavoie – the band itself stood to benefit from the operation of the hydro electric plant. The power plant was obliged to complete a water management plan which was not satisfactory to the applicant due to the killing of fish. In this case, it was argued that an undertaking was more than a physical thing, it was an activity. At para. 28 "It would seem clear to me that the prohibitions contained in sections 32 and 35 of the *Fisheries Act* include both the construction of a work and its operation: 'carrying on a work or undertaking' surely connotes more than construction, as I think, was conceded by counsel for the respondents." The court implied that it included the operation of the power plant which would change the level of water in the river, particularly during low flow periods. Exactly the same affect that the water management strategy of the province has.

strategy in general, and the SSRB Approved Water Management Plan[200] in the specific, is an undertaking or a non physical thing – including a set of rules, regulations, guidelines, policies, strategies, public hearings etc. pursuant to which water is used; the details of which will be set out in the next chapter. It is also arguable that the responsibility or liability for the negative impact on fish habitat of the provincial 'undertaking' or 'regulation' can be attributed to the party who actually diverts the water consistent with the SSRB. A licensee's defence to an action would be the license permits water to be withdrawn to a level below *FH IFN* although in doing so the licensee must actually breach the *Fisheries Act.* That is, in order to exercise its rights under its license it must breach the federal act. In turn, it can be argued that there is nothing compelling a licensee to divert all of the water allowed in a license, it is merely a permission.

Although this section is found in the part of the *Fisheries Act* titled "Fish Habitat Protection and Pollutions Prevention" (including sections 34 to 42.1), which provides the strongest protection for water necessary for fish habitat for established offences, to date, the federal government is unwilling to be proactive in applying it to intentional water diversions which negatively affect fish habitat.[201]

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[200] *AWMP for SSRB, supra* note 49.

[201] See Marcia Valiante, "The Great Lakes Charter Annex 2001: Legal Dimensions of Provincial Participation" (2003) 13 J. Env. L. & Prac. 47. Valiante notes that the amount of water removed from the great lakes is not monitored or recorded and the practice is for the Minister of the Environment (MOE) to wait until a problem develops before taking action. The MOE admitted that it does not know how much water is available in the province for taking purposes with the result that too much water may have been authorized for taking to the detriment of ecosystems – fish- and watersheds.

7. What constitutes an Hazardous Alteration, Disturbance or Destruction – an HADD?

What constitutes an HADD in the *Fisheries Act* is not exhaustively defined either in the statute or by the courts. The courts have confirmed that it is neither possible nor desirable to create strict definitions and have decided that the hazardous alteration of fish habitat is akin to an environmental matter which, by its nature is complex. This approach was stated by the court in *R. v. Canadian Pacific Ltd*.(1995), as follows:

> What is clear from this brief review of Canadian pollution prohibitions is that our legislators have preferred to take a broad and general approach, and have avoided an exhaustive codification of every circumstances in which pollution is prohibited. Such an approach is hardly surprising in the field of environmental protection, given that the nature of the environment (its complexities, and the wide range of activities which might cause harm to it) is not conducive to precise codification. Environmental protection legislation has, as a result, been framed in a manner capable of responding to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation.[202]

It has been unsuccessfully argued by offenders of the HADD prohibition that the lack of precise codification makes the section void for uncertainty and contrary to the Charter.[203] These terms – harmful alteration,[204] disruption[205] or destruction of fish habitat[206] – have been

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[202] *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 43.

[203] *R. v. Leveque*, [2001] O.J. No. 4437 (O.S.C.) [*Leveque*].

[204] See e.g. *R. v. Jackson*, [1994] A.J. No. 680 (Alta. Q.B.). There it was decided that the word "harmful" in s. 35(1) modifies only the word "alteration" and not "disruption" or "destruction."

[205] See e.g. *Leveque*, *supra* note 204 at para. 40. The word "disrupt" is defined as that which would: "interrupt the flow or continuity of...bring disorder to, separate forcibly, shatter, rupture." See also *R. v. Maritime Electric Co.*, [1990] P.E.I.J. No. 27 (P.E.I.S.C.). The court found that the Crown need only prove that one element of a fish habitat has been harmfully altered or destroyed, beyond a reasonable doubt. … In this case fish habitat was divided into two requirements. First, the fish habitat must be spawning grounds and nursery, rearing, food supply or migration areas. Second, the fish habitat must be an area on which fish depend directly or indirectly in

considered by the courts but there is no definitive definition that I can point to for purposes of this thesis.

8. Fish Habitat in the *Fisheries Act*

In order for a fishery to exist all of the life processes of fish as set out the *Fisheries Act* must be ensured – not just the location where the fish can be caught. To protect the fishery, the Parliament must have the jurisdiction to legislate on all essential aspects of the life processes. One could categorize these matters as either an integral part of the *Fisheries Act* or necessarily incidental – but there would be no fisheries without each of the stages included in

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order to carry out their life processes. "…(F)ish habitat has been interpreted by the courts as limited to the protection of physical habitat factors that are 'necessary for the protection of fisheries' rather than the protection of physical factors not required for the protection of fisheries." It is not enough that fish swim in a particular area, the area must be a fish habitat where one of these four activities demonstrably takes place. See also *R. v. Zuber*, [2004] O.J. No. 2989 at para. 14 ".., the courts have stated that the damage to the fish habitat must be 'somewhat permanent'. Any harmful alteration, disruption or destruction of a fish habitat must be something more than minimal or trivial." See also *R. v. Bowcott*, [1998] B.C.J. No. 2342. (B.C.S.C.) at para. 23 where the Court says, "(It) is …(not) necessary for the Crown to prove destruction of fish habitat will actually result in destruction of fish."

[206] See e.g. *R. v. Canadian National Railway*, 2004 BCSC 727, [2004] B.C.J. No. 1121. Canadian National Railway ("CNR") was charged with an HADD when it caused the amount of water in a creek to be reduced by a CNR beaver crew dismantling two beaver dams immediately decreasing the water level. The Court indicated that the trial judge had found, at para. 2, that "[t]he water level decrease in the ditch had wide ranging and significant harmful effects ... The reduction in the water resulted in the loss of fish habitat in what had been the shallow areas of the ditch, and it resulted in a loss of fish habitat in the back channels of the wetlands fed by the water from the ditch." The Court found on the fact that the adjacent wetlands and its channels were fish habitat and the areas contained fish including Dolly Varden, Char, Coho and Steelhead. The removal of the two dams caused, at para. 4, "(i) an almost immediate significant decrease in the water level; (ii) as the water level decreased, it withdrew from the banks, causing a reduction in the overhanging cover from foliage; (iii) the decrease in water level resulted in loss of fish habitat in the shallow areas, the margins of the Creek; (iv) water flowed from the channels in the wetlands at the south bank of the Creek, drying up back channels, resulting in a significant loss of back channels as fish habitat." The trial judge was satisfied beyond a reasonable doubt that any one of the above results was evidence of the harmful alteration of fish habitat, contrary to s. 35(1) of the Act. CNR was acquitted on the basis of a due diligence defence. It is my opinion that the due diligence defense would not be available to the province which has knowingly set a water level below the scientifically established IFN, based on their own study, as discussed in Chapter 6 above. See also *BHP*, *supra* note 141. In *BHP*, the N.W.T. Supreme Court also upheld the jurisdiction of the *Fisheries Act* as extending to dewatering a stream.

the definition of fish habitat namely: spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.[207] Each of these stages require the presence of water which in a river means there must be a flow rate.

(a) Flow Rate is an aspect of Fish Habitat

Flow rate is most often an issue in relation to use of water by the hydro electric industry. It was argued in the 2002 decision, *Lavoie v. Canada (2002)*,[208] that the operation of a power dam on a river in Nova Scotia caused a fluctuation in flow to the extent that it interfered with the river causing hazardous alteration of fish habitat under section 35. The Court did not make a decision on the issue of the flow rate due to the fact that it found the matter to be moot – the dam was fully constructed at the time the complaint was made. However, the court did not decline jurisdiction on the issue. The possibility remains for the argument that the operating license of the dam can be amended to allow for the appropriate flow in the river as discussed in *Carrier-Sekani*[209] in Chapter 4. *BHP*,[210] discussed above also, considers instream flow – dewatering a stream – to be within the scope of this section. Therefore, any

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[207] *Federal Fisheries Act Bill*, *supra* note 173 includes the same protection but with different authorizations by the DFO to approve breach. For instance, s. 59 reads: "(1) No person shall carry on any work or undertaking that results in the harmful alteration or disruption, or the destruction, of fish habitat. (2) No person contravenes subsection (1) if (a) the alteration, disruption or destruction is authorized by the Minister and is done in accordance with the conditions established by the Minister; or (b) the work or undertaking is carried on in accordance with the conditions set out in the regulations or with any other authorization issued under this Act. (3) For the purposes of subparagraph (2)(b), a lease issued under section 36 is not an authorization."

[208] *Lavoie v. Canada (Minister of the Environment)*, 2002 FCA 268, [2002] F.C.J. No. 946.

[209] *Carrier-Sekani*, *supra* note 168.

[210] *BHP*, *supra* note 141.

instream flow proposed by Alberta ought to be within the jurisdiction of the *Fisheries Act*. The same standards of flow applied to the hydro electric industry ought to be applied to the provincial government's management of water.[211]

It is difficult to make the distinction between the dewatering done by a power company pursuant to a strategy necessary to manage the power supply and a provincial water management strategy. Managing the flow of the river or surface water to the standards imposed by the DFO should be the same – fish habitat does not concern itself with who the decision maker is or why the water is being taken.

(b) Riparian Areas as an aspect of Fish Habitat

The court has concluded that it has jurisdiction under section 35 to protect the riparian areas that impact fish habitat. In *R. v. Denault (1998)*,[212] an Aboriginal band while constructing a trailer park on the banks of a wetland adjacent to the Thompson River, a salmon river, allowed silt to enter the salmon inhabited river. The Court concluded that the Band was guilty of an offense under section 35 because it failed to take the necessary precautions to protect fish habitat. The DFO considered that the addition of landfill constituted a HADD due to the presence of spawning fish in the slough waters. The entitlement of the First Nations to fill the slough on their land was subject to the protection of fish habitat which now includes the banks of rivers.

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[211] *R. v. British Columbia Hydro and Power Authority*, [1997] B.C.J. No. 1744 (B.C.S.C.).

[212] *R. v. Denault*, [1998] B.C.J. No. 3364 (B.C.P.C.)

Fish habitat needs healthy riparian areas so the rivers do not fill up with silt and the foliage on the bank offers shade. In the South Saskatchewan River Basin, the poplars require seasonal flood waters to survive and propagate. Flood waters are not available when the waters are diverted or allocated from the river for human use.

As discussed, section 35 provides that a work or undertaking must not adversely affect fish habitat. Physical works such as run of river licenses which change the flow rate and construction which affects riparian areas adjacent to streams[213] are works that are approved by the Province but are subject to the jurisdiction of the DFO.

