

1986

An Overview of Canadian Law and Policy Governing Great Lakes Water Quantity Management

Marcia Valiante

Paul Muldoon

Jim Harvey

Paul King

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Marcia Valiante, Paul Muldoon, Jim Harvey, and Paul King, *An Overview of Canadian Law and Policy Governing Great Lakes Water Quantity Management*, 18 Case W. Res. J. Int'l L. 109 (1986)

Available at: <https://scholarlycommons.law.case.edu/jil/vol18/iss1/8>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

An Overview of Canadian Law and Policy Governing Great Lakes Water Quantity Management

*by Canadian Environmental Law Research Foundation**

I. INTRODUCTION

A. *A Scope of the Study*

As water supplies in dry areas of North America have become increasingly depleted in recent years, the threat of water shortages has focused attention on the possibility of diverting waters from two large sources of fresh water in North America, the Great Lakes and the north flowing rivers of Canada. Concern over diversions from the Great Lakes increased in 1981 with publicity surrounding a plan for a coal slurry pipeline in the United States using water from Lake Superior. This concern has led to a number of initiatives to study the use of water in the Great Lakes Basin and to prepare for the possibility of a diversion being proposed. One such initiative is the study undertaken by The Center for the Great Lakes on the legal issues involved in Great Lakes diversions. This paper forms one part of that study.

The purpose of this paper is to provide an overview of the legal regimes in Canada governing water quantity management, with an emphasis on how these regimes might respond to a proposed diversion of water from or into the Great Lakes Basin. For this purpose, the laws and policies of the Canadian federal government and the provinces of Quebec and Ontario are examined.

Although the primary emphasis is on Great Lakes diversions, the paper also touches on interrelated issues governing consumptive uses of water resources. From a general perspective however, it should be made clear that neither topic can be said to command a distinct or comprehensive regime. In effect, it was necessary to collate various provisions from a multitude of statutes and regulations in order to understand present controls on diversions and consumptive uses in Canada. Moreover, due to the legislative division of power between the federal and provincial governments under the Canadian Constitution, the questions concerning

* Marcia Valiante, Director of Research, Paul Muldoon, Research Associate, Research Assistance provided by Jim Harvey and Paul King. Special Note: Professor Paul Emond, Osgoode Hall Law School, York University provided editorial assistance and prepared Section II, THE COMMON AND CIVIL LAW

which government has legislative competence over various issues tend to be complex and unpredictable.

B. The Concepts of "Diversion" and "Consumptive Use" Under Canadian Law.

For purposes of this study, "diversion" means the transfer of water from the Great Lakes Basin into another watershed, or into the Great Lakes Basin from another watershed, or from the watershed of one of the Great Lakes into another. "Consumptive use" is that portion of water withdrawn or withheld from the Great Lakes Basin and assumed to be lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products, or other processes.

There seems to be no distinction under Canadian law between "interbasin" transfers and "intra-basin" transfers of water. For example, one of the most direct controls of diversions in Ontario, the Lakes and Rivers Improvement Act,¹ does not specifically refer to diversions except with respect to the definition of a "dam," which includes "a dam or other work forwarding, holding back or diverting water." Although Canadian law fails to distinguish between inter- and intra-basin transfers, it does distinguish between different categories of waters as to which rules apply. In other words, the laws and regulations applicable to various water resources differ somewhat depending on whether the waters in question are boundary, international, interprovincial or intraprovincial waters and whether they are navigable.

The paper is divided into four main parts. The first part will examine the common law and civil law principles relevant to a discussion of water diversion and consumptive uses. The second part explores the sources of legislative authority, from the perspective of both provincial and federal authority. The third part examines the relevant federal and provincial laws with a view to determining the extent to which existing laws facilitate information gathering, comprehensive water basin planning and water licensing. The fourth part speculates about potential legal responses to two kinds of water diversion proposals: one opposed by a Basin province, the other proposed by a Basin province. And finally, there is a brief look at federal and provincial policy with regard to water diversions.

II. THE COMMON AND CIVIL LAW

A. Introduction

Historically, water use in Ontario was regulated by the court according to the applicable common law principles. Water use rights in

¹ Lakes and Rivers Improvement Act, ONT. REV. STAT. ch. 229 (1980).

Quebec were determined according to the provisions of the Civil Code. With the passage of water quality and water use legislation in both jurisdictions, the common law and civil code have been relegated to a very modest role in resolving disputes over competing water uses and in settling out water management principles. Although most water diversions and consumptive uses are regulated by permit pursuant to the appropriate statute, the common law and civil law continue to be relevant.

Before discussing the common law and civil code principles that govern water use in the two provinces, it is important to distinguish Canadian law from American law. First, under the Constitution Act of 1867,² the provinces have ownership of all natural resources as well as jurisdiction over property and civil rights within a province. For this reason, there is no federal common law that would determine rights between provinces. This makes it important (although not legally mandatory) that provincially sanctioned water projects that may have interprovincial or international consequences involve both the federal and affected provincial governments. Those projects that are not authorized by the province within which they are situated would, subject to the comments that follow, be subject to the relevant common law or civil code of the province.

The second distinction between Canada and the United States is that Ontario and Québec have very different legal backgrounds. Ontario water law, like the other eight common law Canadian provinces, is based primarily on English common law. Quebec water law, on the other hand, is derived from the Quebec Civil Code. Under the Code, property ownership includes the right to enjoy property in the most absolute manner, provided the use in question is not prohibited by law or regulation. Some limitations, such as the law of servitude, are derived from the Code, while others flow from Quebec statutes and regulations. While there are obvious similarities between the common law of Ontario and the civil law of Quebec, the differences are much sharper than those that exist among U.S. states bordering the Great Lakes.

