Water Law: The Interjurisdictional Context

Water's Place in the Constitution

Sections 91 and 92 of the *Constitution Act, 1867*[1] govern the distribution of federal and provincial powers. Legislative authority is determined by relating the subject matter of a given law to the classes of subjects listed in each section.

Water is not expressly mentioned in the *Constitution*. In fact, it has been described as a "fugitive resource," which defies tidy division into federal and provincial jurisdictional responsibilities.[2] The doctrine of paramountcy suggests that if a federal law and provincial law conflict, the federal law prevails to the extent of the inconsistency.[3] However, for the most part, the relationship between Canadian levels of government, in relation to water, has been marked by intergovernmental cooperation.[4]

Where ambiguities over jurisdiction remain, governments have often negotiated agreements with one another, rather than test the constitutional or legal scope of their power to act unilaterally.[5] Historically, whether or not the federal government has taken enough control over the regulation and care of Canada's water has been a controversial topic.[6] Exploration of the topic will begin with a look at the headings and the case law that have determined jurisdiction over water thus far.

Provincial Powers

The provinces' jurisdiction over water has generally been derived from one or more of four provincial powers listed in the *Constitution*:[7]

- municipal institutions in the province (section 92(8))
- local works and undertakings (section 92(10))
- property and civil rights in the province (section 92(13))
- generally all matters of a local or private nature in the province (section 92(16))

Federal Jurisdiction

Canadian courts have generally read federal jurisdiction over water

narrowly.[8] Constitutional powers that may conflict with the provincial powers over water, include:[9]

- Navigation and shipping (section 91(1))
- Sea coast and inland fisheries (section 91(12))
- Federal works and undertakings (sections 91(29) and 92(10))
- Canals, harbours, rivers, and lake improvements (section 108)
- "Indians, and lands reserved for Indians" (section 91(24))

Indirectly:

- Taxation (section 91(3))
- Trade and Commerce (section 91(24))
- Public debt and property (the spending power, section 91(1A))
- Criminal law (section 91(27))
- Peace, order, and good government (section 91)

Additionally, the federal government, in some cases, has also been able to rely on its general power to govern with respect to "peace, order, and good government" (POGG).

Defining the Federal Role
***Peace, Order, and Good Government* (POGG)**

Much judicial and academic commentary has revolved around the powers of POGG, both with respect to water and other subject areas. In addition to the legislative powers outlined under sections 91 of the*Constitution*, there are certain circumstances in which the federal government may apply its general power to legislate in relation to "peace, order, and good government." POGG may apply where the subject matter falls under one of three branches: 1) the "gap" branch[10] 2) the "emergency" branch[11] and 3) the "national concern" branch.[12] A gap is found "where the Constitution recognizes certain topics as being classes of subjects for distribution-of-powers purposes, but fails to deal completely with each topic."[13] An emergency is found where the federal government's control over a subject matter can "be confined to [a] temporary and extraordinary role required for national regulation."[14] However, the doctrinal approach used most readily in relation to resources is the national concern branch.[15] In *R. v. Crown Zellerbach Ltd.*,[16] this branch is considered to apply when a topic is defined by a singleness or indivisibility across jurisdictional lines.[17]One indicia of such indivisibility is the "provincial inability test."[18] If

the failure of one province to accept uniform procedures or legislation would negate the entire objective of the legislation instituted in other provinces, then POGG may be used to justify federal legislation on the matter.[19]

***Interprovincial Co-operatives v. Manitoba* (1975)**

Facts and Issues

In *Interprovincial Co-Operatives v. Manitoba* (1975)[20] The Supreme Court of Canada (S.C.C.) was called upon to determine whether the provincial government of Manitoba could hold chlor-alkali plants in Ontario and Saskatchewan liable when they released mercury into interprovincial waterways, destroying fish stocks in Manitoba.[21] To impose liability, however, would also negate the Ontario and Saskatchewan regulatory licences that gave a lawful excuse for the contamination.[22] The constitutional question for the Court was whether or not pollution in interprovincial waters can be dealt with under provincial heads of power or whether it must fall under federal authority.

The Majority

The 4-3 majority held that the Manitoba legislation was *ultra vires* (outside the legal abilities of) the province.[23] Three members of the majority found the legislation to fall within the federal POGG power because of the interprovincial nature of the matter.[24] This reasoning was based on the fact that the actual activity causing the injury to the fisheries in Manitoba was conducted outside the province:

While it can be said that the legislation is aimed at damage caused in Manitoba, it is not directed against acts done in that province: the basic provision on which the claim is founded is an act done outside the province namely, the discharge of the contaminant.[25]

One member of the majority, Justice Ritchie, agreed that the legislation was inapplicable to the defendants because it attempted to deny a right outside of its jurisdiction, but he declined to hold that the legislation falls within the federal POGG power due to its interprovincial nature.[26] He argued that this point had not been brought before the Court.[27] While there was no true majority in this case, it is generally accepted that this decision stands for the principle that interprovincial pollution of fisheries is a matter falling under the federal power over POGG.[28]

The Dissent

The dissent, written by Justice Laskin, stated that the province has a right to protect its property under section 92(13) of the *Constitution*. The Chief Justice

wrote:

It is plain enough to me that a province having rights in property therein is entitled to protect those rights against injury, and, similarly, to protect the interests that others may have in that property, by bringing or authorizing actions for damages, either as at common law or under statutory provision.[29]

This perspective suggests that the act of placing contaminants in a water source should not be differentiated from its effect.

Remaining Questions

Unfortunately, Justice Pigeon's judgment did not clarify whether the POGG power applies only to pollution affecting fisheries in interprovincial waters or to pollution of all kinds in interprovincial waters. Justice Pigeon did, however, emphasize the breadth of the POGG power: "The basic principle of the division of legislative powers in Canada is that all legislative power is federal except in matters over which provincial legislatures are given exclusive authority."[30] The implication seems to be that pollution of interprovincial waters, beyond that which affects fisheries, would fall under the federal power over POGG. In *Zellerbach*,pollution of interprovincial waters falling under POGG is definitively extended to all pollution affecting marine waters.[31]

R. v. Crown Zellerbach Canada Ltd.

Facts and Issues

In *Zellerbach*, a lumber company in British Columbia was charged with dumping debris into the sea without a permit under section 4(1) of the federal *Ocean Dumping Control Act*.[32] The sea, as defined under the *Act*, includes all inland waters except for fresh waters.[33] The Court held that the *Act* contemplates marine dumping as a whole, a broader subject matter than the effect on fisheries. As a result, federal authority under section 91(12) with respect to coastal and inland fisheries, was not considered an adequate means of support for the constitutional validity of section 4(1) of the *Act*.[34] The constitutional question for the Court was whether or not the federal legislation could be found valid under the federal power over POGG.

The Majority

In the earlier cases of *R. v. Fowler*[35] and *R. v. Northwest Falling Contractors*,[36] the S.C.C. had already decided that, in order for provisions in the *Fisheries Act*[37] dealing with the regulation of dumping to be valid, it was necessary for the legislation to draw a link between dumping and actual harm to

fisheries.