9. When is an HADD not an HADD?

Notwithstanding the presence, or likely presence, of HADD conditions, the *Fisheries Act* creates opportunities for the DFO to mitigate the impact of the legislation on such conditions. The DFO has discretion under the *Fisheries Act* subsection 35(2) [214] and subsection 37(1)[215] to work with the offender, or potential offender, to reduce or eliminate the potential for an HADD. In both cases, there is the potential for the Minister to trigger a federally authorized

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[213] *Ibid*. In this case the First Nations Band owned property adjacent to the river and brought in landfill to expand the development of a trailer park by filling a slough adjacent to the river. The DFO claimed jurisdiction over the riparian area and the work was not allowed.

[214] *Fisheries Act Section 35(2)* No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

[215] *Fisheries Act* s. 37(1) provides that any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat is subject to a request for information by the Minister for information (plans, studies, procedures, schedules, analyses, samples etc.) relating to it that is or is likely to be affected by the work or undertaking as will enable the Minister to determine whether the work or undertaking results or is likely to result in an HADD and what measures would prevent or mitigate same. There is a procedure to require modifications , to restrict operation or essentially cancel it.

environmental assessment. Involvement by the DFO at this level, would increase the understanding of Minister in the potential for an HADD and increase the pressure on the Province to consider the effect of its plans on fisheries.[216]

Alternatively, the DFO has developed a practice of issuing Letters of Advice which indicate that the DFO is aware of the potential HADD and will not prosecute if the conditions in the Letter of Advice are met.[217]

These sections also empower the Minister to determine the extent of any potentially offending situation such as the water management strategy of the Province of Alberta, at least at the point where it is a "work or undertaking'. Although the DFO was present during meetings to design the *AWMP for SSRB* there is no indication that the Minister's authority under these sections was considered.

Can the Province destroy the fish habitat killing all the fish and then claim that there are no fisheries and therefore no federal jurisdiction? Note that the *Fisheries Act* – for purposes of the definition of "water frequented by fish"[218] – does not apply "where proof is made that at

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[216] See *Friends*, *supra* note 81. In this case the court considered the Minister's responsibilities under subsections 35(2) and 37(1) and whether the circumstances were in place to trigger an environmental assessment. In that case, the Minister made a request pursuant to s. 37 but did no more. The application for mandamus to compel the Minister to act was denied. "The answer was negative as the under s.37 of the *Fisheries Act* has been given a limited ad hoc legislative power which does not constitute an affirmative regulatory duty. For that reason, I do not think the application for mandamus to compel the Minister to act is well founded."

[217] See A. Kwasniak "*Slow on the Trigger: The Department of Fisheries and Oceans, the Fisheries Act and the Canadian Environmental Assessment Act"* (2004) Dalhousie Law Journal 347. In this Article, Professor Kwasniak considers the practice of the Ministry to issue letter of advice.

[218] *Fisheries Act* s. 34.

all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish." If a party, by its practices, eliminates all of the fish, and then claimed it is not water frequented by fish, the court would characterize this action as 'spurious'.[219]

The effect of the federal grant of the senior large diversion licenses to hydropower, municipal and irrigation licenses on the argument in this thesis has not been explored. Other questions that have arisen: Does the fact that the licenses were issued by the federal government affect the way in which the matter is dealt with under the *Fisheries Act*? Did the federal legislature approve the degradation of the fisheries by the federal approval of irrigation and the *NWIA*?[220] It is arguable that if the act of managing water below the *FH IFN* is contrary to the fisheries power now,[221] in the twenty first century, it would have been in the late 1890's and thereafter had the current water short situation been contemplated.

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[219] *BHP*, *supra* note 141 at 68. Dewatering of the lakes to access the (minerals) beneath would obviously eliminate those fish habitats. The court did not accept the argument that the destruction of fish habitat would eliminate the DFO jurisdiction.

[220] The research of the irrigation licenses is beyond the scope of this thesis. It is my understanding that many of the irrigation licenses are attempting to work out issues with the terms of their licenses.

[221] See Wenig, *Fisheries Act as a Framework*, *supra* note 158 at 115 for a review of the historical provisions of the *Fisheries Act*. He speculates that at that time, the concept of protecting fish in the North-west Territories was not contemplated due possibly to very few people present, a great deal of water and no contemplation of the fish or the extent of federal jurisdiction. This argument raises the prospect of the application of the Living Tree doctrine discussed in Chapter 3 above.

10. Example of Authority over *FH IFN* exercised in the *Fisheries Act*

I have shown that the *Fisheries Act* concerns fish habitat which includes instream flow – there can be no fish without sufficient water.[222] Certain sections in the *Act* specifically deal with instream flow, such as those sections concerned with obstacles placed in a river for which a a fish-ways is required to allow the fish to pass. Owners are obliged to keep the fish-way supplied with sufficient water to enable fish to migrate. Subsection 20(4) refers to 'any stream' that the Minister determines is in the public interest and is the first section in which the quantity of water is articulated in the *Act*. The actual amount of water is not specified, it is subject to the discretion of the Minister. In this section, the *Fisheries Act* is clearly concerned with instream flow and has made it plain that to maintain sufficient flow for the migration of fish is an important aspect of the fisheries. Therefore it is not unreasonable for the Minister to consider large, or cumulatively large diversions as a result of an *AWMP for SSRB* water management strategy, as having a significant impact on the ability of fish to migrate or worse, to the point that fish habitat is no longer sustainable.

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[222] The water must not only be present but it must also be of the appropriate quality - including temperature. See Government of Alberta, News Release, "Hot fish need help from Alberta anglers" (3 August, 2007), online: Alberta Government <www.gov.ab.ca/home/NewsFrame.cfm?ReleaseID=/acn/200708/218822CC13F8A-08EC-687C-999496A3A06DA3AB.html> (last accessed 14 September 2008). "Hot weather and the lower stream flows of summer are straining some fish at their critical limit. … Some streams in the foothills between Rocky Mountain House and the Montana border are experiencing water temperatures as high as 26 C. Trout and mountain whitefish in those streams are particularly hard hit. The Alberta government is receiving reports of dead fish in shallow parts of rivers, reservoirs and lakes in the southern half of the province. Reports vary from a few to several hundred fish of various species in different locations."

The Act goes on to provide that "every obstruction requires a sufficient flow of water … to permit the safe and unimpeded descent of fish"[223] and further, an owner of an obstruction is required to 'permit the escape into the river-bed below the obstruction of such quantity of water, at all times, as will, in the opinion of the Minister,[224] be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth … necessary for the safety of the ova deposited thereon.[225] Further, section 26 of the *Fisheries Act*[226] provides that 1/3 the width of any stream must be open for fish to migrate. If there is insufficient water the fish cannot do so and the intent of the Act to allow fish to move is thwarted.[227] The lack of water would inhibit movement of fish.[228] The scope of this section could be tested to determine whether a diversion that draws water to the point where fish cannot swim, is a device that unduly obstructs the passage of fish. The device itself does not cause the obstruction but by its operation can be said to unduly restrict the passage of fish. The Act also provides general

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[223] *Fisheries Act* s. 22.

[224] See *Carrier-Sekani*, *supra* note 168, following an action by the DFO against Alcan due to concerns that the minimal water flows were not being maintained in the rivers, the jurisdiction of the DFO to affect instream flow was challenged. The main issue was the scope of the Minisiter of Fisheries and Ocean's power to control flows to the Nechako River under the *Fisheries Act*; there were also some subsidiary issues, such as the quantity of water actually released and the level of flow required for protection of fish but the matter was never brought to trial due to the settlement of the action and the characterization of the agreements as private and therefore not reviewable by the court.

[225] *Fisheries Act,* s.22.

[226] *Ibid*. ss. 26 (1): "One-third the width of any river or stream and not less than two-thirds of the width of the main channel at low tide in every tidal stream shall be always left open, and no kind of …. apparatus shall be used or placed therein."

[227] See also *Fisheries Act,* s. 27: "No one shall b) do anything to stop, impede or hinder fish from entering or passing the fishway or canal or stop, impede or hinder fish from surmounting any obstacle or leap."

[228] See *Fisheries Act* ss.29(2): "The Minister ….. may order the removal of or remove any device that, in the opinion of the Minister … unduly obstructs the passage of fish. The question is whether a diversion pipe or a device under this section."

prohibitions to killing fish or disturbing or injuring a fishery as follows:[229] "No person shall … kill fish in any water … within any fishery described in any lease or license, or shall disturb or injure any such fishery."[230]

It is my opinion that it is not coherent to compel the owner of a fish-way to maintain the river or stream at a level which allows the fish to migrate while at the same time allowing diversions which do not sustain fish as set out in an *AWMP for SSRB*. The principle of coherent interpretation of statutes was recently considered and applied by the Supreme Court of Canada as follows:

> (I)t is important to keep in mind the principles for harmonizing different statutes. Professor Ruth Sullivan expressed these principles as follows, in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 288:
>
> > The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. ... Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred. [231]

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[229] See also *Fisheries Act* 32. "No person shall destroy fish by any means other than fishing except as authorized by the Minister or under regulations made by the Governor in Council under this Act."

[230] *Fisheries Act* s.23.

[231] *R. v. Ulybel Enterprises Ltd.* (2001) SCC 56, 203 D.L.R. (4th) 513 at para. 30.

11. Conclusion

In summary, in this chapter I briefly consider the implied purpose of the *Fisheries Act*, notwithstanding the absence of any statement of an explicit purpose in the *Act*. Next I consider the definition of fish, which, based on the cases, includes the entire life cycle of the fish. Although in the evolution of the jurisprudence, it was once necessary that the fish be of commercial value, the courts have softened that view. [232] I show that the courts are more concerned with the place where a commercial species may be present from time to time. I then consider the HADD provisions of the *Fisheries Act* in section 35 which I argue can apply to the provincial water strategy. I also discuss other sections of the *Fisheries Act* which apply to instream flow to demonstrate the exercise of jurisdiction of the federal Parliament over the matter of water in the stream. The next chapter on the *Water Act* will show the extent to which that Act also concerns instream flow in a manner that is inconsistent with the *Fisheries Act* or alternatively, constitutes an HADD.

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[232] *Ibid.*

CHAPTER 6: SCOPE OF THE PROVINCIAL *WATER ACT*

Water – the sine qua non of Fish Habitat

1. Introduction

Although provincial governments might wish it otherwise so that they have more control, water is a resource different from other resources such as oil, gas and forests; water requires a fundamentally different approach as discussed in Chapter 2. The control over the resource is subject to its inherent need to be shared and in Canada, the Constitution requires that water be shared. My discussion on whether the sharing that is currently in place between Canada and Alberta is constitutional, continues in this Chapter with an examination of the *Water Act*.

This chapter considers the *Water Act* and whether the Province has exceeded its legislative jurisdiction and if so to what extent. Specifically, the question is whether the exercise of provincial jurisdiction in the *Water Act* is inconsistent with the federal fisheries power and the *Fisheries Act*.