Thus, the discussion that follows is subject to two important caveats: (1) there is no federal common law in Canada and (2) the principles governing water diversions and consumptive uses are quite different between the Canadian provinces bordering the Great Lakes.

B. Common Law Rights and Obligations.

Under the common law, a number of actions are available to those adversely affected by the water use activities of another. Generally, rights fall into two broad categories: private rights and public rights.

² British North America Act, 1867, 30 & 31 Vict., art. VIII, §§ 108, 109 [hereinafter cited as Constitution Act, 1867].

Under the former, three causes of action are especially relevant to this discussion: riparian rights, private nuisance, and the doctrine in *Rylands v. Fletcher*.³ Under the latter, there are two actions: one based on public nuisance, the other on breach of public trust.

While each of the categories has a long history and is well embedded in the common law of Ontario, their evolving and changing nature makes precise description of the right difficult. This uncertainty makes it particularly difficult to rely on a legal doctrine, either for purposes of public water use planning or private water use development. Furthermore, the predictive value of the common law has been eroded by the dearth of actions in this area. Thus, whatever one may say about the law or theory of riparian rights, for example, there is little prospect that the doctrine will be utilized except in the most extraordinary cases. Highly restrictive class action rules in Ontario, the plaintiff's liability for the defendant's costs in an unsuccessful action, as well as judicial reluctance to award a satisfactory remedy (such as an injunction), all make a private civil action especially problematic.

1. Riparian Rights

a. Surface Water

While each cause of action makes its own contribution to the principles upon which a court, in the absence of a statutory determination of the issue, would turn, the riparian rights doctrine is clearly the most important. The classic statement of the right is found in Halsbury's:

A riparian owner has, as an incident to his property in the riparian land a natural and proprietary right—arising *jure naturae*, to have the water in any natural channel, which is known and defined on which his land abuts—or which passes through or under his land, flow to him in its natural state both as regards quantity and quality, whether he has made use of it or not.⁴

Although first formulated as an absolute right, recent court decisions have moderated the strictness of the doctrine through the application of a "reasonableness" test. Reasonableness has, of course, always been a feature of the doctrine. Indeed, a riparian owner's right was to the "reasonable enjoyment" of the stream. Historically, that meant the right to take water for ordinary or domestic purposes. Today it seems to include much more. A water diversion in Halifax, Nova Scotia for example, to facilitate construction of an apartment building, was deemed "reasonable" when weighed against the aesthetic loss of a free flowing stream to the lower riparian plaintiff, although those responsible for the diver-

³ *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (1868).

⁴ 39 HALSBURY'S LAWS 3D 516-17 (1962).

sion were liable in damages.⁵ On the other hand, the water used by a lower riparian owner to manufacture scotch whiskey was found impaired by the hard water discharged into the stream by an upper riparian mine, even though the water was clean and potable.⁶ In these and other cases the character of the neighbourhood and the surrounding uses were important factors in determining whether there had been an interference with a riparian right and, just as important, in determining the appropriate remedy.

Water may be extracted by a riparian owner for extraordinary purposes (non-domestic or non-subsistence agriculture purposes) subject to three conditions. First, the water use must be "reasonable" (a concept that is not well defined by the courts); second, the purposes for which the water is taken must be connected with the riparian tenement,⁷ and third, the water must be returned substantially undiminished in volume and unaltered in quality. Thus, as long as the use is reasonable and connected to the riparian lands, there are no restrictions on the uses to which the water may be put. An owner may not sell his riparian rights, although failure to act to preserve the right may, after twenty years, create prescriptive rights in those who have interfered with the riparian rights. Neither English nor Canadian courts have attempted to establish water use priorities, except those that are inherent in the doctrine and the judicial determination of reasonableness. Thus, ordinary or domestic uses have first call on the water. After that, well established uses would likely be seen as "more reasonable" than others, although as the *Lockwood* case indicates, reasonableness will also be judged by the needs of the community.

Riparian rights accrue to the owners of the banks against which the water washes or flows. While most private lands patented on Lake Ontario would qualify as riparian lands, recently patented lands in northern Ontario would not likely qualify because most are separated from the water by a sixty-six foot road allowance. There is no restriction on the water to which the right attaches providing that it flows in a defined channel.

Thus, both non-navigable surface water and underground streams are riparian, even though water may not flow continuously throughout the year. Artificial waterways, on the other hand, would not qualify as riparian unless the waterway had been in existence for a considerable period of time.⁸ One need not prove actual damages to succeed in court once an infringement of the right is established; damages are presumed.

⁵ *Lockwood v. Brentwood Park Investments Ltd.*, 10 D.L.R.3d 143 (1970).

⁶ *John Young & Co. v. Bankier Distillery Co.*, 1893 A.C. 691.

⁷ *Watson v. Jackson*, 19 D.L.R. 733, 745 (1914).

⁸ *Epstein v. Reymes*, 29 D.L.R.3d 1, 4 (1973).

b. Groundwater

Groundwater may either flow in a defined channel, in which case riparian rights apply, or it may percolate in undefined channels through the subsoil. Until recently, the law regarding percolating underground water was fairly straightforward: the rights to the water went to the first person to appropriate the water, irrespective of the motivation that lay behind those who appropriated the water or the consequences on those adversely affected by the appropriation.⁹ Courts were unconcerned about the consequences of such a rule on other potential water users or on those whose surface lands had subsided as a result of a lowered water table.¹⁰ Recently, the Ontario Court of Appeal reversed this archaic rule in the case of *Pugliese v. National Capital Commission*.¹¹ The court concluded that to continue to give effect to the English rule and give those who abstract percolating underground water the right "to wreak havoc on their neighbours would be harsh and entirely out of keeping with the law of torts as it exists today."¹² The result is that the court was prepared to apply nuisance and negligence principles to determine the reasonableness of underground water extraction, and in this way produce a rule not dissimilar to the American "reasonable use rule."