Based on this decision, it was suggested that a link between dumping and harm to the federal subject matter must be found in order for federal legislation to be constitutionally valid. Justice Le Dain, writing for the majority, pointed out that the *Act*, taken as a whole, does deal with the prevention of harm to the marine environment.[38] Furthermore, section 4(1) can be justified on the basis that it is likely the only way to prevent harm to such a broad subject matter:

[T]he chosen, and perhaps only effective, regulatory model makes it necessary, in order to prevent marine pollution, to prohibit the dumping of any substance without a permit …The nature of the marine environment and its protection from adverse effects from dumping is a complex matter which must be left to expert judgment.[39]

In other words, Justice Le Dain suggested that it is not the Court's role to decide whether the regulatory scheme chosen by the legislature is appropriate, nor is it the Court's role to speculate on how it should work.[40]

The Court then moved on to consider where federal power over marine pollution might be found in the*Constitution*. The majority noted that since "a basis for federal legislative jurisdiction to control marine pollution generally in provincial waters cannot be found in any of the specified heads of federal jurisdiction in section 91 of the *Constitution Act, 1867*," it would be necessary to consider the national concern doctrine of the federal power over POGG.[41] The Court listed four crucial elements to the doctrine:[42]

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of

singleness, distinctiveness and indivisibility it is relevant to consider what the effect would be of any one province's failure to act in cooperation with the other provinces on the issue.

Marine pollution, it was found, has an international and inherently interprovincial character and is, therefore, of concern to all of Canada.[43] Fresh water and salt water were considered to have enough differences in their composition and in their scientific considerations that they may be distinguished from one another.[44]Moreover, the Court found that the boundary between the territorial sea and internal marine waters is almost impossible to determine visually and therefore creates unacceptable uncertainty in terms of imposing regulations and penalties.[45] On this basis, the majority concluded that the matter has the requisite singleness, distinctiveness, and indivisibility, and that, therefore, section 4(1) of the *Ocean Dumping Control Act* is constitutionally valid under the national concern doctrine of the POGG power.[46]

According to one commentator, Justice Le Dain's decision in *Zellerbach* "appears to have opened the door to extensive federal environmental protection jurisdiction under POGG."[47] Prior to this decision, federal legislation either adhered to a narrow, but clear, federal power such as fisheries, or it invoked "the substantively broad, but functionally limited Criminal Law power."[48]

The Dissent

Justice La Forest took a fundamentally different approach to the issue. First, he pointed out that the regulation of marine pollution is not a new subject matter and that the federal government already controls both inland and coastal marine water through several existing powers, including the power over fisheries, public property and potentially interprovincial waters.[49] Second, he insisted on the interconnectedness of the environment.[50] Hydrologic cycles are such that intermixing occurs between salt and fresh waters, as well as air and water. It is, therefore, not a discrete, singular topic. To give federal control over the pervasive heading of marine pollution, Justice La Forest argues, is to gut provincial power.[51] A third difference is that Justice La Forest required evidence of why a permit that does not provide a link between dumping and harm caused to the marine environment is necessary.[52] The lack of harm forms a large part of the reason why Justice La Forest finds that the legislation "overreaches."[53] One commentator synthesizes Justice La Forest's perspective on this aspect of the *Act* as follows: "It goes beyond extra-provincial pollution control and includes regulation of moving inert materials, such as rock, from one area of provincial property to another."[54]

Remaining Questions

These decisions suggest that in order for POGG to be invoked in relation to interprovincial waters, some*harm* of a national dimension must be imminent or present.[55] It is unlikely that POGG could be invoked to house an innocuous issue, even if that issue is of national proportions. In this sense, the requirements are relatively narrow. However, what constitutes harm has not yet been fully decided. Health and the environment are likely to warrant federal attention, however, some areas like economic harm are less certain to elicit the use of POGG.[56]

Navigation and Shipping

Friends of the Oldman River v. Canada (Minister of Transport)

Facts and Issues

In *Friends of the Oldman River v. Canada* (*Minister of Transport*),[57] the project under discussion was the construction of a dam in southern Alberta. The province took into consideration extensive environmental studies and public opinion when considering the costs and benefits of constructing the dam.[58] Federal interests came into play, however, because the project affects navigable waters, fisheries, Aboriginals and Aboriginal lands.[59] Section 5 of the federal *Navigable Waters Protection Act*[60] requires that the federal minister of transport approve the project if it affects navigable waters. The minister approved the application after carefully considering the project's effect on marine navigation. There was no consideration, however, of the *Environmental Assessment and Review Process Guidelines Order*,[61] made under the federal*Department of the Environment Act*.[62]

The *Guidelines* are in place for the broad purpose of the "preservation and enhancement of the quality of the natural environment."[63] The Friends of the Oldman River Society (Society), aiming to make environmental review of the project more stringent, sought to compel the province to additionally adhere to these, more general, federal *Guidelines.* This supplementary legislation, the appellant's argued, was triggered by section 5 of the *Navigable Waters Protection Act*.[64] The *Guidelines* only apply where affirmative statutory authority has been established, such as the *Navigable Waters Protection Act*. The *Fisheries Act*,[65] on the other hand, did not come into play, as the Society had initially attempted to argue, because it did not impose an affirmative regulatory duty and, therefore, the only minister who had a responsibility to conduct an environmental assessment was the Minister of Transport. The constitutional question for the S.C.C. was whether the *Guidelines* were *ultra vires* (outside of the powers of) the federal government, considering their breadth.[66]

The Majority

Alberta argued that the term "the environment" in the *Department of the Environment Act* refers only tothe biophysical environment and that the *Guidelines* overreach this authorized scope.[67] Justice La Forest stated, on behalf of the majority, that although federal areas of jurisdiction must remain the focus, "the environment" is a diffuse subject area that inherently requires looking beyond physical elements.[68]

The province also argued that the *Guidelines* are inconsistent with the federal *Act* on the basis that their ambit reaches beyond navigational issues.[69] The majority found, however, that the *Guidelines* are "supplemental to [the minister's] responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the*Guidelines*."[70] This part of the argument was based on the principle that environmental assessment should not be seen as an extraneous matter in making legislative choices or administrative decisions; it should be an integral part of sound federal decision-making.[71]

The *Guidelines*, Justice La Forest states, appropriately mandate that any cost-benefit analysis regarding navigation take into account environmental concerns surrounding the area of federal interest being directly affected as well as other areas of federal jurisdiction, including Aboriginals and Aboriginal lands and any socio-economic implications.[72] For instance, if the dam created environmental changes that were a hindrance to an Aboriginal community, this would legitimately affect the outcome of the minister of transport's decision.