In the first part of this chapter, I explore the issue of the constitutional authority of the Province specifically with respect to the exclusive authority over water and fish habitat. In the second part of this Chapter I discuss Alberta's approach to water management. Because certain aspects of the *Water Act* are new as the Act was proclaimed in 1999, there is relatively little jurisprudence available to assist with the interpretation and application of the Act. The intent is to show that, although the provincial legislature has some legislative

jurisdiction over water, it is subject to paramount federal jurisdiction with which it must be consistent. I also point out that although the provincial legislation in its general language espouses aquatic protection, including fish habitat protection, that protection is not evident. Instead, I show that the ethos of Alberta's water management is maximization of the economic and efficient use of water, according to the current understanding of these terms. As a result of the focus on the economic use of water, a water market is being established in the province, the implications of which have not yet been determined. To the extent that the issues discussed in this thesis are not resolved, the water available for the market may be affected. In the third part of the Chapter, I illustrate the effect of the implementation of the Act. This illustration focuses on an *Approved Water Management Plan for the South Saskatchewan River Basin*[233] which I argue is in the form of a regulation and as such codifies water in the stream at a level inadequate for fish. It is this regulation which is demonstrably inconsistent with the federal fisheries power and the *Fisheries Act*. In the fourth part of this chapter, I consider the implications of the inconsistency – including the effect on licensees.

2. Scope of Provincial Constitutional Legislative jurisdiction over Water

In the *Constitution Act, 1867*, there are several sections which provide the potential for provincial legislative authority over water. I discuss seven of these sections which, although they provide the Province with some legislative jurisdiction over water, none gives it exclusively. This will be evident as I discuss each of these seven sections below.

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[233] *AWMP for SSRB*, *supra* note 49.

First, subsection 92(5) of the *Constitution Act* assigns to the province the management and sale of public lands belonging to the province. The province of Alberta acquired public lands from the federal government in 1930/1938 pursuant to the *NRTA*. It was also at this time that the Province acquired interests in water connected to these transferred lands (see Chapter 2). This thesis shows that even if this section gives the Province the legislative authority to manage water connected to public lands, that authority is subject to the federal fisheries mandate.

Second, subsection 92(13), property and civil rights in the province, is under provinces' legislative authority. The majority of the cases in my research concerning water, concerned some aspect of fish. Water, as a property of the province, became vested following the NRTA discussed in Chapter 2. It is further distributed by the licensing system begun by the federal *NWIA* and furthered by the *Water Resources Act* in 1931, as amended, and the *Water Act*. The Constitution requires that the jurisdiction over water be shared and managed for the benefit of all, including as fish, fishery, navigation and property as I have discussed in this thesis. In 1896, the Supreme Court of Canada considered the relationship between 92(13) and 91(12) and in answer to the sixth in a series of questions concerning fish. Although the case strongly supports provincial legislative authority over property, it confirms the legislative power of the federal government to conserve fish.

> Question 6 – Has the Dominion Parliament jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them? Answer.—Certainly not, for the reason that the right of fishing in such non-navigable waters belongs exclusively to the owners of the beds of such waters and because the Dominion Parliament has no power to interfere

> by legislation with this right, notwithstanding the grant by section 92 of the *British North America Act*, subsection 12, or the right to legislate as regards sea-coast and inland fisheries. The exclusive power to legislate as regards, 'property' in a province is by section 92, subsection 13, conferred on the provincial legislatures, and the legislative authority of Parliament under section 91, subsection 12, is confined to the conservation of fisheries by what may conveniently be designated as police regulations.[234]

Therefore, to the extent that the property of water is included in 92(13) it is subject to the federal legislative authority.

The Province has legislative jurisdiction in 92 (16) over "(g)enerally all matters of a merely local or private nature in the Province". It is my contention that surface water, and groundwater which crosses borders, is not a merely a matter of 'local or private nature in a province.' Surface water does not remain within provincial boundaries, rivers are generally connected and feed into or are major river basin systems – such as the South Saskatchewan River. The words 'in the province' limit the scope of provincial jurisdiction over water the extent of which we have not begun to appreciate.[235]

To the extent that diverting water below the *FH IFN* in the South Saskatchewan River can be considered to be a municipal institution in the province pursuant to subsection 92(8) or a

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[234] *Re Fisheries*, *supra* note 14 at para. 1, Question 6.

[235] See S. A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis*, (Calgary: Canadian Institute of Resources Law, 1991) at 29. Kennett argues it is foreseeable there may be an issue particularly where upstream provinces (provinces higher up on the stream), which can affect the flow of water to downstream provinces legislate in a manner which may impact on either the quality or quantity of water received by a downstream province. Kennet says at 29, "watersheds which cross provincial boundaries may give rise to water management problems in areas of provincial jurisdiction since actions in one province – consumption of water for irrigation,…dams,.. waste disposal – may have serious consequences for residents in another creat(ing) a risk of serious interprovincial conflicts over the use of shared watershed. The avoidance and resolution of these conflicts are major challenges for Canadian water management."

local work or undertaking pursuant to subsection 92(10), the constitutional test of inconsistency must still be applied. Fluoridation of water in municipal systems demonstrates the issue. In a B.C. case, it was argued that fluoridation of municipal water was outside provincial legislative authority. The Supreme Court of British Columbia disagreed with the argument, testing for inconsistent federal law and finding that fluoridation in water was a valid municipal institution or a local work or undertaking. After conducting the basic constitutional analysis outlined in this thesis, the court in this case stated:

> There is no evidence that fluoridation of public water cannot be done consistently with any of the federal statutes … referred to. …. The pith and substance of s. 523 is clearly a matter that deals with local works and undertakings, that is, the public water system being administered by the local government in question. The fact that the fluoridation of a local water system may result in the fluoride being contained in food substances or beverages prepared with that local water, which substances may be ingested elsewhere, including outside the province does not invalidate s. 523. This is simply an incidental extra provincial effect.[236]

Therefore the court confirmed that the valid provincial (municipal) law had an incidental extra provincial effect which was not inconsistent with any federal law. If, by analogy, Alberta's water management strategy, under the auspices of the *Water Act,* is an undertaking of the nature in this section, exclusively within provincial jurisdiction, yet inconsistent with the *Fisheries Act*, it will not invalid to the same extent as the fluoride legislation.

Water is necessary for agricultural and section 95 grants legislative authority over "Agriculture in the province … as far only as it is not repugnant to any Act of the Parliament of Canada." It is my thesis, that to the extent that legislative authority for irrigation in the

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[236] *Millership*, *supra* note 79 at para. 56.

Province is authorized under the auspices of this section, the manner in which irrigation is legislated must not be repugnant or inconsistent with federal jurisdiction under the inland fisheries power or the *Fisheries Act*. It is therefore my position that irrigation is also subject to the standard for *FH IFN*.[237]

To the extent that water is considered to be connected to land, the legislative authority for it is found in s. 109 which provides that "(a)ll Lands, Mines, Minerals, and Royalties … belong to the several Provinces … in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." This section applied to the original Canadian provinces which was intended to be duplicated by *NRTA* (1930) discussed in Chapter 2 when the vesting of water transferred from the federal Crown to the Provincial Crown.[238] In 1896, the Privy Council, on the issue of ownership of water under this section, concluded that it does not matter whether water is vested in the federal or provincial Crown, the same rules apply:

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[237] See *Clipperton Report*, *supra* note 5 which is the key source cited in this thesis in support of the argument that, to the extent the *AWMP for SSRB* concerns agriculture, there is no authority in that section to override the federal fisheries jurisdiction.

[238] During the course of my research I discovered an argument concerning a better claim to resources in Alberta than in the original provinces of Canada – which I set out briefly here but have not explored further in this thesis. It has been argued that the western provinces have an even better right to their resources than the originating provinces dues to the wording in the *NRTA* and the *Constitution Act*, which reads- "notwithstanding anything in the *British North America Act, 1867*, or any Act amending the same, or any Act of the Parliament of Canada" With this legislation, the provinces of Manitoba, Alberta and Saskatchewan were intended to be placed in the same position as the original provinces. However in *Reference Re Proposed Federal Tax On Exported Natural Gas*, [1982] 1 SCR 1004 at para. 104, the issue was whether the words the *Constitution Act, 1930* gave the province of Alberta a stronger right to resources than that of the founding provinces under s. 109. The 1930 amendment to the B.N.A. Act and the presence of 'notwithstanding' in s. 1 of the Act was argued to make the grant or transfer of resources confirmed by the 1930 amendment immune from any term in the 1867 Act, as amended, including the expression of "notwithstanding" in s. 91." The Supreme Court of Canada in that case did not make a decision on this argument concluding" "whether the province of Alberta's title to its resources be on the level of s. 109 of the *B.N.A. Act* or on a higher plane, the interests of the province are not subject to federal taxation, implemented under s. 91(3), where no regulatory or other valid federal power is the constitutional basis of the taxation in question." (At para. 105). This case illustrates the importance of the correct and actual exercise of the fisheries power by the federal government in the *Fisheries Act*.

> Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same.[239]

The provincial Crown has a higher obligation to comply with federal legislation, it must observe a regulation which affects its jurisdiction whereas the reverse is not the case, so the status is not precisely the same when held by either Crown. This issue was discussed extensively by the Supreme Court of Canada in *Reference re Waters & Water-Powers*:

> Question 8: Has a Province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with the Dominion requirements as to navigation? … A province is, moreover, bound, of course, in dealing with rivers in respect of which it has powers of control, to observe any regulation validly enacted by the Dominion in relation to navigation works or in exercise of its authority over navigable waters. [240]

In this case, the Supreme Court clearly states that the Province has the right to manage its water provided that it complies with the Dominion legislation. In another important case, *Friends* the Supreme Court again tackles the extent of provincial jurisdiction over water. The court was primarily concerned with navigable waters affected by the construction of the Oldman Dam, but made the observation that "if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists."[241] The court goes on to consider the nature of that right and then concludes with this statement:

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[239] *Fisheries Case*, *supra* note 124 at para. 4. This quote is also used in the introduction to Chapter 4.

[240] *Water Powers Reference*, *supra* note 105 at para. 41.

[241] *Ibid.,* at 68.

> …the right of navigation is not a property right, but simply a public right of way. It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. For example, in *Attorney-General v. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240, a relator action to enjoin a public nuisance causing an obstruction in the River Thames and an adjoining thoroughfare along its bank, the Lord Chancellor said, at par 246.
>
> > I consider it to be quite immaterial whether the title to the soil between high and low water-mark be in the Crown, or in the City of London, or whether the City of London has the right of conservancy, operating as a check on an improper use of the soil, the title being in the Crown, or whether either Lord Grosvenor or Mr. Johnson have any derivative title by grant from any one having the power to grant…It is my present opinion that the Crown has not the right either itself to use its title to the soil between the high and the low water-mark as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects. If the Crown has not such a right, it could not give it to the City of London, nor could the City transfer it to any other person.[242]

Therefore, if fishing is a public right similar to navigation, which it arguably is, then such a right is paramount to the right of the owner of the bed of the river, namely the province, if owning the bed is the source of provincial power. I quote extensively from this case in order to demonstrate that if the Federal government did not have the right to vest the water in the provincial Crown without it being subject to the *Fisheries Act*, and if provincial Crown does not in turn have the authority to manage the water in a manner inconsistent with federal legislation, it also does not have the authority to give to any other person the right to interfere with federal authority. Therefore, the right of a Licensee to withdraw water below *FH IFN* could be considered to be an empty right.