While *Pugliese* represents an important step into the twentieth century, there continues to be a marked divergence between the common law principles that apply to water flowing in defined channels and those that apply to so called percolating water. The case was finally decided not on the new standards set out by the Court of Appeal but rather on the basis that the defendant exceeded the maximum amount of water that may be extracted without a permit under the Ontario Water Resources Act.¹³ The Court of Appeal's reasoning is persuasive but not binding.

c. Ownership of the Bed

There will often be cases in which a potential plaintiff owns the bed and subsoil of the lake or river affected, particularly if the plaintiff is a provincial government. In such circumstances, the plaintiff's rights are far more extensive than those of the riparian owner. The owner of the solum is suing to protect a distinct property in the superjacent waters, whereas the riparian owner's rights in the water are merely usufructuary. As a result, the riparian owner has no special claim to the fisheries affected by a water diversion project. The owner of the solum, on the other hand, has a property interest in the fish and thus need not prove special

⁹ *Acton v. Blundell*, 152 Eng. Rep. 1223, 1224 (Ex. Ch.) (1843).

¹⁰ *Rade v. K. & E. Sand & Gravel (Sarnia) Ltd.*, [1970] 2 Ont. 188.

¹¹ *Pugliese v. National Capital Commission*, 79 D.L.R.3d 592 (1977).

¹² *Id.* at 615.

¹³ Ontario Water Resources Act, ONT. REV. STAT. ch. 361 § 20 (1980).

damages to sustain an action to recover damages for lost fish and enjoin the offending activity.¹⁴

2. Private Nuisance, Trespass and the Doctrine of *Rylands v. Fletcher*

Although neither nuisance, trespass nor the *Rylands v. Fletcher*¹⁵ doctrine are specifically concerned with water rights, all three doctrines may have an important effect on what use one may or may not make of water. First, nuisance is concerned with the unreasonable interference with the use and occupation of another's property. Unlike trespass, the interference is indirect. Thus, the typical nuisance action will arise as a consequence of increased water pollution that results from a decreased flow of water, or land subsidence that results from lowering the local water table. The typical trespass case, on the other hand, will likely stem from a decision to impound water, thereby flooding upstream property and thus directly interfering with the rights of upper riparian owners. In both nuisance and trespass the source of the interference is largely irrelevant. What matters is the impact of the defendant's activities on the plaintiff's land. An indirect interference that materially affects the land is actionable per se. Those that "merely" lead to some personal, sensible discomfort for the occupants of the land are subject to a round cost benefit analysis in which the courts weigh the costs to the plaintiff against the benefits to the defendant. In conducting such an analysis, relevant factors include the sequence of events that gave rise to the problem, the nature of the neighbourhood, and even the relative value of the defendant's and plaintiff's activity. Trespass, on the other hand, is a direct interference by the defendant with the plaintiff's land. The court does not distinguish between material and other types of injury. All trespasses are actionable. As with riparian rights, damage to land need not be proved, it is assumed.

The doctrine in the *Ryland v. Fletcher*¹⁶ case may be viewed as either a special branch of nuisance or trespass, although it is now generally regarded as a separate form of liability. The case involved an artificial containment of water which subsequently escaped and damaged the plaintiff's land. In its modern form, the doctrine is comprised of three components: the non-natural use of one's land (or the use of a non-natural substance on one's land), followed by an escape, and finally damage to some interest (not necessarily land) of the plaintiff's. Liability, as in the case of nuisance and trespass, is strict. In other words, negligence need not be proved although it will often be present. While the courts have

¹⁴ McKie v. K.V.P. Co., [1948] Ont. 398.

¹⁵ Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (1868).

¹⁶ *Id.*

not attempted to balance competing interests as they have for non-material nuisance actions, they have defined and redefined "non-natural" in such a way that the doctrine now applies to only the most dangerous activities. Thus, pesticide spraying is clearly a non-natural use of land, but impounding water on land, notwithstanding the facts of *Ryland v. Fletcher*, may not be.

While the relevance of riparian rights to water planning is clear, it is difficult to predict, except in a very general sense, what restrictions other common law doctrines are likely to impose on proposed diversions. Restrictions will probably range all the way from the obvious observation that one cannot flood the land of another for a water diversion scheme, to the more tenuous proposition that adverse weather modification brought about as a result of a major water diversion scheme may be actionable under the nuisance doctrine.

In addition to the private law principles that may be used to determine issues arising out of a proposed water diversion scheme, there are two public actions that may bear on the questions raised. The first is the public trust doctrine and the second is public nuisance.

3. The Public Trust Doctrine

The public trust doctrine is an ancient concept that traces its history to Roman Law. It first found formal expression in England in the *Magna Carta* of 1215. More recently it has received limited legislative and judicial support from environmental protection and resource management laws and isolated judicial pronouncements on the subject.

The common law has historically regarded the Crown as trustee of certain public rights, specifically the right to fish, the right of passage over navigable waters and certain more limited rights to use the foreshore. As owner and trustee of the resources in question, the Crown is under a duty, enforceable by the courts, not to derogate from or interfere with the public's rights to use these resources. Thus, "if the Crown grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right."¹⁷ The public rights, at least at common law, are not extensive.¹⁸ It does not, for example, include a right to activities of a recreational nature.

While the common law doctrine provides an important rule for interpreting crown grants, it offers little assistance to those dissatisfied with

¹⁷ *Gann v. Free Fisheries of Whitstable*, 11 Eng. Rep. 1305, 1312 (1865).