Commentator Stephen Kennett argues that Justice La Forest's reasoning, in this case, supports a distinction between "comprehensive" and "restricted" federal environmental jurisdiction.[73] Since dams do not fall under federal jurisdiction, "federal jurisdiction over dam-building is … restricted to regulating this activity in terms of its consequences for federal heads of power."[74] Environmental considerations of the Oldman River dam can, therefore, only extend to issues such as fisheries, navigation or Aboriginal lands. Railways, on the other hand, belong under federal jurisdiction.[75] Consequently, when a railroad is being built, the environmental assessment can be "comprehensive" in the sense that it may regulate the building of a railway in terms of all of the activity's environmental consequences, whether they fall under a federal head of power or not.[76]

The S.C.C. acknowledged that the *Guidelines* might be used as a "constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."[77] However, the Court insisted

that the legislation specifies that only those matters relating to areas of federal responsibility can be examined.[78]Justice La Forest's dissent in *Zellerbach* is incorporated into the majority opinion in *Oldman River*: environmental management can and should be addressed through the application of the catalogue of powers in the *Constitution* rather than applying the national concern doctrine of POGG.[79]

Remaining Questions

The federal power over navigation is sometimes read rather broadly:

Parliament may authorize works for improvement of navigation, may prohibit under penalty, or require removal of, obstructions to navigation, and hence may require a license or permission to erect dams, bridges or other structures and may regulate their operation in their effect upon navigation.[80]

One commentator suggests, however, that relying on federal powers over navigation to build a federal water management regime would be limiting because it would be very difficult to target water quality issues.[81] In contrast, federal power over fisheries could more readily serve this function. On the other hand, water quantity could appropriately be targeted by federal control over navigation, considering that navigation may be affected by the amount of water in a given waterway.[82]

Sea Coast and Inland Fisheries

R. v. Fowler

Facts and Issues

In *Fowler*, a logging operation, run on the Humphrey Channel in the County of Vancouver, deposited debris into part of the coastal water of British Columbia. Fish occasioned the stream, but there was no evidence that the debris affected or injured the fish.[83] The logging operation was charged under section 33(3) of the federal *Fisheries Act*,[84] which states that:[85]

No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps, or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

The constitutional question for the Court was whether or not *harm* to fisheries is

necessary for the federal legislation to be *intra vires* (within the federal government's powers).

Decision

Justice Martland, speaking for the Court, stated that the federal power over fisheries under section 91(12) was conceived so as to protect fisheries as a public resource.[86] The legislation in question did not consider whether an operation would have a deleterious effect on fisheries.[87] Counsel for the logging operation argued that the legislation would have a preventative effect.[88] The Court found that if the section did not include proof of deleterious effects, every logging operation would be committing a violation of the*Fisheries Act*.[89] While the provision may incidentally prevent harm, it does not explicitly aim to do so, therefore, it is a blanket prohibition that primarily regulates property and civil rights within the province.[90]

In contrast, in *Northwest*, a different section of the *Fisheries Act*, section 33(2), was found to be *intra vires*federal jurisdiction on the basis that it states that "no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions" where deleterious was defined as having a negative effect on fish.[91] Since this provision mentions actual harm to the subject matter under federal jurisdiction, it was considered constitutionally valid.

Water Governance and Aboriginal Peoples

Section 91(24) of the *Constitution* allows the federal government exclusive jurisdiction over "Indians and lands reserved for Indians." The main instrument through which the federal government exercises its power in regard to Aboriginals and Aboriginal lands is the *Indian Act*.[92] The *Indian Act* provides for the "management, possession, disposition, development, and use of reserve lands."[93] In other words, many topics that would normally fall under provincial jurisdiction are covered by this federal legislation.

It also touches on how provincial legislation will affect Aboriginals and Aboriginal lands. Section 88, which was enacted in 1951,[94] reads:

Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any

matter for which provision is made by or under this Act.

A provincial law of general application is a law that applies uniformly throughout a given jurisdiction and does not single out the federal matter for special treatment.[95] This section says that such a law will apply to Aboriginal and Aboriginal lands, unless:

1) a treaty conflicts with the law
2) a federal law conflicts with the law
3) an order, rule, regulation or by-law in the *Indian Act* conflicts with the law
4) or, unless the *Indian Act* has already made provisions to deal with the issue at stake in the law

In correspondence with exception number 4, one reason why water found on Aboriginal lands may be protected from provincial laws of general application is because there are some provisions within the *Indian Act* that speak to water regulation.

Section 81(1) of the *Indian Act* allows bands to make regulations and bylaws in relation to:

(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works; and
(l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies.

According to a decision out of Ontario's lower courts, *R. v. Martin*,[96] however, it is not enough that the *Indian Act* has a provision to make a provision. By-laws (or orders, rules and regulations) must actually be passed in order for the exception in section 88 to come into play. If by-laws have been passed, these provisions could be read as a federal assertion of jurisdiction over water management on reserve lands.

What if a provincial law of general application affects "Indianness"?

In 1985, the S.C.C. interpreted section 88, in a case called *Dick v. R.*[97] Here, Justice Beetz found that provincial laws of general application that "impair the status or capacity"[98] of Aboriginals and, in this way, affect "Indianness" should have section 88 applied to them.[99] On the other hand, provincial laws of general application that do not affect "Indianness" would simply apply of their own force.[100] This means that although there is impairment of status or capacity of aboriginals (a core federal matter), the provincial law of general application may still apply if none of the exceptions under section 88 are triggered.

The analysis might look like this:[101]

1. Do provincial water laws apply of their own force to aboriginals and lands reserved for aboriginals?

a) Is provincial water regulation a law of general application? (If not, the analysis ends here and the provincial law will not apply).

b) Do provincial water laws affect "Indianness" by impairing the status or capacity of aboriginals? (If not, the law applies of its own force. If yes, then go on to step 2).

2. If provincial water laws cannot apply of their own force, because they affect "Indianness," then can they be saved through the application of section 88?

What lies at the "core" of "Indianness" and, therefore, when to apply section 88 has not been fully determined to date.[102] Thus far, provincial laws of general application relating to traffic law and labour law have been found to apply to reserves because they do not affect "Indianness," per say.[103]

Stephen Bartlett has argued that water rights are "essential to the traditional and contemporary existence of Canada's aboriginal people."[104] He goes on to say that,

[W]ater rights were appropriated by treaty or executive appropriation along with reserve lands to that the objectives with which the lands were set apart could be met, and that the objectives contemplated modern and non-traditional uses of the land and water as well as traditional uses.[105]

Finding, first, that Aboriginal water rights are included in Aboriginal title, Bartlett also argues that the *Indian Act*is comprehensive in its treatment of water issues.[106] From this perspective, the *Indian Act* affirms the notion that only very strong indicators of intention will be accepted in any provincial move to abrogate water rights attached to reserve lands.[107]

In the same vein, Kerry Wilkins has noted that "a core of exclusive federal power over lands reserved is already unusually broad: a core that encompasses ownership, use, possession, occupation and disposition of lands that are subject to aboriginal interests."[108] Therefore, according to these writers, provincial regulatory powers would be closely scrutinized in relation to Aboriginals and Aboriginal lands.

Criminal Law Power

In the *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)*,[109]the S.C.C. stated that, "A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect

upon the public against which the law is directed."[110]

From this extract we can assume that, in order for criminal law to apply, the matter must fulfill a three-part test: 1) Is there a prohibition? 2) Is there a penalty? 3) Is there a criminal law purpose, i.e. a public purpose? What constitutes a criminal law purpose has been the primary point of contention in the courts. This issue was dealt with in relation to the environment in *R. v. Hydro-Québec*.[111]

R. v. Hydro-Québec

Facts and Issues

In *Hydro-Québec*, a power company released PCB's into a Québec river and was charged under sections 34 and 35 of the *Canadian Environmental Protection Act*,[112] which made their actions a crime.[113] The company won at the Court of Appeal level and the Crown appealed to the S.C.C. The constitutional question for the Court was whether or not environmental considerations could fall under the federal power over criminal law.