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[242] *Ibid.,* at 69.

In summary, in this section I have dealt at length with the several sections of the *Constitution Act* which give the Province legislative authority over water and have shown that in no case does the Province have exclusive authority which challenges the paramountcy of the federal authority.

3. Exercise of Provincial Legislative Authority as set out in the *Water Act*

The *Water Act* is the focal point for water management in Alberta, pursuant to which the Province asserts its right to divert and use all water. They key section of that Act reads as follows:

> The property in and the right to diversion and use of all water in the Province is vested in Her Majesty in right of Alberta except as provided in the regulations.[243]

This section does not reference the limitations on such power; it treats all water in the Province as wholly owned as if all of the aspects of property were available to it. Alberta's assertion to the property in water does not reflect limitations on the use of water such as are set out in the *NRTA*, the *Constitution Act*, *1867* or in Inter-provincial agreements and entitlements. For example, diversion limits are set by the Master Agreement on Apportionment among Alberta, Saskatchewan and Manitoba at 50 per cent of the mean flow of the rivers without any reference to *FH IFN*. An instream flow rate of 42.5 m3/sec. has been set for the South Saskatchewan River, and this is measured at the gauging point just

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[243] *Water Act*, *supra* note 7, s. 3(2).

beyond the Saskatchewan border.[244] This basin is managed as a unit to meet the commitment in this agreement but different sub basins contribute differently. For example, the Red Deer River, apparently the only river which is not over allocated in the South Saskatchewan River basin, may be required to make the greatest contribution to the apportionment of water. If the Red Deer River is the primary source of water to meet the agreement, the arrangement allows the other rivers in the SSRB to be drawn down or diverted below fifty per cent of their flow thereby giving Alberta the opportunity to manage the flows in these rivers at exceedingly low levels below *FH IFN*. The Master Apportionment Agreement does not consider fish habitat. However, the agreement does contain water quality obligations which have not been substantively considered in the South Saskatchewan River Basin even though science recognizes that flow rate affects the dilution capacity of a river which in turn affects water quality for fish. It is also notable that the provinces of Saskatchewan and Manitoba have been complicit in the way water is managed in this agreement in a manner inconsistent with the federal fisheries mandate to protect *FH IFN*.[245]

4. The Inconsistency of the *Water Act*

The next section of this chapter discusses the *Water Act* and its implementation beginning with its primary purpose – or pith and substance with the intent to show that it is inconsistent

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[244] See *AWMP for SSRB*, *supra* note 49.

[245] See *Master Agreement on Apportionment* (October 13, 1969) online: Environment Canada <www.mb.ec.gc.ca/water/fb01/fb00s05.en.html> (last accessed 14 September 2008) among Alberta, Saskatchewan and Manitoba (note Schedule E includes the *Water Quality Agreement* of 1992 which contains some but not all of the water quality factors affecting fish).

with the federal fisheries power and the *Fisheries Act*. The *Water Act* supports the process by stating its purpose, which includes a reference to a healthy environment, as follows:

> The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future; (b) the need for Alberta's economic growth and prosperity; (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces; (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making; (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management; (f) the important role of comprehensive and responsive action in administering this Act.[246]

In this section, the management of water for all purposes appears to be addressed with the exception of *FH IFN* which ought to be addressed clearly in the language. If water in the Province is managed to sustain and ensure a healthy environment as stated in the Act, assuming that these standards would at least meet *FH IFN* levels, then perhaps the arguments made in this thesis would have no merit. However, these standards are not set.[247] It is notable that among the competing uses for water, *FH IFN* within the aquatic environment is but one so that the Province is obliged to consider the competing uses. The problem is that the Province has not given appropriate regard to the limitations on the Province in deciding how to allocate water.

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[246] *Water Act*, *supra* note 7, s. 2.

[247] *Mountain View Regional Water Services Commission, Re*, [2005] A.W.L.D. 1105 at para. 40 (A.E.A.B.), the Board says, "It is important for the Board, and Alberta Environment, to listen to the concerns of the citizens of Alberta. As the purpose of the *Water Act* is to encourage wise use of Alberta's water resources and to allow Albertans an opportunity to provide input into management planning and decision-making…."

The Act itself, the regulations pursuant to the Act, and the exercise of authority pursuant to the Act are not consistent with the noted stated purpose of the Act. The scheme in the *Water Act* provides that water is managed in accordance with a plan based on a framework[248] – which includes a strategy,[249] part of which is the protection of the aquatic environment, including fish habitat, without any clear strategy to achieve or protect it.[250] In fact, the opposite result is achieved by the authorization[251] of the diversion of water in excess of the scientific instream flow needs in a manner inconsistent with the *Fisheries Act*, as set out in the Approved Water Management Plan for the South Saskatchewan River Basin.[252]

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[248] *Water Act*, *supra* note 7, s. 8(2) states that " the Minister must establish a strategy for the protection of the aquatic environment as part of the framework for water management planning for the Province." The "aquatic environment" is defined in s. 2(h) of the *Act* to include "the components of the earth related to, living in or located in or on water or the beds or shores of a water body, including but not limited to (i) all organic and inorganic matter, and (ii) living organisms and their habitat, including fish habitat, and their interacting natural systems". See also Alberta Environment, *Framework For Water Management Planning* (Edmonton: Integrated Resource Management) online: <www3.gov.ab.ca/env/water/legislation/Framework_Text_Only.pdf> (last accessed 14 September 2008) [*Framework For Water Management*] at 23 which contemplates the requirements of fish habitat: "For example, the need to specify the rate and quality of flow for fish habitat for a particular stream may lead to the establishment of a WCO. Once established, site specific objective will be useful in choosing the appropriate water management tools to meet the objectives. An example of such a tool is a condition in a license that supports an instream objective." And at 26 "…. the *Fisheries Act* (Canada) prohibits the harmful alteration, disruption or destruction of fish habitat, unless allowed by an authorization. Conditions placed on authorizations allowing the harmful alternation, disruption or destruction of fish habitat are intended to compensate for any habitat loss resulting from an activity and meet, at a minimum, the Department of Fisheries and Oceans 'no net loss guiding principle'."

[249] The strategy has its own attributes as set out in the *Water Act*. See *supra* note 7, s.8 (2): "The Minister must establish a strategy for the protection of the aquatic environment as part of the framework for water management planning for the Province." See also *supra* note 7, s.8(3): "The strategy referred to in subsection (2) may include b) guidelines for establishing water conservation objectives, c) matters relating to the protection of biological diversity."

[250] *Supra* note 7, s. 1(h) defines "aquatic environment" to include "(ii) all living organisms, their habitat, including fish habitat and their interacting natural systems."

[251] *Ibid.*, s. 7(2) which states that the plan "…may include… (f) matters relating to the development of water conservation objectives."; s. 8(2) "…may include (b) guidelines for establishing water conservation objectives."

[252] *AWMP for SSRB*, *supra* note 49. See Appendix I for a comparison between the WCO set out in the *AWMP for SSRB* and the values suggested by the *Clipperton Report*, *supra* note 5.

5. Inconsistency of the Approved Water Management Plan

In order to attempt to deal with complex water management issues, the *Water Act* authorizes the preparation of detailed, geographically focused water-management plans.[253] A water-management plan, once approved by order in council, becomes an Approved Water Management Plan. It is my argument that this Approved Water Management plan may in effect be a regulation and therefore a legislative act of the province, subject to analysis for constitutional validity.[254] The basis for this position is that the Approved Water Management

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[253] *Supra* note 7, s. 11. To be an approved water management plan the plan must receive ministerial approval. If the approval is a legislative act the approved water management plan may be considered to be a regulation inconsistent with the fisheries power and therefore unconstitutional, in excess of jurisdiction and void. Alternatively, if the approval is an administrative act it is inconsistent with or a breach of the *Fisheries Act* and the officials participating may be liable for their contribution to the same. See also *Roncarelli*, *supra* note 120 at para. 166: "The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly, I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification. I content myself with quoting the well known passage from Dicey's "Law of the Constitution", 9th ed., p. 193, where he says '... every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.'"

[254] *Friends*, *supra* note 81at para. 33. Laforest, J. indicated that "[t]here is of course no doubt that the power to make subordinate legislation must be found within the four corners of its enabling statute, and it is there that one must turn to determine if the Act can support delegated legislation of a mandatory nature, the non-compliance with which can be found prerogative relief." The court applied the definition of "regulation" found in the federal *Interpretation Act*, R.S.C. 1985, c. I-21 which includes the following: "an order…b) by or under the authority of the governor in council" and found that the guidelines repeatedly used the word 'shall' indicating a clear intention that the guidelines in that case "shall bind all those to whom they are addressed, including the Minister of the Environment himself", at para. 35. Alberta's *Interpretation Act*, R.S.A. 2000, c. I-8 defines "regulation" in 1 (1)(c) by saying: " 'regulation' means a regulation, order, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted (i) in the execution of a power conferred by or under the authority of an Act, or (ii) by or under the authority of the Lieutenant Governor in Council, but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons." The application of this principle to the approval by the Lieutenant Governor in Council of a water management plan can be argued to elevate it to the level of a regulation. However, the *Water Act* provides in s. 11(4) that "the *Regulations Act* does not apply to an approval of a water management plan under this section or to an amendment of an approved water management plan or

Plan – or regulation - must be considered by the Director when making key decisions for new licenses (clause 51(4)(a)),[255] transfers (section 82)[256] or approvals subsection 38(2).[257]

The *Water Act* states that an Approved Water Management Plan can set the instream flow rates in the form of a Water Conservation Objective (WCO); which, once included, must be considered by the authorized Director when making a decision to authorize a diversion. It is mandatory that the Director consider the Approved Water Management Plan but it is not mandatory that it is applied by the Director.[258] The only *AWMP for SSRB* requires that the Director, before making a decision on a transfer of a license, consider any significant adverse effect on "water quality (including public health and safety and assimilative capacity)".[259] Alll is not lost. Although the *AWMP for SSRB* does not mention a required flow rate to protect the environment it could do so. If this were the case, the Director would be compelled to consider it, and if in the process the plan is ignored the principles of judicial review will be applied and in the process of judicial review the court could determine that the

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its cancellation under section 12." (Section 12 permits the Lt. Gov. in council can cancel or amend a Water Management Plan (WMP) or authorize the Minister to cancel or amend a WMP).

[255] *Supra* note 7, s. 51(4)(a).

[256] *Ibid.*, s. 82(1), 82(5).

[257] *Ibid.*, s. 38(2).

[258] *Ibid.*, s. 51(4). WCO is defined as follows: s. 2 (hhh): "'water conservation objective' means the amount and quality of water established by the Director under Part 2, based on information available to the Director, to be necessary for the (i) protection of a natural water body or its aquatic environment, or any part of them, (ii) protection of tourism, recreational, transportation or waste assimilation uses of water, or (iii) management of fish or wildlife - and may include water necessary for the rate of flow of water or water level requirements."

[259] See *AWMP for SSRB*, *supra* note 49 at 14.