¹⁸ Hunt, *The Public Trust Doctrine in Canada* in ENVIRONMENTAL RIGHTS IN CANADA (J. Swaigen ed. 1981).

validly enacted legislation. Thus, the doctrine would seem to impose no legal impediment to the federal government authorizing works in navigable waters which would otherwise constitute an unlawful obstruction to navigation, or regulating the public right to fish pursuant to the provisions of the Fisheries Act.¹⁹ Similarly, it appears that provincial regulatory activity under its water resource legislation could not give rise to a successful action pursuant to the public trust doctrine.

The modern concept of public trust is not limited to common law principles. Canadian environmentalists and legal scholars have sought to establish that it may have a constitutional or statutory basis. Under Section 109 of the Constitution Act, 1867²⁰ all lands, mines, minerals and royalties belonging to the provinces of Canada, Nova Scotia and New Brunswick at the time of Confederation belong to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."²¹ Thus, if a common law trust can be established in provincial lands (and waters) in favour of the public, and if the trust existed prior to confederation, which would clearly be the case in light of its historical origins, then Section 109 constitutionally entrenches the trust. Canadian and English courts, however, have not been persuaded by the logic of this argument. The House of Lords held that Section 109 only relates to "trust law or legal duties that predate Confederation and the only clearly enunciated common law legal duties relate to fishing and navigation, neither of which fall within provincial jurisdiction."²² For Section 109 to create any affirmative trust duties on the provinces, the courts would have to find general public rights relating to the water itself, something that they have been most reluctant to do.

Legislative pronouncements of broad statutory purpose may offer the greatest scope for the public trust doctrine. The argument in favour of such a trust is as follows. Pursuant to the terms of a legislative statement of statutory purpose, it can be argued that the legislature has declared that the government is a trustee of the resource in question, that it is statutorily bound to manage it according to the purposes of the trust and that it is liable to the beneficiaries of the trust (i.e. the public) should it fail to properly discharge its statutory duty. Again, while this argument has some obvious appeal to a layperson, the courts have not thought it an appropriate basis on which to justify judicial supervision of the government's management of provincial resources. Indeed, in the one case to come before the Ontario Supreme Court the court denied the

¹⁹ Fisheries Act, CAN. REV. STAT. ch. F-14 (1970).

²⁰ Constitutional Act, 1867, 30 & 31 Vict., art. VIII, § 109.

²¹ *Id.*

²² Provincial Parks Act, ONT. REV. STAT. ch. 401 § 2 (1980).

plaintiff standing to bring the action, dismissed the claim as frivolous and vexatious, and finally concluded (by way of an obiter comment), that the provisions of the Act were such as to make "the power of the Province in the whole concept of parklands absolute."²³ While there were enough factual problems with the *Green* case that the action should probably not have been initiated, the decision now stands as a serious obstacle to anyone who may wish to use the public trust doctrine to limit or even prohibit a provincially endorsed water diversion scheme.

4. Public Nuisance

A second body of principles that may bear on the question of Great Lakes water diversion and consumptive uses falls under the heading of public nuisance. Although the public nuisance doctrine had its beginnings in criminal law, the courts have long recognized that in certain circumstances certain individuals may bring a civil action to enjoin the offending activity.

What activity qualifies as a public nuisance? While the list is not closed, it is possible to make some general comments about the kind of activity that may be enjoined in a successful public nuisance action. Most importantly, the activity in question must interfere with some "public right." Although this statement does little more than reformulate the original question, it is possible to identify certain public rights that may be adversely affected by a proposed water diversion scheme including, for example, the public's right to fish in and navigate over all navigable waters. Beyond that, the public rights protected by the doctrine are less easy to identify. A public nuisance has been defined as "any nuisance . . . which materially affects the reasonable comfort and convenience of a class of Her Majesty's subjects"²⁴ and in a Canadian case as "an inconvenience materially interfering with the ordinary physical comfort of human existence."²⁵ Such a broad definition encompasses virtually all objectionable activities, including for example, a major water diversion project that adversely affects the reasonable comfort and convenience of local residents.

While public nuisance offers a broad and flexible heading under which courts may enjoin environmentally disruptive activities, it is not without difficulty. The courts have held that unless a private individual suffers "special damage", the appropriate plaintiff is the Attorney General. Special damage has been defined very restrictively. It is sufficient to show that the plaintiff's loss may be greater than that of other

²³ *Green v. The Queen*, 34 D.L.R.3d 20 (1973).

²⁴ *Attorney-General v. P.Y.A. Quarries, Ltd.*, [1957] 1 All E.R. 894, 902.

²⁵ *Attorney-General of B.C., ex rel. Eaton v. Haney Speedways Ltd.*, 39 D.L.R.2d 48, 54 (1963).

members of the public, it must be qualitatively different from other losses. Thus, in an action by a commercial fisherman to enjoin the pollution of Placentia Bay, Newfoundland, the Newfoundland Supreme Court held that, although the plaintiff's livelihood may have been jeopardized by the pollution, he lacked the necessary interest to satisfy the standing requirement.²⁶ If no individual has the necessary interest to support a claim, then the appropriate plaintiff is the provincial Attorney General. Needless to say, if the project in question involves provincial financing, approvals or public support, then it is unrealistic to expect the Attorney General to embarrass his government with a public nuisance action. Indeed, regulatory approval for a potential water diversion project, combined with the necessary water permits, may render the project immune from judicial review under the doctrine of statutory authorization, no matter who brings the action.

One obvious solution to the standing problem is to bring a class or representative action. By suing on behalf of all affected persons, one presumably obviates the need to show special or direct damage. Although originally skeptical of such an approach, the Nova Scotia Supreme Court recently held that a proposed herbicide spraying programme could be challenged through a class action.²⁷

C. *Civil Law Rights and Obligations*

Unlike the common law, the Quebec Civil Code does not recognize fixed or separate categories of civil wrongs. The fundamental principle of Quebec civil law is that ownership of land confers upon the owner proprietary rights to the land including the right to use and enjoy the land, providing the use is not prohibited by law or regulation. Some users are prohibited or regulated under environmental and land use statutes as will be discussed later in this paper. Others flow from the law of servitude pursuant to articles 499 to 504 of the Civil Code.²⁸ Space does not permit a detailed discussion of these provisions.