The Majority

In this case, the S.C.C. decided that the federal government has the authority to pass legislation that criminalizes harm to the environment. In other words, the protection of the environment may constitute a criminal law purpose under part 3 of the criminal law test, described above. Justice La Forest, writing for the majority stated that:

While many environmental issues could be criminally sanctioned in terms of protection of human life or health, I cannot accept that the criminal law is limited to that because "certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health", as the paper approvingly cited by Gonthier J. in *Ontario v. Canadian Pacific*… observes. But the stage at which this may be discovered is not easy to discern, and I agree…that Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values.[114]

While advocating for broad understanding of the environment (i.e. the environment includes effects on people), a further justification was that the *Act* did not attempt to deal with the environment generally, but only with particular toxic substances and their specific effects on the environment.[115] In other words, the decision underscores the principle that the criminal law aims to use discrete prohibitions to prevent broad "evils."[116] Justice La Forest also

emphasizes, however, that the use of the criminal law power does not preclude the provinces from exercising their extensive power under section 92 with regard to pollution and property and civil rights.[117] In the future, water pollution issues may be seen to fall under federal control more readily, considering that the criminal law power may now be applied to this subject matter.

Canadian Criminal Code

Under the federal power over criminal law, Parliament has also passed provisions in the *Criminal Code* that may relate to water contamination.[118]

Section 180 states that:

(1) Every one who commits a common nuisance and thereby

(a) endangers the lives, safety or health of the public, or

(b) causes physical injury to any person,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

(a) endangers the lives, safety, health, property or comfort of the public; or

(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

Federal Undertakings

In 2007, the doctrine of interjurisdictional immunity was revised somewhat. Originally, this doctrine stated that federal undertakings are immune from provincial laws of general application if those laws "affect" a vital or core part of the undertaking. Since the decision in *Canadian Western Bank v. Alberta*,[119] the provincial law of general application must "impair" and not simply "affect" the vital part of the federal undertaking to be considered constitutionally invalid:

It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core" competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.[120]

A tightening of this requirement means that provincial laws of general application, regarding water, will apply more readily to federal undertakings.

Remaining Heads of Power in Relation to Water

The courts have not examined, in any significant way, the federal powers over taxation, trade and commerce, public debt and property and the power over canals, harbours, rivers and lake improvements.[121]

Initiatives to Strengthen the Federal Role

Overview

J. Owen Saunders and Michael M. Wenig note that policy and constitutional considerations are inseparable:

Our understanding of what level of government is most appropriately placed to address a particular policy question is coloured to a significant degree by the particular Canadian consensus on what federal and provincial levels of government 'should' be doing.[122]

The primary policy argument for increasing federal involvement in water management is the transjurisdictional nature of water bodies. Other arguments include the international implications of water management and its moral significance to human beings.[123]

As owners of resources, provincial governments have felt relatively secure in their role as water managers.[124] The federal government, however, has shown a marked uncertainty about how best to interact with provinces on water management issues. Even when it acts under clearly defined constitutional authority, the trend has been toward deference to the provinces.[125] A closer look at the initiatives of the federal government throughout the last century reveals a general wane in federal involvement. Some of the reasons for this and possible problems with this trend will be discussed.

Around the time of Confederation, the Government of Canada was heavily involved in monitoring and instigating water related projects.[126] At this time, the federal government's involvement was closely tied to nation-building activities. Most works were related to the promotion of commerce and increasing the population.[127] Optimal irrigation patterns for the prairies were scoped out in order to promote settlement. The Public Works department facilitated the use of streams for transport of natural resources and dams were built to support the federal government's decision to create seaway routes.[128]

Federal initiatives ballooned after the Second World War.[129] Cooperation with the provinces as well as the United States became the focal point of federal water policy. Some of the joint projects included: the Maritime Marshlands Rehabilitation Administration (1948), the Eastern Rockies Forest Conservation Board (1947) to promote the maintenance of runoff coming from the Saskatchewan River, the Prairie Provinces Water Board (1948) to facilitate cooperation on the use of interprovincial waters, and the Fraser River Board (1955) which assessed possible flood remedies.[130]

Shortly after this initial proliferation of regional projects, the emphasis turned to boundary water projects with the United States. In 1950, the Niagara River Diversion Treaty was established in order to apportion flows equally between the provinces and the States.[131] A year later, the United States agreed to work on the St. Lawrence Seaway and Power Development Project.[132] After twenty years of negotiations, the Canadian government was also successful in the implementation of the Columbia River Treaty in 1964. It was, initially, unclear whether or not British Columbia would allow the Treaty to be ratified.[133] The province was interested in offering an American aluminum company a 50-year water license in exchange for payment of provincial taxes and water license fees.[134] The opinions expressed in the press at the time indicated that this option would inhibit the full development of the river, displace a Canadian owned dam from an optimal position and create a competitive disadvantage for Canadian corporations in the same business.[135]Eventually, the federal government implemented the *International River Improvements Act*, which vetoed the agreement between the American corporation and the province.[136] The Treaty was pivotal because it introduced a new international principle on water regulation. Upstream countries would now be guaranteed equal benefits from reservoirs, which provide power and flood control, as downstream countries.[137]

During the 1960's a federal water policy began to emerge. In 1970, the *Canada Water Act*[138]was passed, as a means through which to provide consultations between the federal and provincial governments on cost sharing and other management issues.[139] The early 1970's and 1980's saw water become a pressing issue of public concern. This concern led to the formation of the Inquiry on Federal Water Policy in 1985.[140]The objectives of the inquiry were to examine water quantity in Canada and to propose a framework for federal water policy in the future. After the creation of this report, however, experts Peter H. Pearse and Frank Quinn suggest that federal policy tapered off, causing the jurisdictional web to fall into a state of disarray. They cite Environment Canada's new approach, which involved subsuming water issues into the concept of sustainable development generally, as the major cause of the problem.[141] Other authorities on interjurisdictional issues in Canadian water management have

demonstrated, on the other hand, that this demise in federal control could be detected in even the boldest of federal initiatives *throughout* the century. Key initiatives that may have revealed federal reluctance include: the *Lake of the Woods Accord* (1921), the*Water Powers Reference* (1928), the *Canada Water Act* (1970) and the Inquiry on Federal Water Policy (1985).[142]

The Trend of Deference in Federal Policy

The Declaratory Power

In 1919, the federal government applied section 92(10)(c) of the *Constitution* in relation to the regulation of an international and interprovincial body of water, the Lake of the Woods.[143] Section 92(10)(c) of the*Constitution* allows the federal government to consider that some resources, although entirely within the geographical or jurisdictional bounds of a province, may be governed solely by Parliament if it is deemed necessary:

Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

The Lake of the Woods straddles the United States-Canada border, as well as the Manitoba-Ontario border. United States regulation was imminent in 1919, spurring the Canadian government to cooperate with the provinces in regulating the lake.[144] A control board was created, but the entity faced an early hurdle: the private interests of Mr. E. W. Backus in several dams and outlets on the lake.[145] The Prime Minister at the time explained in the House of Commons debates, 1921 that:

These acquirements by [private interests]…if carried through to the point of actual construction…would, before there could be such a thing as the acceptance of the report of the Joint Commission by the two countries, and the establishment of the board provided for by the report, lodge such vested rights in [the private interest]… as would put it out of the power of this country—without at least very, very great expense—to carry out its international obligations in respect of the findings of the International Joint commission…[146]