Director did not give the *AWMP for the SSRB* the appropriate weight and compel the Director to apply it.[260]

6. The Approved Water Management Plan - Opportunities

The *Water Act* provides some legislative tools to increase the allocation of water in the stream. One of those tools is a Crown reservation license which has the potential to designate water for *FH IFN*. However, although unallocated water may be reserved for the Crown for a particular use, unless there is a stated to reserve the amount of water necessary to achieve *FH IFN* the Crown reservation is not a meaningful tool. In addition, in the case of a Crown reservation, there is no statutory guarantee that the water reserved will remain in the stream or contribute to the health of the fisheries. I do acknowledge that a recent Crown reservation is a step in the right direction.[261] The most glaring example of where the provincial process fell short and missing an opportunity to achieve *FH IFN* is the *AWMP for SSRB*.[262]

Another tool for increasing instream flow is an approved water management plan which can set the level of water in the stream. In the case of the *AWMP for SSRB* –the first plan in the

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[260] The principles of administrative review include the process by which the decision of the Director is reviewed by the court to determine whether it is a reasonable or correct decision. An extensive discussion on this process is beyond the scope of this thesis.

[261] *Supra* note 7, s. 51(2). Government may apply for a license and the Director may issue or refuse to issue a license to the government for "c) providing or maintaining a rate of flow water or water level requirements for the purpose of implementing a water conservation objective." See AR Reg. 171/2007. http://envext02.env.gov.ab.ca/pls/xedp_apv/avwp_avwh1000_02.actionquery (site last visited April 24, 2009).

[262] See *AWMP for SSRB*, *supra* note 49.

Province –the levels for the water conservation objectives or instream flow are set at a level less than *FH IFN* as shown in Appendix 1 to this Chapter. Although the *AWMP for SSRB* is labeled by the Province as merely a guideline which replaced the former regulation, it is my position that the guideline as stated above is in fact a regulation and therefore is subject to the same constitutional scrutiny as other legislative instruments.[263] This *AWMP for SSRB* guideline contains a water conservation objective which the Director *must* refer to when deciding whether to grant further diversions. Therefore, the decision of the Director to approve a diversion consistent with the *AWMP for SSRB* is an act of a public officer under the auspices of a government supported document and ought to be reviewable in a manner similar to the actions of the public officer discussed in *Roncarelli v. Duplessis* above. That is, the decision of the Director to authorize a diversion below the level necessary for FH IFN ought to be a reviewable decision. It is notable that a permit to discharge material into the air does not offer a defense to a charge under the *Fisheries Act*.

In addition, water-quality issues other than temperature and dissolved oxygen were not considered in the planning process for the *AWMP for SSRB* notwithstanding the impact of temperature, dissolved oxygen and substances such as ammonia and nutrients on fish habitat. It is important to note the quantity of water affects the dilution capacity of the river, and the government's own reports indicate that there are "…no healthy sites (on) the St. Mary and

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[263] *Supra* note 7, s. 14: "(1) The Minister may establish water guidelines. 2) The *Regulations Act* does not apply to water guidelines." There seems to be a lack of coherence between what receives regulatory status and what does not.

South Saskatchewan Rivers …".[264] Such an admission ought to be construed as an admission of inconsistencies with the *Fisheries Act*.

7. Water Conservation Objective

This section of my thesis is intended to show the actual point at which the exercise of provincial jurisdiction is inconsistent with the exercise of the federal jurisdiction over fisheries. It rests with the decision of the amount of water in the stream. A WCO is defined in the *Water Act* as the amount of water available for three stated objectives – the environment, recreation, or[265] management of fish and wildlife.[266] The WCO is used frequently in water-management documentation and is established in three ways: an Approved Water Management Plan, an (unapproved) water management plan which has not been officially confirmed by an order in council, or set by a Director outside a plan.[267] Various amounts are authorized in the SSRB WMP and in licenses, including a fixed amount for an entire year, or it may vary according to the natural hydrological cycle. It is my argument that an Approved Plan which authorizes a WCO less than *FH IFN* is inconsistent with the *Fisheries Act* and tantamount to an HADD. There is no provision in the Act that requires the WCO to be

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[264] Alberta Environment, *Aquatic and Riparian Condition Assessment of the South Saskatchewan River Basin* (Edmonton: Alberta Environment, 2004).

[265] E. Driedger, *Construction of Statutes*, 2nd. Ed. (Toronto: Butterworths, 1983) at 16 "or" does not mean "and", and "and" does not mean "or." But in normal usage, "and" and "or" can produce the same result.

[266] WCO defined, *Supra* note 258.

[267] *Ibid.*, s. 15: "(1) The Director may establish water conservation objectives. (2) The Director must engage in public consultation that the Director considers appropriate during the establishment of a water conservation objective. (3) Information on a water conservation objective established by the Director must be made available to the public in a form and manner satisfactory to the Director."

connected to the amount of water that fish need. Therefore, when considering the plan as the Director must, the Director – when deciding whether to grant diversions – can approve a diversion consistent with a WCO less than the amount of water fish need.

Both the granting of a license by the Director to divert water that fish need and the actual diversion by a licensee contribute to the HADD.[268]

To further compound the problem of the unmet *FH IFN*, the Province created water licenses which may continue in perpetuity.[269] These long term licenses include those licenses applied for prior to January 1st, 1999 (the *Water Act* came into being on that date) for which water had not been diverted. The impact on the rivers of these yet to be approved licenses will not be fully understood until all of the authorized diversions are actually occurring. These licenses are protected, such that in the event their provisions are inconsistent with the *Water Act* the License terms prevail.[270] Therefore, protected licenses, if they contain no instream flow rate requirements or contain a license term which specifies an instream requirement less than *FH IFN*,[271] can offend the *Fisheries Act* even if the *Water Act* is amended to be

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[268] *Framework for Water Management*, *supra* note 250 at 26. The possibility of an HADD under the *Fisheries Act* is acknowledged but there is no direction within the framework, strategy, or approved water management process concerning fisheries except the reference to the authorization of an HADD.

[269] *Supra* note 7, s. 18 recognizes "deemed licences" granted prior to the *Water Act* – many of these were granted with no expiry date under the *Water Resources Act*, *supra* note 8.

[270] *Ibid.*, s. 18(2)(b).

[271] See *AWMP for SSRB*, *supra* note 49. The plan provides that all provincial infrastructure such as the Dickson and Oldman Dams will be operated to meet the WCO. It does not state that the dams will be operated in a manner consistent with FH IFN.

consistent, unless licenses are also amended.[272] There is much work to be done to bring the *Water Act* into compliance with the *Fisheries Act*.

The *AWMP for SSRB* provides a helpful case study for this thesis. In this Plan, WCO's are set at levels below what the fish need according to the best science available.[273]

This inconsistency between the *Water Act* and federal fisheries is acknowledged by the Province in its own reports:

> Between the Carsland and the Eastern Irrigation district dam at Bassano, the Bow River is gradually transformed from cold to cool water aquatic habitat. The diversion of up to 90% of the streamflow for irrigation at the EID dam at Bassano has drastically reduced the amount of water in the river, and consequently the fish-producing capability of the remaining 167 km of the river to its junction with the South Saskatchewan River. The Bow River between the Bassano Dam and the Grand Forks is classified as cool water aquatic habitat, but water temperatures of up to 29C experienced in that part of the river exceed the tolerance of cool water fish species – evidence of significant alteration of fish habitat. During low discharges, aquatic plants in the warm, shallow river cause low dissolved oxygen concentrations and fluctuations in pH. These factors combine to stress and occasionally kill fish – evidence of destruction of fish.[274]

Further evidence of the inconsistency of the provincial undertaking with the federal fisheries power and the *Fisheries Act*, is evidenced in the *AWMP for SSRB* which states that: "limits

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[272] The only example of a *FH IFN* I was able to find is the Highwood River *FH IFN* which was developed due to the direction of the Natural Recourses Conservation Board (NRCB) following a formal hearing concerning diversions from the Highwood River. It is the first *FH IFN* established in the province and although it is not included in an approved water management plan it is part of the decision of the NRCB and is direction to the province regarding water management. See *Revised Highwood Diversion Plan*, NR 2008-01 (NRCB).

[273] See Appendix I below.

[274] See *Clipperton Report*, *supra* note 5 at 23.

for water allocations are being reached in the Bow, Oldman, and South Saskatchewan River sub-basins."[275] These limits do not correspond to *FH IFN*, but to an amount that corresponds to the obligation to meet the amount of water Alberta is obliged to pass to Saskatchewan. This state of affairs is further illustrated by comparing the scientific flow rate, the instream objective flow rate – IO – (which is a condition in some senior licenses), and the flow rate set out in the South Saskatchewan River Basin. The latter corresponds to the IO and applies to licenses issued after May 2005[276] which I have tried to illustrate in the chart in Appendix I below.

The WCOs[277] in the *AWMP for SSRB* are set at either 45 per cent of the natural rate of flow, or the existing instream objective increased by 10 percent, whichever is the greater at any point in time (see Appendix I). Appendix I demonstrates that the amount of water required for fish habitat in certain reaches of the South Saskatchewan River, according to the best science available in Alberta, is more than the amount of water the government retains in the South Saskatchewan River Basin. Appendix I also compares the scientifically established

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[275] See Alberta Environment, "Draft (Approved) Water Management Plan for the South Saskatchewan River Basin in Alberta" (2005), online: <www3.gov.ab.ca/env/water/regions/ssrb/pdf/Draft_SSRB_Plan.pdf>, (last accessed 14 September 2008) at 1.

[276] See *AWMP for SSRB*, *supra* note 49 at 8: Alberta Environment establishes WCOs for the Bow, Oldman and South Saskatchewan River Sub-basins. See also *ibid.* at vi: "Any licences issued for applications received after May 1, 2005 be subject to the following WCO. The WCO should be 45% of the natural rate of flow, or the existing instream objective plus 10%, whichever is greater at any point in time. Additional recommendations concerning WCOs in these sub-basins are contained in the plan." (See Appendix 1. These flow rates do not correspond to the *FH IFN*.)

[277] There are already established WCO's in the regulations which permit diversions and water diversion management below the level necessary for safe fish habitat. The *AWMP for SSRB*, *supra* note 49 takes these to a new level without reference to the health of the either indigenous or introduced fish. Where fish cannot survive or thrive due to excessive diversion, the WCO allows the status quo to be perpetuated although it seeks to minimize the impact over time. Water quality is not addressed beyond the minimum of temperature, dissolved oxygen and in some cases ammonia.

IFN, the approved WCO and the current Instream Objectives in certain segments of the South Saskatchewan River Basin to demonstrate the discrepancy between what is approved and what is needed.