Suffice it to say, for purposes of this study, that the Code envisages three categories of servitude: natural, legal and conventional. Natural servitudes are those imposed as a result of the constraints of the natural environment. Thus, article 501 provides that lower lands are required to receive the natural flow (run off) from higher lands. The owner of the lower land cannot prevent the flow, nor can the owner of the higher land do anything to increase the flow.²⁹ Similarly, a riparian owner may use the water as he wishes, provided the waters are returned to the water-

²⁶ *Hickey v. Electric Reductions Co. of Canada*, 21 D.L.R.3d 368 (1972)

²⁷ *Palmer v. Nova Scotia Forest Indus.*, 2 D.L.R.4th 397 (1983).

²⁸ CIVIL CODE OF QUEBEC arts. 499-504 (1982).

²⁹ *Id.* at art. 501.

course.³⁰ Legal servitudes, on the other hand, serve either a public or private utility. Finally, constitutional servitudes are those imposed pursuant to the normal principle of constitutional law.

In summary, servitudes may offer a basis for resolving some potential water use conflicts, particularly those associated with water quality, but they clearly lack the ability to provide comprehensive water use management. As a consequence, Quebec, like Ontario, has enacted comprehensive environmental quality legislation which has created new legal servitudes on an owner's civil right to use property as he/she wishes. These legislative provisions as well as those from Ontario form the basis of the next part of the paper.

III. SOURCES OF LEGISLATIVE AUTHORITY AND THE LEGAL FRAMEWORK

A. Introduction

Under the Constitution Act, 1867,³¹ the federal and provincial governments each have their own exclusive spheres of legislative competence. Many issues, including, for example, proposed water diversion projects, transcend the constitutionally designated spheres. Generally speaking, Canadian courts have dealt with the overlapping jurisdiction created by the Constitution by permitting one level of government to "incidentally affect" the powers of the other. There is, however, a good deal of uncertainty about the precise scope of governmental powers and the "incidental effect" doctrine. Where federal and provincial governments have concurrent jurisdiction, and both have legislated on the matter, the doctrine of paramountcy determines that the federal law prevails over any inconsistent provincial laws. In practice, therefore, most issues over which there is some degree of uncertainty are tackled through cooperative action.

The Constitution also distinguishes between proprietary rights over resources and legislative competence to regulate those resources. For example, Ontario owns the bed, the fish and the water of the Canadian side of the Great Lakes, while the federal government is empowered by the Constitution to make laws pertaining to navigation or fishing in those waters. Thus, not only is the Canadian regulatory environment with regard to Great Lakes diversions confused by overlapping jurisdiction, but also by a division between ownership and legislative competence. Finally, the federal government has primary legislative authority over those matters that have an interprovincial or international dimension.

³⁰ *Id.* at art. 503.

³¹ Constitution Act, 1867, 30 & 31 Vict. art. IV.

B. Provincial Jurisdiction

As one constitutional authority has noted: "[I]t is a safe generalization that the regulation and distribution of water resources in a province for domestic consumption or industrial purposes are within exclusive provincial competence."³² Provincial legislative authority over water resource matters flows from the provinces' proprietary interest in water as well as their legislative authority over the resource.

1. Proprietary Rights

The Constitution Act, 1867³³ provides for the ownership of public property between the federal and provincial governments. Section 108 assigns all public work and property enumerated in the third schedule to the Act (to be discussed *infra*) to the federal Crown.³⁴ Section 109 provides that all lands, mines, minerals and royalties belonging to the provinces at confederation continue to belong to the provinces.³⁵ The ownership of public "lands" includes the ownership of water.³⁶ In addition, Section 117 provides that the provinces retain the remainder of public property, subject only to federal power to take property for defense purposes.³⁷ The combined effect of Sections 109 and 117 is to give the provinces ownership of all watercourses and the soil and beds of all navigable waters.³⁸ Ownership means that "the province can deal with the resource as a private owner; subject to the common law and validly passed legislation."³⁹ Furthermore, the courts have held that provincial powers that flow from their ownership rights are not constrained by the same constitutional limitations as the legislative powers of the province. For example, contractual or licensing prohibitions on the export of a provincial resource have been held to be valid, whereas similar prohibitions on privately owned resources would have been invalid because they interfered with the federal power over interprovincial trade and commerce.⁴⁰

³² Laskin, *Jurisdictional Framework for Water Management in 1 RESOURCES FOR TOMORROW* 211,216 (Kristjansen, ed.1961).

³³ Constitution Act, 1867, 30 & 31 Vict.

³⁴ *Id.* § 108.

³⁵ *Id.* § 109.

³⁶ G. LAFOREST, *NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION* (1969).

³⁷ Constitution Act, 1867, 30 & 31 Vict. art. VIII, § 117.

³⁸ See *The Queen v. Moss*, 26 S.C.R. 322 (1896); *Attorney Gen. of Canada v. Attorney Gen. of Ontario (Re Fisheries Case)* 1898 A.C. 700 (P.C.); *Montreal v. Harbour Comm'rs. of Montreal*, 1926 A.C. 299 (P.C.).

³⁹ Hoogbruin, *A wash in a sea of Jurisdictional Controversy: Legal and Political Implications of Transboundary Water Diversion from Canada to the United States* 12 (April 15, 1984) (available at Osgoode Hall Law School); Barry, *Interprovincial Electrical Energy Transfer: The Constitutional Background* 4 (June 18, 1980) (available at Dalhousie Law School).