The two governments agreed that the control board would, as a result of these private interests, also need to be imbued with statutory authority.[147] Ontario hesitated and eventually refused to pass the necessary legislation because the province felt that Manitoba would benefit disproportionately from the provision determining flow regulation.[148] Unable to reconcile the provinces of Ontario and Manitoba to one another, the federal government passed the *Lake of the*

Woods Regulation Act, 1921[149] unilaterally.[150]The legislation's most relevant provision states that all dams, and other works built upon the lake and surrounding waters, which affect the outflow of water, are "declared to be for the general advantage of Canada."[151]

While the use of the declaratory power may indicate, at first blush, a strong initiative on the part of the federal government to take control of natural resources, the legislation also reveals the federal government's reluctance to infringe on provincial powers. It included a provision that makes it possible to nullify the Parliament's independent initiative upon a revival of Ontario's participation. The Prime Minister stated:

[W]hen Ontario passes the legislation introduced this year, or legislation to that effect, the Governor in Council may, when the two measures go into effect and the board is created thereon, repeal or suspend the legislation that we now submit to Parliament. That is to say, this legislation is intended to take care of responsibilities pending the concurrence of Ontario in the principle of joint control.[152]

This statement indicates that the use of section 92(10)(c), with regard to this natural resource, was seen only as an emergency measure. While vested with constitutional authority to take action, Parliament reiterated that it saw water management as a matter inherently within the domain of the provinces:

There is not, on the part of the Government of Canada, the least desire to invade the rights of the province of this country. No better evidence could be given of reluctance on the part of this Government or of this Parliament to invade provincial rights, than the evidence that, while we had paramount authority in the first place to go in and control, because international obligation is the first basic responsibility and navigation rights are the next responsibility and both are paramount to provincial rights, we did not do so. We recognized the rights of Ontario and Manitoba…and we sought by joint action tot take them with us in this control. It is only because, through no fault of ours but entirely through the fault…of Ontario…[that] we are compelled to take the position which we are taking now to ask Parliament vest us with authority to serve the interest of both provinces and the whole country until we are able to effect the joint legislation for which we strove in the first place.[153]

Although federal authority was constitutionally mandated, a preference for deference is clearly articulated in this statement with regard to water. J. Owen Saunders points out that the reluctance to use the declaratory power was not found in other areas of federal interest, such as railways. The likelihood of using

the declaratory power for water management purposes has only decreased since.[154]

The Water Powers Reference

In 1928, a series of questions were asked of the Supreme Court in order to clarify the division of powers question in relation to water. In large part, the questions went unanswered, notably, in regard to whether or not the federal government has control over interprovincial waters.[155] While the provincial ownership provisions are compared and contrasted to the federal navigation and declaratory powers, there was no consideration of water quality issues or how far reaching the federal power over fisheries might extend.[156]

Canada Water Act

Passed in 1970, the *Canada Water Act* (*Act*) was developed to provide a coherent plan for provincial and federal cooperation on water management issues. Some parts of the *Act* suggest that federal authority should prevail where cooperation fails between the two levels of government or between the provinces. Saunders and Wenig suggest, however, that even these parts of the *Act* tend to demonstrate constitutionally unnecessary deference towards the provinces.[157] Although the federal government is allowed to *design*management plans in order to deal with interjurisdictional waters of national interest, the federal government is not given the authority to implement or run the programs.[158] In other areas, the *Act* is somewhat bolder in relation to the federal role. Section 13 allows the federal government to take unilateral action if a particular water-quality management issue has become of significant "national concern." However, this section of the*Act* further stipulates that that this sort of action can only be undertaken after "all reasonable efforts" have been made to work with the provinces on finding a solution. To date, this section has never been invoked and most commentators agree that the likelihood of provincial dissension ensures that it will not be used in the future.

The Federal Water Policy

In the early 1970's the Energy, Mines and Resources department of the federal government transferred control over water to the newly created Department of the Environment (Environment Canada). As public interest grew in relation to issues such as climate change, water shortages, interbasin diversions, acid rain and export, pressure increased on the federal government to show leadership.[159] By 1985, the Inquiry on Federal Water Policy had produced a document entitled *Currents of Change: Final Report*.[160] The *Final Report* included a consideration of "the nature of emerging issues, the state of the resource, future requirements for water, interjurisdictional dimensions, and

scientific and research expertise."[161] The gathering of public opinion was also conducted. Some of the 55 recommendations made included:

- that the federal government should adopt integrated watershed management as a principle of federal policy[162]
- that the federal government should encourage water conservation and demand management by endorsing payment for use of water[163]
- that the federal government should take the initiative in establishing minimum quality standards for drinking water[164]
- the federal government should take radical steps toward controlling acid rain[165]

No over-arching strategy was put forward.[166] The inquiry focused on discrete issues to be dealt with by the federal government. The report acknowledged the diversity of federal interests and the need to cooperate with the provinces on these. One of the key issues addressed was the need for a federal role in dispute resolution between provinces.[167]

Shortly thereafter, in 1987, the policy was revised into the *Federal Water Policy*,[168] which incorporated many of the same recommendations.[169] This version of the strategy had five specific parts to it: water pricing, science leadership, integrated planning, legislative change and public awareness. Its stated objective was to "encourage the use of freshwater in an efficient and equitable manner consistent with the social, economic and environmental needs of present and future generations."[170] The document speaks to the recommendation, made in the 1985 *Final Report*, that the federal government should orchestrate dispute resolution between the provinces. However, the key proposed initiative—to enable mediation and arbitration and "to negotiate with the provinces the development of a mechanism for the ultimate resolution of interjurisdictional disputes"[171]—has never been implemented.[172]

The departments of Environment and Justice did review all federal legislation with an eye to bringing it into line with the new policy, however, after the report of the Bruntland Commission, which introduced the concept of sustainable development, Pearse and Quinn argue that the *Federal Water Policy* was abandoned.[173] In 1989, senior management at Environment Canada decided against modernizing and fleshing out the*Canada Water Act* in favour of pursuing an omnibus bill to be called the *Canada Environment Act*.[174] It was intended to incorporate the federal legislation for parks, environmental assessments and environmental protection, but the size of the undertaking made it unfeasible. A Green Plan was implemented instead, with the goal of making the public think in

terms of ecosystems.[175] As resources were allocated towards ecosystem awareness activity, these commentators argued that decades of work on water issues were undone. Changes included (in 1996):[176]

- Environment Canada shelved the *Federal Water Policy*
- The *Canada Water Act* fund had fallen from $9 million in 1990 to what was projected to be $0.5 million in 1997
- The Freshwater Science Program, conducted by the department of Fisheries and Oceans, had its funding cut by 55%
- Funding to flood damage reduction programs and water boards was also restricted
- Inland Waters Directorate was dissolved. As a result, an inquiry was conducted into whether or not water issues were being adequately considered

These authors conclude that when one considers the critical state of water systems on Aboriginalreserves or the growing need for negotiations on water export issues, down-sizing the focus on water-specific issues was premature.[177]