8. Opportunities to Remove the Inconsistencies – Restore Fish Habitat

In the following sections of this Chapter, I discuss the sections in the *Water Act* which provide opportunities for the Province to manage water in a manner consistent with federal jurisdiction. These include water licenses - particularly WCO licenses, closing a basin or portion or reach of a basin, Crown Reservation Licenses and cancellation or enforcement of water licenses, and holdbacks. The use of these sections could eventually bring water levels in the river to the amount of water necessary for the scientifically established instream flow needs.

a) WCO Licenses

Currently, the Province may apply for a license for a WCO but it must be established with input from the public, and the Director may grant or refuse to grant such an application.[278] The water in this WCO license can be retained in its original body to achieve a specified water level such as *FH IFN*. Prior to granting a WCO license to the province, the Director must consider the terms of the applicable approved water management plan, and may impose

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[278] *Water Act*, *supra* note 7, s. 15(2), 51(2).

terms and conditions in the license to the province.[279] In addition, the license for the WCO license held by the Crown can be temporary or can have a fixed term,[280] which means that it is not granted in perpetuity as are the more senior licenses. All of this means that if a WCO license were to achieve *FH IFN*, it would not be a situation that would remain static.

The Crown can reserve unallocated water in the rivers for a WCO. The opportunity to do so was not seized by the government in the Oldman river. Rather, in 2003, the Crown reserved 11,000 acre feet pursuant to the *Water Act* section 35 but in turn, reallocated the water for irrigation purposes.

In addition to the flexibility in the terms of the WCO license, if the provincial Crown were to apply for a WCO license in the South Saskatchewan River Basin, it would be a junior license; that is, all licenses issued prior to the WCO license are permitted to divert water before the WCO license can be fulfilled.[281] A proviso is that the Province may purchase existing licenses with early priorities which would change the priority of the WCO for the amount of water in these licenses only. A WCO license is always subject to the principle of 'first in time, first in right', therefore, in a river basin already over-allocated, the *FH IFN* will never be achieved because the earlier licenses to divert will always take priority. The statement within the *AWMP for SSRB* "that the plan is intended to 'foster opportunities to

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[279] *Ibid*., 51(4).

[280] *Ibid*., 51(5).

[281] *Ibid.*, 29(2)(a).

increase flow'[282] is a hollow statement with respect to consistency with the *Fisheries Act* if the basic *FH IFN* levels are neither intended or achievable. Any increases in instream flow using any of the tools in the *Water Act* are not pegged to any scientific result such as a *FH IFN*[283] therefore compliance with the *Fisheries Act* are not intended to be achieved under the current scheme. And to emphasize the point, although a WCO has the potential to increase flow in a water body to the amount of water necessary for *FH IFN*, there is no current plan to meet any scientific IFN notwithstanding the evidence that the fisheries is at risk in certain reaches of the river and the hazardous alteration, disturbance and destruction of fish habitat is evident. The lack of plan and admission of fish distress is contrary to the federal mandate to preserve and protect fish habitat.

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[282] *AWMP for SSRB*, *supra* note 49 at 8 "2.3.2. ...Bow, Oldman and South Saskatchewan River Sub-basins WCOs: The recommended WCOs will serve as an administrative tool that will foster opportunities to increase flows. These opportunities could include holdbacks from transfers, voluntary actions by licence holders, cancellations, and purchases of transfers. These WCOs will serve on an interim basis until monitoring, research and public consultation identify a long-term WCO."

[283] *Instream Flow Needs Determinations for the South Saskatchewan River Basin, Alberta Canada* http://www.assembly.ab.ca/lao/library/egovdocs/alen/2003/144905.pdf (site last visited September 18th, 2008). This report confirms that at the present time IFN science is not certain "As is the case with any instream flow needs study, there is uncertainty. However, in the absence of data, assumptions must be made. The Technical team reduced the uncertainty as much as possible in the absence of data, assumptions must be made.. Instream Flow Incremental Methodology (IFIM) was developed in the U.S. in the late 1970s to quantify the amount of fish habitat and predict the water depths and velocities in the river at different flows. It is the most widely-used and accepted method for evaluating instream flow needs for fish habitat ….based on the understanding that fish prefer water with a certain depth and velocity depending on the species and life stages. Criteria considered include velocity (may be too high or too low for fish to spawn), gravel (or substrate) affecting spawning; protective, cooling cover. IFIM does not address all stream flow-related variables affecting fish production (e.g., predation, territoriality and competition, water quality, etc.) Representative studies, including historical fish reviews, are done by qualified experts (i.e. hydrologists, limnologists) by establishing a transect (a straight line) across the representative segment site at which velocity, substrate-measured at high, medium and low flows, fish present, where and what (rearing, spawning, holding) are documented to establish fishes' habitat preferences using computer generated models to produce a value known as "weighted usable area," (WUA), for each species and life stage. WUA is expressed in square feet per 1,000 feet of stream and shows how the availability of fish habitat is affected by changes in flow. It is recognized that model results need to be verified by observation. (Introduced species that are capable of adapting to warm, slow flowing contaminated water may justify an IFN less than the native species require.)

The WCO could be an opportunity to restore fish habitat, it has not be used as such requiring more extreme measures to deal with water levels, such as closing the basin.

b) Closing a Basin or Subbasin

A Director is given the authority to close a basin[284] for a specified period of time. This means that no new water diversions are authorized and no new applications are accepted. Any industry, land owner, municipality or other water user must find available water from existing licenses. Closing the basin presents an opportunity to consider the use of unallocated water for a WCO license.

In order to close the basin, the Director must consider an approved water management plan (AWMP), and may consider any existing, potential or cumulative effects on the aquatic environment. If the AWMP does not include direction to close the basin or stop issuing licenses when the IFN is reached, the Director has the power to include or not to include the aquatic environment in his or her considerations – including fish habitat. Given the precedent set in the St. Mary and South Saskatchewan Rivers, in which fish habitat is degraded, it is foreseeable that the Director will continue to manage the water to the benefit of the economy

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[284] *Water Act*, *supra* note 7. s.53(1) If the Director is of the opinion that no further allocation of water should be made in a water management area or other geographical area considered appropriate by the Director or from a water body, the Director may decide that applications for licenses are not to be accepted by the Director for a specified period of time. (2) If the Director conducts a public review in a form and manner satisfactory to the Director, the Director may extend the period of time referred to in subsection (1). (3) In making a decision under subsection (1) that no applications for licenses may be accepted, the Director (a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing a license, as specified in an applicable approved water management plan, b) may consider any existing, potential or cumulative i) effects on the aquatic environment, (ii) hydraulic, hydrological and hydrogeological effects,….. that result or may result from a potential diversion of water, operation of a works or provision of a rate of flow or water or water level requirements, and (c) may consider any other matters that, in the opinion of the Director, are relevant including any applicable water guideline, water conservation objective and water management plan.

and to the detriment of fish habitat. Although the *Water Act* contains provisions for taking good care of river basins, including fish habitat, to this point these provisions have not been used for this purpose.

In the current South Saskatchewan River Basin (Approved) Water Management Plan, the closing of the basin is interim "until the Minister … specifies, through a Crown reservation, how water not currently allocated is to be used".[285] A Crown reservation license is yet another opportunity to protect fish habitat in that it allows the Province to specify that any unallocated water can be retained in the river for fish habitat. [286] On August 3, 2007 Alberta filed a regulation under the *Water Act* reserving all unallocated water for four purposes: First Nation use, water conservation objective, storage, or all applications filed and completed before August 3, 2007 with the Director. A search of licenses issued to the Crown revealed no licenses have been issued but for a license registered for the South Saskatchewan River Basin in favour of the Government of Alberta and issued as of September 26, 2007 with no expiry date.[287]

c. Water Conservation Holdbacks

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[285] *AWMP for SSRB*, *supra* note 49 at 6.

[286] *Water Act*, *supra* note 7 s. 35.

[287] AR. See Document 00240847-00-00. (Note, this refers to a License that is noted but the actual document is not available on the website). By Water Allocation Order 171/2007 (filed August 3, 2007) all of the unallocated water in the Bow, Oldman, and SSRB can be applied to a WCO, and other purposes.

In addition to the above tools which could increase *FH IFN*, the *Water Act* and the terms of the SSRB WMP authorize the Director to consider taking a holdback of up to 10% of the water transferred in a license if the Director is of the opinion that withholding water is in the public interest to protect the aquatic environment or implement a Water Conservation Objective."[288] While it is noteworthy that there is mention of protecting the aquatic environment, and the public interest, it is equally noteworthy that neither of these are defined, particularly with respect to *FH IFN*. It is also important to consider that if the Director does not make a decision to hold back water at the time of the transfer and the new license is issued, the opportunity is lost. The authority for transfers permits the Director to refuse a transfer if in his or her opinion it would cause significant adverse effects on the environment. Those adverse impacts are not defined nor do they refer to the protection or conservation of fish habitat. In the absence of the use of scientific IFN as a benchmark, the opportunities offered in the *Water Act* do not give the Director any guidance or even encourage the Director to reference *FH IFN*.[289]

d) Cancellation of Licenses

Although the *AWMP for the SSRB* provides that normal administration of water allocations by Alberta Ministry of the Environment will continue, it also provides that normal

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[288] *AWMP for SSRB*, *supra* note 49 at 11 and *Water Act*, *supra* note, s. 83.

[289] *AWMP for SSRB*, *supra* note 49 at 6 states: "no license would be cancelled for the sole reason of accomplishing recommended outcomes of the water management plan."

administration may include canceling licenses on grounds articulated in the *Water Act*. These grounds include those set out in the *Act* as follows:

> 55 (2). Subject to the regulations, the Director may suspend or cancel a license issued under this Act if, in the opinion of the Director, a significant adverse effect on the aquatic environment occurred, occurs or may occur that was not reasonably foreseeable at the time the license was issued, and compensation may be payable under section 158.[290]

This section applies only to licenses issued after January 1st, 1999 under the *Water Act* which severely limits the right of the Director to suspend or cancel the large, senior licenses which have the most adverse effect on the aquatic environment. Consequently, this section further supports the argument that water management in Alberta systemically undermines the *Fisheries Act*. Even for the later licenses, the question is at what point it is or was reasonable for the Director to foresee a significant adverse affect on the aquatic environment to the point that *FH IFN* is damaged. In most cases, that information is available at the time the license is issued. In a best case scenario, this section, if properly applied, might remove the practical inconsistencies between the *Water Act* and the *Fisheries Act* for rivers that have not yet been over allocated.

e. Amend or Enforce existing licenses

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[290] *Water Act*, *supra* note 7. Legal scholars opine that this provision does not apply to licenses issued after January 1st, 1999. See A. J. Kwasniak,"Quenching Instream Thirst: A Role for Water Trusts in the Prairie Provinces" (2006) 16 J.Envtl.L. 211 at 221. In this article concerning the operation of water trusts in Alberta and the applicability of provisions that could increase instream flow the writer states: "These provisions only apply to licences issued under the *Water Act*, that is, those that were issued after January 1, 1999. By then most of Alberta's water short areas were already highly allocated. Accordingly, the provision does not enable the Director to alter the licences that can most impact aquatic systems."

The Director ought to review licenses issued prior to 1999 to determine whether there is an opportunity within the wording of each to make changes which will benefit *FH IFN*. There are opportunities available within the *Water Act* and the licenses themselves that would enable the Director raise the level of water in the over allocated rivers.