⁴⁰ G. LAFOREST, *supra* note 36, at 168.

2. Legislative Powers

In addition to assigning proprietary rights to resources, the Canadian Constitution gives the provinces specific legislative authority over:

- the management and sale of public lands⁴¹
- local works and undertakings⁴²
- property and civil rights⁴³
- generally all matters of a merely local or private nature in the province.⁴⁴

It is clear that the combined effect of these legislative grants is to vest the provinces with authority to make laws concerning all lands under or adjacent to waters in the provinces and land flooded by diversions. These powers have been expanded with respect to nonrenewable natural resources by a 1982 amendment to the Constitution.⁴⁵ Because water is usually considered a renewable resource, it is unlikely that this amendment adds to provincial powers over water and water diversions. Under the amendment, provincial governments are given jurisdiction over electricity generating works including, of course, hydroelectricity generation.

C. Federal Jurisdiction

1. Proprietary Rights

Section 108 gives the federal government proprietary rights over all the works listed in the third schedule of the Constitution which include:

1. canals, with lands and water power connection therewith;
2. public harbours;
3. lighthouses and piers, and Sable Island;
4. steamboats, dredges and public vessels;
- ...
10. lands set apart for general public purposes.⁴⁶

In addition to these matters, the federal government also has a proprietary interest in lands set aside for Indians (Indian reserves) pursuant to section 113 of the Constitution;⁴⁷ National Parks (of which there are three on the Great Lakes) and over the two northern federal territories.

⁴¹ Constitution Act, 1867, 30 & 31 Vict. art. VI. § 92(5).

⁴² *Id.* § 92(10).

⁴³ *Id.* § 92(13).

⁴⁴ *Id.* § 92(16).

⁴⁵ Constitution Act, 1982, Consolidation of the Constitution Acts, 1867 to 1982, art. VI., § 92A.

⁴⁶ Constitution Act, 1867, 30 & 31 Vict. art. VIII, §§ 108, sched. 3.

⁴⁷ *Id.* at art. VI., § 113.

2. Legislative Powers

In addition to federal proprietary rights, the Constitution confers authority on Parliament to legislate under a number of general and specific headings. For instance, the federal government can encroach on areas usually reserved to the provinces where federal intervention is required for the "peace, order and good government"⁴⁸ of Canada, or with regard to matters that fall within the federal power over trade and commerce. Further, the federal government may declare a provincial work situated wholly within a province to be for "the general advantage of Canada."⁴⁹

In practice however, the federal government has only enacted water legislation in this regard where it can support it under a specific legislative head. For example, the Navigable Waters Protection Act⁵⁰ was established pursuant to the federal power over navigation and shipping.⁵¹ Similarly, the Fisheries Act⁵² was supported under the federal jurisdiction over sea coast and inland fisheries.⁵³ Other legislation, such as the International Boundary Waters Treaty Act,⁵⁴ and the International River Improvements Act,⁵⁵ was enacted under the federal power over works connecting two or more provinces or extending beyond the territorial limits of a province⁵⁶ or its treaty making authority.⁵⁷

D. Summary

Uncertainty exists concerning the jurisdiction over water diversions from the Great Lakes. However, there is little doubt that the provinces of Ontario and Quebec have plenary jurisdiction over interprovincial water resources and, in particular, the rights to exploit their water resources and regulate their uses. These powers become increasingly unclear as transboundary aspects are interposed. Traditionally, federal power increases as the matter assumes an interprovincial or international perspective. Perhaps the present situation is best described by the Inquiry on Federal Water Policy:

The combination of indirect reference to water in the constitution and limited guidance from the courts makes it impossible to define precisely the respective roles of the federal and provincial governments in

⁴⁸ *Id.*

⁴⁹ *Id.* § 92(10)(c).

⁵⁰ Navigable Waters Protection Act, CAN. REV. STAT. ch. N-19(1970).

⁵¹ Constitution Act, 1867, 30 & 31 Vict. art. VI, § 91(10).

⁵² Fisheries Act, CAN. REV. STAT. ch. F-14(1970).

⁵³ Constitution Act, 1867, 30 & 31 Vict. art. VI., § 91(12).

⁵⁴ International Boundary Waters Treaty Act, CAN. REV. STAT. ch. I-20(1970).

⁵⁵ International River Improvements Act, CAN. REV. STAT. ch. I-22 (1970).

⁵⁶ Constitution Act, 1867, 30 & 31 Vict. art. VI., § 92(10)(a).

⁵⁷ *Id.* art. IX., § 132.

water management.⁵⁸

Because of this uncertainty, transboundary water development projects will necessarily involve a considerable degree of federal-provincial cooperation in almost all aspects of the proposal. To a considerable extent, jurisdictional questions depend on the scope and substance of the project itself. Hence, any definitive response to such questions will depend on a specific analysis of the particular parameters of the project proposed.

With this jurisdictional framework in mind, it is now appropriate to provide a cursory overview of the laws governing diversions and consumptive uses. Again, however, the questions as to which laws are directly applicable will depend upon the particular nature of the project in question.

IV. LEGISLATIVE CONTROLS

A. Introduction

The following sections outline the legislative provisions under Ontario, Quebec and federal law relevant to Great Lakes diversions and consumptive uses. They have been divided into four subsections: (a) legislative provisions that mandate information gathering and basin planning activities; (b) authority to license and regulate impoundments of water; (c) authority to require use permits; and (d) emergency allocation powers. These four topics are of most relevance to future diversion proposals.