Water Exports and Intergovernmental Agreements: Further Federal Deference

Context

Bulk-water exports form another contemporary example of the inability or reluctance of the federal government to take a leadership role in building a national water policy.[178] Generally, the provinces regulate water uses within their own boundaries, but boundary-waters with the United States are an exception. Bodies of water that cross the border between Canada and the United States are under federal jurisdiction, in accordance with the *Treaty relating to Boundary Waters and Questions Arising with Canada, United States and United Kingdom*[179] of 1909.[180] International trade and commerce also gives the federal government jurisdiction over export of water as a "good."[181] Most provinces have prohibition on the export of water and there is federal legislation that disallows export out of international freshwaters.[182] However, many scholars agree that, "these provisions create a patch-work of laws, raising different NAFTA [North American Free Trade Agreement] considerations in each jurisdiction."[183] Legal scholar, David Boyd, argues that it is imperative for the federal government to take control over the issue of bulk-water exports in order to overcome the loopholes inherent in the patchwork of provincial laws.[184] On the other hand, some experts have argued that "harmonization agreements" have

achieved a well-functioning, nationwide regulatory regime.[185] Harmonization agreements have been adopted in order to avoid contestation over the constitutional boundaries and to avoid conflict with provinces, like Québec, who advocate for provincial autonomy. Their function is to encourage provinces to adopt environmental measures that are consistent throughout the nation.[186]

Whether or not international trade agreements apply to water exports has not yet been determined. The controversy stems from the ambiguity over the whether or not bulk-water exports constitute a "good." Water in a bottle is considered a "good. However, a legal opinion, provided by the Council of Canadians, based on court decisions and trade law from other countries, strongly suggests that ordinary water in its natural state is also good and therefore falls under international trade agreements.[187] Canada, the United States and Mexico have signed a statement that declares natural water resources to be out of the reach of the *North American Free Trade Agreement*, [188] but the statement is non-binding. Some scholars suggest, however, that it carries "significant interpretive weight."[189]

Chapter 11 of *NAFTA* creates particularly drastic reductions of trade barriers. In this portion of the agreement, it is stated that any kind of trade practice undertaken domestically cannot be prohibited internationally.[190] In other words, foreign investors cannot be treated differently than domestic investors. Public interest groups argue that this provision inhibits the implementation of national environmental standards and health regulations, because governments fear being liable to foreign investors.[191] Article 1106 of *NAFTA* also provides that a state may be prohibited from restricting the export of its natural resources or from placing regulations on environmental pollutants.[192] It is also the case, under *NAFTA* and the *General Agreement on Tariffs and Trade*,***[193]*** that if Canada agrees to allow export at one point in time, it may not be able to retract that agreement at a later date, unless it is for conservation purposes, to protect humans, animals or plants and a proportional decrease in water extraction can be demonstrated domestically.[194]

Recent Past

In the 1990's several controversial bulk-export proposals were put forward. In 1991 Sun Belt Water Inc., an American Company, and Snowcap Waters Ltd., a British Columbia corporation, made an application to export water from British Columbia to California. This proposal was halted when the provincial government put a moratorium on bulk-water exports and eventually introduced legislation that prohibited bulk-exports altogether.[195] The second proposal gained the most media attention. In 1998, the Nova Group was given permission from the Ontario government to extract water from Lake Superior in Ontario and export it to Asia.

While the amount of water the company proposed to extract is not considered to be all that much, public opposition caused the Ontario government to rescind Nova's permit.[196] In Newfoundland, the provincial government considered lifting a ban on bulk-water exports in order to allow the McCurdy Group to extract and export water from Gisborne Lake[197] to ship to oilfields in the Middle East.[198] This project was estimated to be one hundred times the size of the Nova project and on a much smaller lake. Public opposition kept the ban in place.[199] One commentator notes that "the one constant is the hostility with which [each private proposal] has been received by an overwhelming majority of Canadians, usually in the neighborhood of 70%."[200]

Present

In 1999, instead of maintaining a reactive approach, the Canadian federal government developed a three-part pro-active strategy.[201] The first part of the strategy involved a reference to the International Joint Commission regarding the environmental ramifications and the possible effects of international trade agreements on bulk-water exports. Secondly, an amendment was made to the *International Boundary Waters Treaty Act* that had the effect of restricting the amount of water that can be extracted from the Great Lakes and other boundary waters (in particular, the Great Lakes). Finally, the *Accord for the Prohibition of Bulk-Water Removal from Drainage Basins* was tabled. The *Accord* is an attempt to voluntarily induce the provinces to adopt legislation that emulates all other provincial legislation for prohibiting bulk-exports of water. The voluntary nature of the *Accord* avoids testing the boundaries of constitutional authority over water management and the extent of Canada's obligations under international free trade agreements.[202] Its objectives are to prohibit the removal of water in bulk from major drainage basins, thereby allowing the*Accord* to fall under "conservation" exemption of the international free trade agreements.[203] Frank Quinn explains: "Protecting water within natural rather than political boundaries—regardless of whether a proposal aims to divert water within Canada or outside of it—may well avoid the argument of discrimination that could lead to international trade challenges."[204]

A number of provinces, as well as the Yukon, have adopted the *Accord* directly. The federal government requires permission from the minister of Indian Affairs and Northern Development for diversions occurring in Nunavut and the Northwest Territories. Those provinces that have not signed the *Accord* have independently implemented legislation that prohibits bulk-water export.

Josha McNab, Murray B. Rutherford and Thomas I. Gunton conducted a survey of the legislation, regulations, and policies used to support each province's and each territory's commitment to prohibiting bulk-water export. In order to determine

the effectiveness of the inter-governmental agreements, they looked at:[205]

1) the strength and scope of the provincial and territorial policies
2) the jurisdiction's adherence to the goals of the Accord
3) the likelihood that individual jurisdictions will remain committed to their prohibitions or restrictions.

They summarize their study by stating the strategy adopted by the federal government of "guided federalism" has not been effective.[206] No consistency has evolved since the introduction of the *Accord*. They note that each jurisdiction can change their approach without the consent of any other jurisdiction.

These authors concur with Quinn, who points out that Québec has made exceptions for hydro projects, allowing these types of operations to continue to engage in diversions.[207] Both Québec and Newfoundland, Quinn continues, have shown interest in maintaining the option of shipping water in bulk if global market prices rise sufficiently.[208] Alberta, Manitoba and Nova Scotia gave their Cabinets the power to add exemptions along the way.[209]

Boyd points out that Alberta recently passed legislation to approve a licence that would enable the transfer of water between to water basins inside the province.[210] A further problem he mentions is that some of the provincial laws focus on banning water export from the province, while others are concerned with prohibiting transfers of water between water basins.[211] Even if the provincial legislation could be perfectly synchronized, Boyd questions whether banning bulk-water export is a constitutionally valid exercise if performed by the provinces. Although water regulation falls under the provincial domain, regulating international trade does not.[212] This would be particularly relevant where the provinces have focused on export to other countries in their legislation rather than diversion from water basins. McNab, Rutherford and Gunton add that most of the policies that do exist do not take into account the *Accord's* approach for circumventing the application of international trade agreements.[213] That is, most of the policies do not define their prohibition by watershed boundaries instead of political boundaries. As a result, foreign investors may be able to demand bulk-water exports.