The terms of existing water licenses in Alberta reviewed for this thesis are not consistently worded – they offer several different opportunities to meet instream flow. For example, a relatively large license upstream of the City of Calgary reads as follows:

> 11. The terms and conditions of this addendum are based on knowledge available at the time of issued(sic) and therefore the rights and privileges granted are subjected to review from time to time; and without interfering with the generality of the foregoing, the Controller of Water Resources reserves the right to require modification to the works or the conditions of the addendum anytime there is information indicating unreasonable interference due to the operation of the project on:
>
> (a) the source of water supply;
> (b) other water users;
> (c) the receiving body of water; or
> (d) the environment"[291]

Another example is a license issued to Trans Alta Utilities (the licensee). In this instance, the License is 'deemed to have been executed on the express condition that the licensee will comply with any orders made by the Minister or any person authorized by the Minister in respect of the control or regulation of the flow of the water of the river or stream'.[292] This

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[291] *Document 00034332-00-00 ALLEN'S TROUT FARM INC, WR, 16813* is held by Allen's Trout Farm Inc., under the provisions of the *Water Resources Act*. This licence is currently issued as of Apr. 23, 1979 and does not expire. http://envext02.env.gov.ab.ca/pls/xedp_apv/avwp_avwh1000_02.actionquery (site last visited September 18, 2008).

[292] *Document 00080715-00-00 KANANASKIS VILLAGE/POWER/TRANSALTA - F01552* is held by TransAlta Utilities Corporation, under the provisions of the Water Resources Act. This licence is currently issued as of

license is a composite of several licenses issued to the same company and its predecessors over a period of years between 1930 and 1998. It provides the opportunity, in the license, for the Minister or the Director to set the flow rate.

Not all licenses include the above wording. In such cases, the Province may not be in a position to amend licenses especially those granted prior to 1930. In *Alberta (Attorney-General) v. Majestic Mines Ltd.(1942)*[293] the issue was whether the provincial government in Alberta could legally add a royalty clause to petroleum leases originally granted by the federal government and transferred to the provincial government in 1930 under the *NRTA*. The Supreme Court of Canada considered the attempt by the Province to collect the royalty, and concluded that the wording of the NRTA did not expressly reserve the right to the royalty. As a result, the Province could not amend the older licenses. With respect to water licenses granted prior to 1930, a different case could be made. An amendment to the licenses could be argued to arise due to the applicability of the fisheries power imposed on the licenses by constitutional interpretation and not generated or promulgated by the Province. Therefore, licenses could be subject to the imposed term of complying with the *Fisheries Act* which would stop diversion below instream flow needs.

Sep. 18, 1961 and does not expire.
http://envext02.env.gov.ab.ca/pls/xedp_apv/avwp_avwh1000_02.actionquery (site last visited September 18, 2008).

[293] 1942 S.C.R. 402.

Closer scrutiny of the licenses may lead to another option –to work with senior licensees to restore instream flow. For example, the license to a major utility company provides two potential opportunities to apply the new *Water Act.* A senior license states as follows:

> Notwithstanding any rights granted or approval given by this Final License, the Licensee shall also comply fully with the provisions of any statutes or regulations of the Province or of Canada governing the preservation of the purity of waters or governing logging, forestry, fishing or other interests present or future which might be affected by any operations conducted under this Final License and shall also observe and carry out any instructions of the Minister in respect of any of the foregoing matters not inconsistent with the said statutes and regulations…Schedule "C" of this Final License states at p.C-1 'Act' means the *Water Resources Act*, or any successor legislation.[294]

The Director may not need to rely upon the *Water Act* to effect the change required to meet IFN.

9. The Current Public Consultation Process Perpetrates Inconsistencies

The provincial government wants public support for its water management programs, and this comes from the public consultation process set out in the Act which requires that the public be consulted.[295] This consultation on instream flow, *inter alia*, took place during the development of the *AWMP for SSRB*. The direction given to the public by the government with respect to the *FH IFN* was that the process was subject to the restriction that all licenses issued prior to January 1, 1999 must be accepted as givens and protected by the *Water Act*.

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[294] See *License for the Development of Water Power at the Spray Power and Storage Development Priority No. 1948-05-14-02* p. 4. [Final License] (note this is a public document but is only available by making a written request to the Director, Alberta Environment. It is the intention of Alberta Environment that eventually all of these licenses will be available on line but at the time of writing, this license was not available on line).

[295] *Water Act*, *supra* note 7, s. 8 (4) The Minister must, in a form and manner that the Minister considers appropriate, consult with the public during the development of the strategy.

None would be cancelled to meet the desired outcomes.[296] This is spelled out in the following section of the approved plan

> 1.2.2 Issues Considered
>
> In view of the significant private and public investment and the foundational role this water use plays in the prosperity of the communities of southern Alberta, a given for the planning process was that no licence be cancelled for the sole reason of accomplishing recommended outcomes of the water management plan. [297]

Therefore, decisions or recommendations made by the public in the consultation process could not deprive senior licenses of water notwithstanding the water authorized for diversion by these licenses may exceed the scientific IFN. The consultation process to set the WCO in the South Saskatchewan River Basin ensured that the scientific work around *FH IFN* would be disregarded. This approach fixed the inconsistency between the *Water Act* and the *Fisheries Act* by ensuring that the licenses would be honored and continue to be honored in reaches where the licenses can divert water to a level below fish habitat needs.

Only by setting a WCO or Instream Objective in a water -management plan that is equivalent to or better than the *FH IFN* will fish habitat not be harmfully altered, disrupted or destroyed. Water management plans are developed for geographic areas, usually a drainage area or reach with distinctive boundaries, in which the affected public or stakeholders are

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[296] *Ibid*. s. 18(2). … "a person who holds a deemed license under this section may continue to exercise the right to divert water in accordance with (a) the priority number of the deemed license, and b) the terms and conditions of the deemed license and this Act, and if a term or condition of the deemed license is inconsistent with this Act, that term or condition prevails over this Act."

[297] *AWMP for SSRB*, *supra* note 49 at paras 1.2.2.

consulted.[298] When the provincial government set limitations on the consultation process by specifying that existing licenses would not be affected, the public is not given an opportunity fully consider the issue and in the case of the *AWMP for SSRB*, meaning that the WCO will not be raised to meet *FH IFN* standards.

Even where there is the opportunity to argue in favour of a *FH IFN* in a hearing conducted outside the auspices of the *Water Act,* the quest for the appropriate instream flow needs has not been implemented, such as in a hearing conducted before the joint federal and provincial review panel when the DFO and the Province .[299]

10. Conclusion

The Province does not have exclusive legislative authority over water – even with its authority over property. If it can be argued that the provincial jurisdiction over lands in spelled out in section 109 of the *Constitution Act*, provides exclusive jurisdiction over its

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[298] *IN THE MATTER of a project of Alberta Public Works, Supply and Services for approval to construct a water management project (the Project) to convey and store water diverted from the Highwood River* (1996) NRCB Decision No. 9601--01 , online NRCB http://www.nrcb.gov.ab.ca/nrp/Board%20Order.pdf> . In the decision, at paragraph 6 the Board held: **"**The Operator shall, to the satisfaction of Alberta Environmental Protection, revise the IFN analysis used in the Application to reflect current fisheries management objectives for the Highwood River and to include instream flow needs based on the most recent information regarding the River, and current scientific assessment procedures and file the results thereof in the updated assessment of the economic, social and environmental effects of the Super Expanded Squaw Coulee project component."

[299] *EUB/CEAA Joint Review Panel Report Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant, and Water Pipeline Shell Canada Limited* (EUB Decision 2004-009) (February 5, 2004) http://www.ercb.ca/docs/Documents/decisions/2004/2004-009.pdf.> (site last visited September 2008) at 30. After deliberation and submission by interveners the panel stated "With respect to IFN, the Panel agrees that there is a need for CEMA (Cumulative Effects Management Association) and AENV to implement a management system prior to water withdrawals by Shell for the project. The Panel expects CEMA to make its recommendation for an IFN management system to AENV by the end of 2005. The Panel recommends that AENV establish IFN for the Athabasca River in collaboration with the DFO in the event that CEMA fails to meet its timelines. The Panel supports AENV amending existing *Water Act* licences for IFN management, if that becomes necessary. The Panel does not believe that setting of interim IFN is necessary. In addition, the Panel believes that work to establish interim IFN might result in resources being diverted from the process of determining permanent IFN." As at the time of writing this thesis in 2008, the IFN for the Athabasca has not been met by CEMA.

land and therefore its water then it can also be argued that exclusivity is subject to prior trusts, any Interest other than that of the Province and to Constitutional law. The Province must have regard for federal authority and interests in the exercise of its jurisdiction over water.

In the absence of exclusive jurisdiction over the water, the *Water Act* needs to be consistent with the exercise of federal jurisdiction. In this regard, it is important to note that the *Water Act* does not articulate its relationship to the *Fisheries Act*, nor does it set boundaries to protect the fish habitat. Rather, the *Water Act* regulates or authorizes decision-makers to permit diversion of water necessary for fish habitat. I contend that *Water Act* is unconstitutional, because it deprives the federal fisheries' power of its vitality. Further, it is inconsistent with the *Fisheries Act* because it is impossible to permit the approved amount of water to be diverted and at the same time ensure that fish habitat is not harmfully altered, disturbed or destroyed. In Appendix 1, I compare the WCO's set out in the *AWMP for SSRB* to the scientifically established IFN to show the specific reaches in which water can withdrawn to a level at which fish cannot survive. The *Water Act* provides measures which will increase the amount of water for instream flow, but there is nothing that requires instream flow to be brought to and maintained at the level required for fish habitat. Thus the Province manages water in a manner inconsistent with *FH IFN* to the extent that fish habitat is disregarded and is systemically harmfully altered, disrupted and destroyed. This becomes obvious when observing that water levels in provincial rivers – for example, the southern tributaries – are maintained at a level below what is scientifically necessary for fish habitat.

In this chapter, I set out the provincial legislative powers in the *Constitution Act, 1867* to show that the power over water is not exclusive and is therefore subject to the exercise of paramount federal legislation. I then consider the exercise of the provincial powers which forms the basis of the *Water Act* and set out the ways in which the provisions and operation of the *Act* are inconsistent with the *Fisheries Act*. To conclude this chapter, I set out in chart form in Appendix 1 which demonstrates the inconsistencies between the two which ought to remove all doubt of the invalidity of the *Water Act* to the extent that it permits such inconsistency.

CHAPTER 7: CONCLUSION

Management of surface water is a complex process involving many parties with a great diversity of needs and desires. As a result, finding a path to a coherent legal framework for water management is a formidable challenge. Alberta, as a community within Canada, has yet to develop a vision or a set of coherent, rules concerning water. This is not surprising given all of the competing pressures. Perhaps, such a vision would be too monumental a task and beyond our political and jurisdictional limitations. The purpose of this thesis is to offer a way in which to engage the *Constitution Act, 1867* as a legal tool to increase the coherence of how we manage water.

Water is a fundamental component of the physical and economic health of the fisheries the preservation of which was included in Canadian law as early as 1868.[300] Although the history of water management in Alberta shows that it was managed primarily for the settlement and development of the prairies, the concept of fisheries was never legally abandoned.