B. Provincial Control Over Water Use

1. Information Gathering and Basin Planning

a. Ontario

Provisions for information gathering activities with respect to water use may be found in a number of Ontario statutes. Some of the provisions in the legislation are specific to inquiries surrounding the quality of water, as in the case of the Environmental Protection Act,⁵⁹ whereas others are general powers of inquiry conferred upon the Ministries responsible for administration of the acts, as in the case of the Ontario Water Resources Act.⁶⁰

The Ontario Water Resources Act⁶¹ is the primary statute in Onta-

⁵⁸ DEPT. OF SUPPLY AND SERVICES, *Currents of Change* in FINAL REPORT OF THE INQUIRY ON FEDERAL WATER POLICY 63 (1985) [hereinafter cited as THE PEARSE REPORT].

⁵⁹ Environmental Protection Act, ONT. REV. STAT. ch. 141 (1980).

⁶⁰ Ontario Water Resources Act, ONT. REV. STAT. ch. 361 (1980).

⁶¹ *Id.*

rio for initiating studies into the use of water resources in the province. Under this Act, the Ministry of the Environment (MOE) is given authority over water quantity and water quality, and the power to issue orders to municipalities and industries with respect to the establishment of sewage works, water works, and the quantities of water used.⁶² Under section 7 of the Act, the Minister of the Environment is empowered to "construct, acquire, provide, operate and maintain water works and to develop and make available supplies of water to municipalities and persons."⁶³ Pursuant to this power, the Minister is authorized to conduct research programs, prepare statistics, and to disseminate information and advice with respect to the supply and distribution of water.⁶⁴ For example, flow monitoring is done on a regular basis throughout the province and records of consumptive uses are maintained. Major consumptive users such as Ontario Hydro must submit consumption records to the Ministry.

Under section 14 of the Lakes and Rivers Improvement Act,⁶⁵ the Minister of Natural Resources is required to gather information in the form of sketches and statements showing the purpose, size and type of any dam as part of the process by which dams are sited. After the location is approved, the Minister may request the plans and specifications of the dam, a map of the watershed above the dam and the extreme high water mark, and any other information the Minister may require.

The Conservation Authorities Act⁶⁶ also administered by the Ministry of Natural Resources (MNR), authorizes the gathering of information in conjunction with the establishment and implementation of resource management programs focused on individual watersheds in the conservation authorities' areas of jurisdiction. Under section 21 of the Act, a conservation authority is empowered to "study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed."⁶⁷

Proposed water diversion or consumptive use projects planned by provincial bodies would be defined as "undertakings" within the meaning of the Environmental Assessment Act.⁶⁸ The Act only applies to private undertakings if they are specifically designated by the government.⁶⁹ The Act requires the proponent to conduct and the government to review an environmental assessment of the potential impact of the proposed under-

⁶² *Id.*

⁶³ *Id.* § 7(a).

⁶⁴ *Id.* § 7(c)-(d).

⁶⁵ Lake and Rivers Improvement Act, ONT. REV. STAT. ch. 229, § 14 (1980).

⁶⁶ Conservation Authorities Act, ONT. REV. STAT. ch. 85 (1980).

⁶⁷ *Id.* § 21(a).

⁶⁸ Environmental Assessment Act, ONT. REV. STAT. ch. 140, § 1(o)(ii).

⁶⁹ *Id.*

taking.⁷⁰ The assessment and the review are designed to provide valuable information about both the environment that may be affected and likely impacts on that environment.

While the Act has the potential to be the most important information gathering statute in the Province, its limited application has seriously undermined its effectiveness. For example, most major public sector projects have been exempted from the Act by regulation or order-in-council, and very few private sector undertakings have been designated for assessment. The result has been that fewer than twenty major undertakings have been assessed in the ten years since the Act was proclaimed.

There is some question as to whether, and to what extent, the Environmental Protection Act⁷¹ is applicable to water development projects. The Act is intended as a comprehensive statute governing all aspects of environmental protection. The focus of the legislation, however, is on those activities or projects that may directly or indirectly discharge a contaminant into the natural environment. It is difficult to conceive of a water diversion project that would come within the ambit of the regulatory provisions of the statute and hence be subject to the information gathering provisions of the statute. In the event the Act is applicable, the Ministry may request information from the person responsible, or conduct its own studies to determine whether there has been a breach of the statute. The likelihood of such action seems remote. The legislation is not designed to deal with issues related to water diversion or consumptive uses.

In Ontario, provincial authority to undertake basin planning is derived from the Conservation Authorities Act.⁷² Conservation authorities are regional agencies established for the purpose of resources management. Although the Act provides authorities with a broad mandate to undertake programs "designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals,"⁷³ their primary activities have been flood control and, to a lesser extent, provision of water supplies, recreational facilities and pollution control. Small scale dams and diversions are often undertaken as part of their flood control programs.

The Act empowers the provincial Cabinet to establish authorities and to designate the areas over which the authorities have jurisdiction. Authorities are established on a watershed basis or any defined part thereof. In order to achieve their resource management mandate, au-

⁷⁰ *Id.* § 5.

⁷¹ Environmental Protection Act, ONT. REV. STAT. ch. 141 (1980).

⁷² Conservation Authorities Act, ONT. REV. STAT. ch. 85 (1980).

⁷³ *Id.* § 20.

thorities have broad powers and regulation making authority including, inter alia, the power to: enter any land for the purposes of study; acquire land; erect works and structures and create reservoirs; alter the course of any river, canal, or other watercourse or the course of roads, or the position of utilities; control the flow of surface waters so as to prevent floods or pollution; and to use lands owned or controlled by the authority for park or other recreational purposes.⁷⁴ Activities involving the construction of dams and works by authorities are exempt from approval under the Lakes and Rivers Improvement Act,⁷⁵ although all programs must be approved by the MNR.