Conclusion

The case law surrounding jurisdiction over Canadian water has tended to turn on the facts of each case rather than provide an overarching strategy for ensuring effective management of the resource. Many areas remain unexamined by the courts and, where decisions have been rendered, varying approaches have been

used. In *Crown Zellerbach*, for example, Justice Le Dain argued that marine pollution ought to fall under the federal government's POGG authority because it is a subject area of national concern and because it has the requisite "singleness" or "distinctiveness." On the other hand, in *Oldman River*, Justice La Forest demonstrates that the catalogue of powers under each government's subject headings are broad enough to deal with environmental issues and that there is no need to resort to the national concern doctrine under POGG. A further example of the Court's inconsistency is the discrepancy between the decision in *Crown Zellerbach* and the decision in *Fowler*. In *Fowler*, it was found that legislation which purports to fall under the scope of a federal head of power, but which may just as easily fall under a provincial head of power, must demonstrate that the regulation of the subject matter is directed at preventing harm. In *Crown Zellerbac*h, it was found that the federal government could regulate all dumping in marine waters, even if no evidence of harm could be found.

A brief examination of water policy, and the status of Canadian water legislation, has also revealed a deeply troubling situation. Interprovincial agreements have led to very limited coherenc in the relevant legislation nation-wide. Even where the federal government appears to have constitutional authority, federal leadership has not emerged. In addition, legislation has proven to be relatively impotent. The *Canada Water Act* allows the federal government to take unilateral action in instances where water quality has become a matter of "national concern." However, this section has never been implemented, largely due to provincial pressure. While the public has demonstrated an urgent concern over matters such as international water exports, this concern appears to have led only to a more complicated patchwork of laws and loopholes. It appears that, until the desire for provincial autonomy over resources is remedied, Canadian water quality and quantity will remain at risk.

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[1]*Constitution Act, 1867*(U.K.), 30 & 31 Vict., c. 3, s. 91 and 92, reprinted in R.S.C. 1985, App. II, No. 5 .
[2]Peter H. Pearse & Frank Quinn, "Recent Developments in Federal Water Policy: One Step Forward, Two Steps Back" (1996) 21.4 Canadian Water Resources Journal 329 at 331.
[3]Peter Hogg, *Constitutional Law of Canada* 2007 student ed. (Toronto: Thomson Carswell, 2007) at 382.
[4]J. Owen Saunders, *Interjurisdictional Issues in Canadian Water Management* (Calgary: The Canadian Institute of Resources Law, 1988) at 2.
[5]Pearse & Quinn, *supra* note 2.

[6]*Ibid*. at 329.
[7]Walkerton Inquiry, “Constitutional Jurisdiction Over the Safety of Drinking Water” (Toronto: Queen’s Printer for Ontario, 2002) at 8 [Walkerton], online: <http://govdocs.ourontario.ca/results?fsu=Drinking+water>.
[8]J. Owen Saunders & Michael M. Wenig, “Whose Water? Canadian Water Management and the Challenges of Jurisdictional Fragmentation” in Karen Bakker, ed., *Eau Canada: The Future of Canada’s Water* (Vancouver: UBC Press, 2007) 121 at 122.
[9]Walkerton, *supra* note 7 at 11-12.
[10]Hogg, *supra* note 3 at 435.
[11]*Ibid*. at 449.
[12]*Ibid*. at 438.
[13]*Ibid*. at 435.
[14]*Ibid*. at 454.
[15]Saunders & Wenig, *supra* note 8 at 123.
[16]*R. v. Zellerbach Canada Ltd*., [1988] 1 S.C.R. 401 (CanLii) .
[17]*Ibid.* at 33.
[18]*Ibid*.
[19]Hogg, *supra* note 3 at 444.
[20][1976] 1 S.C.R. 477 (WLeC) .
[21]*Ibid.* at para. 1.
[22]*Ibid.* at para. 38.
[23]*Ibid.* at para. 20.
[24]*Ibid.* at para. 48.
[25]*Ibid.* at para. 6.
[26]*Ibid.* at para. 48.
[27]*Ibid.*
[28]Walkerton, *supra* note 7 at 3.
[29]*Interprovincial, supra* note 20 at para. 68.
[30]*Ibid*. at para. 15.
[31]Saunders, *supra* note 4 at 18.
[32]S.C. 1974-75-76, c. 55 ; *Zellerbach*, *supra* note 16 at para. 1.
[33]*Ibid.*
[34]*Ibid*. at para. 22.
[35][1980] 2 S.C.R. 213 (WLeC) .
[36][1980] 2 S.C.R. 292 (WLeC) .
[37]R.S.C. 1970, c. F-14.
[38] *Zellerbach*, *supra* note 16 at para. 18.
[39]*Ibid.*
[40]Alastair R. Lucas, “R. v. Crown Zellerbach Canada Ltd.”, Case Comment,(1988-1989) 23 U.B.C. L. Rev. 355 at 363.

[41]*Zellerbach*, *supra* note 16 at paras. 22 and 24.
[42]*Ibid*. at para. 33.
[43]*Ibid*. at 37.
[44]*Ibid*. at 39.
[45]*Ibid*. at 38.
[46]*Ibid*. at 40.
[47]Lucas, *supra* note 40 at 356.
[48]*Ibid*. at 355.
[49]*Zellerbach*, *supra* note 16 at paras. 58-61.
[50]*Ibid*. at 60.
[51]*Ibid*. at 72.
[52]*Ibid*. at 64.
[53]*Ibid*. at 74.
[54]Lucas, *supra* note 40 at 363.
[55]Saunders, *supra* note 4 at 20.
[56]*Ibid*. at 21.
[57][1992] 1 S.C.R. 3 (WLec) .
[58]*Ibid*. at para. 3.
[59]*Ibid*.
[60]R.S.C. 1985, c. N-22.
[61]S.O.R. 84-467 .
[62]R.S.C. 1985, c. E-10.
[63]*Ibid*. at section 4(1)(a).
[64]*Oldman River*, *supra* note 57 at para. 3.
[65]R.S.C. 1985, c. F-14.
[66]*Oldman River*, *supra* note 57 at para. 3.
[67]*Ibid*. at 46.
[68]*Ibid*. at 47.
[69]*Ibid*. at 51.
[70]*Ibid*. at 52.
[71]*Ibid*.
[71]Mark Warkentin, “Friends of the Oldman River Society v. Canada (Minister of Transport) (1992)”, Case Comment, (1992) 26 U.B.C. Law Review 313 at 323.
[72]*Oldman River*, *supra* note 57 at para. 51.
[73]Stephen Kennett, “Environmental Jurisdiction After *Oldman*”, Case Comment, (1993) 38 McGill L.J. 180 at 185.
[74]*Ibid*. at 190.
[75]*Ibid*. at 191.
[76]*Ibid*. at 187-189.
[77]*Oldman River*, *supra* note 57 at para. 104.
[78]*Ibid*.