The fundamental tenet of Canadian constitutional law is that legislation on subject matters assigned exclusively to the federal government is paramount to inconsistent provincial legislation and must be respected; seacoast and inland fisheries is a subject matter exclusively within federal domain as shown by the review of the *Constitution Act 1867*. FH

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[300] *Fisheries Act, 1868 supra* note 27.

IFN is an essential core of that federal matter and as such, it ought not be harmed. There is no doubt that fish need water.

I argue in this thesis that the Federal government, through the *Fisheries Act*, has in fact exercised its authority over the water necessary for *FH IFN*. The exercise of this authority is found particularly in subsection 35(1) which protects fish habitat from harmful alteration disruption and destruction. Having exercised this authority, any party, including the Province, that harmfully alters, disrupts or destroys fish habitat is acting contrary to the *Fisheries Act*. I show that the *Fisheries Act* has been interpreted and applied by the courts to embrace the various aspects of fish habitat, including instream flow. I also show that the *Water Act* authorizes a reduction in the instream flow below *FH IFN*, which is inconsistent with both the federal authority over seacoast and inland fisheries and the *Fisheries Act*.

My primary posit in this thesis is that the *Water Act* is inconsistent with the Federal *Fisheries Act* to the extent that diversions from surface water levels are authorized in the Province at a level insufficient to satisfy scientifically established fish habitat instream flow needs. And further, to the extent that the provincial interference with *FH IFN* is approved and condoned by the *Water Act*, the Province is purporting to exercise authority in a manner inconsistent with the federal power thereby impairing its essential core.

In conclusion, I recommend that by reference to the Supreme Court of Canada, based on the constitutional argument made in my thesis, that the *Water Act* be read down to the point that

it is consistent with the fisheries power and the *Fisheries Act*, such that instream flow is returned to and maintained at the level necessary for fish to survive and thrive.[301]

[301] Boris Laskin *supra* note 13 at 223 considers when it would be appropriate to take a matter to the Supreme Court of Canada on a reference. "…The reference power between … Province and Canada, on water rights, would be significant only if by reason of federal legislative power there was an underlying common law or governing federal statute law binding on the disputants…which explicitly or implicitly incorporated governing principles of law and which required interpretation to disclose what they were in a particular case."

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APPENDIX 11

Instream Flow Rates for Certain Reaches of the South Saskatchewan River

Reaches (indicating distance between points).[2]	***Instream objectives (IO) set out in licenses for the specified Reach. [3]***	***The Water Conservation Objective (WCO) in the (Approved) SSRB WMP for the specified Reach. (as at 2006)[4]***	***The Scientific FH IFN to protect the fish for the specified Reach- (less water is hazardous to fish - an HADD).[5]***	***The difference between safe fish habitat and provincially approved water level.***
SSR1/SSR2 (South Sask. River from Grand Forks to Medicine Hat, Medicine Hat to Sask. border).	IO is 42.5 m^3/s (1,500 ft^3/sec) or 45% of the natural rate of flow.[6]	The recommended WCOs are either 45% of the natural rate of flow, or the existing instream objective increased by 10%, whichever is the greater at any point in time. (IO of 42.5 m^3/s (1,500 ft3/sec is attached to earlier licenses 45% of the natural rate of flow for licenses after 2005.[7]	100 m^3/s – week 14, peaking at 300 m^3/s in week 24 and tapering to 100 m^3/s – from weeks 33 to 44. [8]	100 – 42.5 = 57.5 m^3/s Deficiency 300 – 42.5 = 257.5 m^3/s
BW1 (Bow River at Grand Forks to Bassano).	IO based on 80% habitat fish rule curve. The reach below Bassano to the mouth of the river has three IO values: - 39.6 m^3s (1,400 ft3/sec) for all licences except EID; 2.83 m^3/s (100 ft^3/sec) for EID's 1963 licence (1903 priority); 11.3 m3/s (400 ft3/sec) for EID's 1998 licence. [9]	45% of the natural rate of flow or the existing instream objective plus 10% whichever is the greater at any point in time[10] (39.6 + 10% = 40.59 cms) The segments that have sufficient water have a WCO set at a percentage of the natural rate of flow.	50 cms – week 14, peaking at 150 cms – week 25 and tapering off to 50 cms in week 35 to 44. (never lower than 50 cms). [11]	between 50 m^3 week 14 and either 39.6 or 40.59 - leaves a deficit of between 9.4 m^3/s and 10.4 m^3/s.

Reaches (indicating distance between points).[2]	***Instream objectives (IO) set out in licenses for the specified Reach.***[3]	***The Water Conservation Objective (WCO) in the (Approved) SSRB WMP for the specified Reach. (as at 2006)***[4]	***The Scientific FH IFN to protect the fish for the specified Reach- (less water is hazardous to fish - an HADD).***[5]	***The difference between safe fish habitat and provincially approved water level.***
BW4 (Bow River from Highwood River confluence to WID weir – located within Calgary City Limits.[12]	Current instream objective is 80% of fish rule curve. (This curve is not greater than 20 m3/s at any time of the year). [13]	Recommended WCO is 45% of the natural rate of flow, or the existing instream objective increased by 10%, whichever is the greater at any point in time. (the latter would barely meet the minimum recommended flow.[14]	A variable Ecosystem Base flow using the max. value between 80% habitat duration for mountain whitefish and 95% flow exceedence. (varies between 21m3/s to 190 m3/s.).[15]	190 m3/s (max) – 22 m3/s = 168 m3/s variation. The scientific IFN will not be meet if the 10% increase is applied, at no time does it meet the curve requirements.
BL2/BL1 (above the confluence with the Waterton River and to the confluence with the Oldman River.)	Current IO is 33 cubic feet per second measured above its confluence with the Waterton River and above its confluence with the Oldman River.[16]	Recommended WCOs are either 45% of natural flow, or the existing instream objective increased by 10%, whichever is the greater at any point in time.[17]	BL1 – for the first reach of the Belly, the recommended IFN is 30% reduction from natural flow, with the added restraint of EBF. Ref. to the adult mountain whitefish – a native species.[18]	The scientific IFN is not met in any of the categories.

[1] This Appendix 1 is a compilation of information assembled by me to illustrate by a few examples the gap between the regulated instream flows and the scientific instream flows to demonstrate the argument in my thesis that water management in Alberta is below fish habitat needs and is therefore inconsistent with the federal fisheries power.

[2] *Clipperton Report, supra* note 5 at 9. Map of South Saskatchewan River Basin sets out reach boundaries. Note this report has not been peer reviewed.

[3] See *AWMP for SSRB*, *supra* note 49, Appendix F and *Alta. Reg. 307/1991*. The original IOs are based on habitat only and do not include water quality (temperature and dissolved oxygen) protection parameters. Licenses issued in the South Saskatchewan River Basin on or around 1985 contain an instream objectives which allow the province to prevent diversions when the water reaches that specified level. The IO is not equivalent to FH IFN as noted in the above chart. The *AWMP for the SSRB* contemplates that licenses issued pursuant to the *Water Act* may be amended to include the new WCO where the *Water Act* s 54 (1) permits the amendments. In addition to licenses already issued, there is a backlog of unissued licenses, permits and approval applications predating January 1st, 1999 which, when issued, will impact on the water level in the river due to the increased diversions. Since 1999, neither the *AWMP for the SSRB*, nor the actions of the government in other provincial

river basins, such as the Athabasca and Red Deer Rivers, have supported a water level in the rivers consistent with the scientific FH-IFN. *Alta. Reg. 307/1991*. This regulation set instream flows for certain segments of specified rivers without reference to a scientific FH IFN. Section 7(1). Provided that any licence issued … may contain conditions limiting the amount of water that may be diverted and used when necessary to maintain minimum instream flows. The regulation goes on to set the minimum instream flow for each of the following rivers as: Waterton River, 80 cubic feet per second measured above its confluence with the Belly River; Belly River, 33 cubic feet per second measured above its confluence with the Waterton River and above its confluence with the Oldman River; St. Mary River, 97 cubic feet per second measured above its confluence with the Oldman River. Note that the IO is a fixed amount of water at a certain point, it does not vary with the normal or natural flow of the river. Note also as stated in the *AWMP for SSRB*, *supra* note 49 at 2.4 that the recommendations and provisions of the plan supersede the 1991 Regulation with the exceptions noted.

[4] *AWMP for SSRB*, *supra* note 49 at para. 2.3. Numbers in this column of the chart come from this section. "The WCOs recommended in this plan provide direction on opportunities to increase flows in the highly allocated rivers in the Bow, Oldman and South Saskatchewan River Sub-basins and permit allocations in the Red Deer River Sub-basin. They are subject to future review and refinement in light of improved knowledge and information about the aquatic environment and water quality. The plan states that "There was a need to protect the aquatic environment and to prevent speculation on water allocations. This date was determined to be May 1, 2005, based on imminent plans at the time for the draft SSRB plan going out to public consultation.

[5] *Clipperton Report, supra* note 5 at 9. The Instream Flow Needs (IFN) research prepared by the Department of Sustainable resources, although stated to be based on an archaic science, it is the best science available. The research was done to determine certain aspects of site-specific fish habitat results for open-water only – week 14 (May 1st) to week 44 (November 1) and is expressed as a percent reduction from natural flow, with an associated Ecosystem Base Flow (EBF), that is, a threshold value below which the IFN is considered to require all of the natural flow and no diversions should take place. (p. 51-52). One of the methods followed to establish the IFN is to identify the natural flow and reduce it in 5% increments. This method maintains the natural flow variability which has the shape of a bell curve corresponding to average base flows between November and May, and peak flows corresponding to snow melts and rain between May and November.

[6] *AWMP for SSRB*, *supra* note 49, Appendix F.

[7] *AWMP for SSRB*, *supra* note 49 at 2.3.2. This approved water management plan recognizes the need for improvement of the WCO by the tools mentioned earlier in my thesis as follows for the Bow, Oldman and South Saskatchewan River Basin. "The recommended WCOs will serve as an administrative tool that will foster opportunities to increase flows. These opportunities could include holdbacks from transfers, voluntary actions by licence holders, cancellations, and purchases of transfers. These WCOs will serve on an interim basis until monitoring, research and public consultation identify a long-term WCO." And at 3.7.1 "The Grand Forks area is the only known lake sturgeon spawning area in the South."

[8] *Clipperton Report*, *supra* note 5 at 116.

[9] *AWMP for SSRB*, *supra* note 49, Appendix F.

[10] *AWMP for SSRB*, *supra* note 49 at para. 2.3.1. et seq. "Rationale the lower reaches of these rivers have aquatic environments that have been impacted by water diversions. These WCOs, combined with the set limits on water allocations, are the first steps toward restoration of the aquatic environments.

[11] *Clipperton Report*, *supra* note 5 at 93.

[12] See Chapter 2 above. This reach of the river is an economically viable fisheries.

[13] *AWMP for SSRB*, *supra* note 49, Appendix F.

[14] *AWMP for SSRB*, *supra* note 49 at para. 2.3.1.

[15] *Clipperton Report supra* note 5 at 96.

[16] *Alta. Reg. 307/1991.*

[17] *AWMP for SSRB*, *supra* note 49 at 2.3.1.

[18] *Clipperton Report*, *supra* note 5 at 108.