Time to Revisit the *Water Act*

By Jason Unger

Certainty in the law is a good thing. Clarity in a law's application translates into clarity in government's implementation of the law. Alberta's *Water Act* aimed to provide water users with certainty when it was passed in 1996. This certainty, however, has only evolved in terms of water allocations. Protection of the aquatic environment, as another central mandate of the *Water Act*, has lacked this level of certainty.

This is not surprising considering the history of water use and law in Alberta. Aimed at attracting settlement and promoting the development of an agricultural economy, the predecessor legislation to the *Water Act* focused on providing certainty regarding water supply for those seeking its use. This was achieved by creating a water licence allocation system that provided people with a set priority to divert water, a priority based on the date the licence was issued. This system, commonly referred to as "first in time, first in right" (FIT FIR), was part of the *Water Resources Act* that governed water use in Alberta through much of the twentieth century. FIT FIR was adopted by its successor, the *Water Act*.

The FIT FIR system is primarily user driven. Applications arrive at the desk of an Alberta Environment Director, and the subsequent allocation decision might come with conditions as to when and where water is removed. The government might intervene where a user's priority is negatively impacted by activities of licencees with a lower priority.

The *Water Act* also enables the Director to consider environmental factors when making an allocation decision. The Director can refuse to grant a licence and can cease accepting applications for water allocations in a region for environmental reasons. This is currently the situation in the South Saskatchewan River Basin (SSRB), but this only occurred following a lengthy water management planning process and long after ecological flows were undermined by unconstrained allocations.

The question arises as to whether the Director should have proactively curtailed allocations long ago instead of deferring to the user-driven allocation processes, which in this case resulted in a further limitation of options to protect ecological flows.

This lack of proactive protection of the aquatic environment is not limited to the allocation decisions. The *Water Act* also gives the government the ability to set "water conservation objectives" (WCOs), defined in the *Act* as "the amount and quality of water…necessary for the:

(i) protection of a natural water body or its aquatic environment, …

(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."

These provisions of the *Water Act* appear relatively straightforward, yet current decisions about WCOs in the SSRB indicate that a WCO may undermine the ecological sustainability of a region by being set too low. In many other areas WCOs have yet to be set.

Similarly, the *Water Act* permits the government to hold back 10 percent of an allocated water licence when it is transferred, to return that allocation back to the environment. Again, this provision has not been consistently used, even in the over-allocated SSRB.

The *Water Act* also contemplates planning initiatives for protection of the aquatic environment in prescribing the creation of a "strategy for the protection of the aquatic environment." The *Water Act* invites the government while creating this strategy to consider the following:

- identification of criteria to determine the order in which classes of water bodies are to be dealt with,
- guidelines for establishing water conservation objectives,
- matters relating to the protection of biological diversity, and
- guidelines and mechanisms for implementing the strategy.

Unfortunately, the resulting strategy consisted only of motherhood statements and an enumeration of existing legislation and policy. A strategy that provides some certainty and substantive action remains elusive.

A unifying feature of these legislative provisions and how they have been inadequately implemented to protect the aquatic environment is that they rely on the government to exercise its discretion: that is, they are government driven. Unfortunately, the user-driven allocation process has vastly outpaced the government-driven process to protect the aquatic environment.

Further, the FIT FIR system, upheld by the *Water Act*, makes addressing this disparity difficult to overcome. In the SSRB, this would require undertaking drastic measures to restore instream flows. Under the current system, this may entail paying significant amounts of money to compensate for cancelled licences or to purchase instream allocations.

As a piece of legislation, the *Water Act* is effective in dealing with water allocations. It has been far less effective in protecting the aquatic environment, as it is plagued by a lack of clear administrative direction and lack of certainty in legislative provisions. The situation in the SSRB has made the need for legislative reform apparent.

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