[79]Marie Ann Bowden, “Friends of the Oldman River Society v. Canada et al: Two Steps Forward, One Step Back”, Case Comment, (1996) 56 Sask. Law Review 209 at 217.
[80]Bora Laskin, “Jurisdictional Framework for Water Management” in *Resources for Tomorrow* (Conference, Background Papers vol. 1) (Ottawa: Queen’s Printer, 1961) 211 at 216.
[81]Saunders, *supra* note 4 at 11.
[82]*Ibid.*
[83]*Fowler*, *supra* note 35 at 5.
[84]R.S.C. 1970, c. F-14.
[85]*Fowler*, *supra* note 35 at 4.
[86]*Ibid*. at para. 13.
[87]*Ibid.* at para. 16.
[88]*Ibid*. at para. 20.
[89]*Ibid*. at para. 22.
[90]*Ibid.* at para. 23.
[91]*Supra* note 35 at para. 20.
[92]R.S.C. 1985, c. I-5.
[93]Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: The Canadian Institute of Resources Law, 1988) at 139.
[94] Walkerton, *supra* note 7 at 24.
[95]Minister of Indian and Northern Affairs Canada, “Report of the Expert Panel on Safe Drinking Water for First Nations” (Ottawa: Public Works and Government Services Canada, 2006) [Expert Panel], online: Government of Canada, Indian Affairs and Northern Development <www.ainc-inac.gc.ca>.
[96]*R. v. Martin*, (12 August 1985), (Ont. Dist. Ct.).
[97]*R. v. Dick*, [1985] 2 S.C.R. 309 (WLeC).
[98]*Ibid*. at para. 31.
[99]*Ibid*. at para. 42.
[100]*Ibid.*
[101] Expert Panel, *supra* note 95 at 9.
[102]*Ibid*. at 10.
[103]*Ibid*. at 10 and 11.
[104]Bartlett, *supra* note 93 at 1.
[105]*Ibid*. at 19.
[106]*Ibid*. at 139.
[107]*Ibid.*
[108]Kerry Willkins, “Negative Capability: Of Provinces and Lands Reserved for the Indians” (2002) 1 Indigenous Law Journal. 57 at 71.
[109]*Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine*

Case) (1948), [1949] S.C.R. 1 (WLeC).
[110]*Ibid*.at para. 142.
[111] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 21 (CanLii) .
[112]R.S.C. 1985, c. 16 (4th Supp.) .
[113] *Hydro-Québec*, *supra* note 111 at para. 88.
[114]*Ibid*. at para. 127.
[115]*Ibid*. at para. 135.
[116]*Ibid*. at para. 128.
[117]*Ibid*. at para. 131.
[118]R.S.C. 1985, c. C-46.
[119]*Canadian Western Bank v. Alberta*, 2007 SCC 22.
[120]*Ibid*. at para 48.
[121]Walkerton, *supra* note 7 at 26.
[122]*Supra* note 8 at 120.
[123]*Ibid*. at 120-121.
[124]*Ibid*. at 124.
[125]*Ibid*. at 125.
[126]Pearse & Quinn, *supra* note 2 at 331.
[127]*Ibid*.
[128]*Ibid*.
[129]*Ibid*.
[130]*Ibid*.
[131]*Ibid*. at 332.
[132]*Ibid*.
[133]Neil A. Swainson, *Conflict over the Columbia: The Canadian Background to an Historic Treaty*(Montreal: McGill-Queen's University Press, 1979) at 58.
[134] *Ibid*.
[135]*Ibid*. at 59.
[136]*Ibid*. at 64.
[137]*Ibid*. at 5.
[138]R.S.C. 1985, c. C-11.
[139]Larry Booth and Frank Quinn, "Twenty-five years of the Canada Water Act" (1995) 20.2 Canadian Water Resources Journal 65 at 65-66.
[140]Pearse & Quinn, *supra* note 2 at 333.
[141]*Ibid*. at 335.
[142]Saunders, *supra* note 4 at 21.
[143]Saunders, *supra* note 4 at 22.
[144]*Ibid*.
[145]Canada, Parliament, *House of Commons Debates*, No. 5 (31 May 1921) at 4173 (Rt. Hon. Arthur Meighen).
[146]*Ibid*.

[147]*Ibid*. at 4174.
[148]Saunders, *supra* note 4 at 23.
[149]*The Lake of the Woods Regulation Act*, 1921, S.C. 1921, c. 38.
[150]*Supra* note 145 at 4178.
[151]*Ibid*., at section 2.
[152]*Supra* note 145 at 4176-77.
[153]*Ibid*. at 4177.
[154]Saunders, *supra* note 4 at 25.
[155]*Ibid*. at 26.
[156]*Ibid*.
[157]*Supra* note 8 at 125.
[158]*Ibid*.
[159]Pearse & Quinn, *supra* note 2 at 333.
[160]Inquiry on Federal Water Policy, *Currents of Change: Final Report* (Ottawa: Environment Canada).
[161]*Ibid*. at 3.
[162]*Ibid*. at 98.
[163]*Ibid*. at 99.
[164]*Ibid*. at 108.
[165]*Ibid*. at 110.
[166]Saunders & Wenig, *supra* note 8 at 126.
[167]*Ibid*.
[168]*Federal Water Policy* (Ottawa: Environment Canada).
[169]Pearse & Quinn, *supra* note 2 at 333.
[170]*Supra* note 168 at 5.
[171]*Ibid*. at 33.
[172]Saunders & Wenig, *supra* note 8 at 126.
[173]*Supra* note 2 at 335.
[174]*Ibid*.
[175]*Ibid*.
[176]*Ibid*. at 335-336.
[177]*Ibid*.
[178]David Boyd, *Unnatural Law* (Vancouver: UBC Press, 2003) at 59.
[179]*Treaty relating to Boundary Waters and Questions Arising with Canada, United States and United Kingdom*, 11 January 1909, 36 U.S. Stat. 2448, U.K. .
[180]Josha MacNab, Murray B. Rutherford & Thomas I. Gunton, "Evaluating Canada's *Accord for the Prohibition of Bulk-Water Removal from Drainage Basins:* Will it Hold Water?" (2006/2007) 34.3 Environments 57 at 60.
[181]*Ibid*.
[182]James Mallet, "Our Water and the Law" (2004) Law Now 9 at 10.
[183]*Ibid*.

[184]Boyd, *supra* note 178 at 59.
[185]B.T. Heinmiller, "Harmonization Through Emulation: Canadian Federalism and Water Export Policy" (2003) Canadian Public Administration 46(4) 495 at 508.
[186]McNab, Rutherford & Gunton, *supra* note 180 at 61.
[187]Boyd, *supra* note 178 at 60.
[188]North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2 (entered into force 1 January 1994) .
[189]Peter Bowal, "Canadian Water: Constitution, Policy, and Trade" (2006) Mich. L. Rev. 1141 at 1171.
[190]*Ibid*. at 1172.
[191]*Ibid*. at 1173.
[192]*Ibid*. at n. 210.
[193]General Agreement on Tariffs and Trade, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948).
[194]McNab, Rutherford & Gunton, *supra* note 180 at 61.
[195]Boyd, *supra* note 178 at 56.
[196]*Ibid*. at 57.
[197]McNab, Rutherford & Gunton, *supra* note 180 at 60.
[198]Boyd, *supra* note 178 at 57.
[199]*Ibid*.
[200]Frank Quinn, "Water Diversion, Export and Canada-US Relations: A Brief History" (August 2007) at 7, online: The Program on Water Issues <http://www.powi.ca/>.
[201]Boyd, *supra* note 178 at 58.
[202]McNab, Rutherford & Gunton, *supra* note 180 at 62.
[203]*Ibid*.
[204]Quinn, *supra* note 200 at 11.
[205] McNab, Rutherford & Gunton, *supra* note 178 at 62.
[206]*Ibid*. at 71-72.
[207]Quinn, *supra* note 200 at 12.
[208]*Ibid*.
[209]*Ibid*.
[210]Boyd, *supra* note 178 at 59.
[211]*Ibid*.
[212]*Ibid*.
[213]McNab, Rutherford and Gunton, *supra* note 180 at 72.