The powers of conservation authorities to develop and implement comprehensive watershed management plans are circumscribed by section 28 of the Act⁷⁶ which prevents them from regulating water used for domestic and livestock purposes, water used for municipal purposes, the rights and powers of the provincially-owned utility, Ontario Hydro, or any rights and powers conferred under the Public Utility Act.⁷⁷ When diversions of water by authorities have adversely affected the operation of Ontario Hydro installations, the utility has demanded compensation. The size of diversions which conservation authorities may undertake are limited by the above exceptions to their powers unless the authority compensates those parties adversely affected. Further, conservation authority regulations would appear to be both conceptually and geographically narrow with respect to pollution control; some authorities do not regard pollution control as one of their functions.⁷⁸

b. Quebec

The Minister of the Environment is given broad powers to undertake information gathering activities under the Environment Quality Act.⁷⁹ Under Division II (Functions and Powers of the Minister) of the Act the Minister may, inter alia,

- (a) carry out or cause to be carried out research, studies, inquiries and inventories on whatever concerns the quality of the environment; and
- (b) prepare plans and programmes for the conservation, protection and management of the environment and emergency

⁷⁴ *Id.* § 21.

⁷⁵ Lakes and Rivers Improvement Act, ONT. REV. STAT. ch. 229, pt. I (1980).

⁷⁶ Conservation Authorities Act, ONT. REV. STAT. ch. 85, § 28(2)(a)-(d)(1980).

⁷⁷ Public Utility Act, ONT. REV. STAT. ch. 423 (1980).

⁷⁸ J.F. CASTRILLI, CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION, I.J.C., INTERNATIONAL REFERENCE GROUP ON GREAT LAKES POLLUTION FROM LAND USE ACTIVITIES: AN EVALUATION OF CANADIAN LEGISLATIVE, REGULATORY AND ADMINISTRATIVE PROGRAMS 52, 53 (1977).

⁷⁹ Environmental Quality Act, QUE. REV. STAT. ch. Q-2 (1977).

plans to fight any form of contamination or destruction of the environment.⁸⁰

The Act is a comprehensive environmental protection and management statute. It has specific provisions dealing with water rights, citizen remedies, and provides for environmental assessments and approvals for certain types of undertakings.

The Act requires proponents of undertakings (such as a water development project which could affect the quality of the environment) to fulfill two requirements. Proponents must undertake an environmental impact assessment and review if the undertaking falls within the classes designated by government regulation and they must also obtain a certificate of authorization from the Ministry of the Environment.⁸¹

The General Regulation governing environmental assessments lists the kinds of undertakings which are subject to assessment and review. The Regulation has a number of categories which would probably cover most types of diversions or water development proposals. The General Regulation requires environmental assessments and reviews, and certificates of authorization, for the following undertakings, among others:

- (a) the construction and operation of a dam or dyke located at the outflow of a lake with a total surface area over 200,000 square metres or which will create a reservoir over 50,000 square metres in size;
- (b) dredging, filling or any similar activity of various waters listed, including the St. Lawrence River;
- (c) the rerouting or diverting of any river or waterway; and
- (d) the construction or extension of any port or wharf.⁸²

The Technical Services Branch of the Ministry of the Environment is responsible for administration of the environmental assessment and review. After consultation with the Ministry, the proponent is required to submit an Environmental Impact Statement. Le Bureau d'audience publiques sur l'environnement assists the public in participating in the process by conducting a public hearing and preparing a report with recommendations for the Cabinet. The Cabinet is vested with the power to make the final decision to approve or not approve the project.⁸³

The Technical Services Branch also administers the certificate of authorization process. As a rule, the proponent submits his plans and specifications for the undertaking and the Deputy Minister of the

⁸⁰ *Id.* div. II., § 2(b),(c).

⁸¹ *Id.* div. IV., § 22.

⁸² Environmental Impact Assessment Review Regulation, R.R.Q. 1981, ch. Q-2, Reg. 9, §§ 6-20.

⁸³ See FEDERAL ENVIRONMENTAL ASSESSMENT REVIEW OFFICE, ENVIRONMENTAL ASSESSMENT IN CANADA 31 (1983).

Environment is empowered to issue an approval or provide the approval on terms or conditions deemed appropriate. When a proposed undertaking undergoes an environmental review, the certificate of authorization process is usually integrated with the review and the decision as to the issuance of the certificate is made by the Cabinet.

As noted under section (b), *supra*, section 2 of the Environment Quality Act allows the Minister of the Environment to "prepare plans and programs for the conservation, protection and management of the environment."⁸⁴ This paragraph empowers the Minister to undertake and implement conservation and management plans on a watershed basis. Beyond this broad statement, however, the Act provides little guidance as to the specific powers the Minister would have in the event that comprehensive watershed management plans were to be developed and implemented in the province.

However, under the Land Use Planning and Development Act,⁸⁵ the government is vested with extraordinary powers to create special planning zones for goals such as the protection, improvement or exploitation of natural resources which are of exceptional interest to the general community, including bodies of water within the province. The Act, administered by the Minister of Municipal Affairs, therefore, offers the potential for government planning or involvement in any major resource development project.

2. Authority to License and Regulate Impoundments

a. Ontario

The principal Ontario statute for licensing and regulating impoundments of water is the Lakes and Rivers Improvement Act.⁸⁶ The purpose of the Act, as laid out in section 2, is to provide for the use of waters of the lakes and rivers on Ontario, and to regulate improvements. It is intended to provide for:

- (a) the preservation and equitable exercise of public rights in and over such waters;⁸⁷
- (b) the protection of the interests of the riparian owners;⁸⁸
- (c) the use, management and perpetuation of the fish, wild life and other natural resources dependent upon such waters;⁸⁹
- (d) the preservation of natural amenities of such waters and on

⁸⁴ Environmental Quality Act, QUE. REV. STAT. ch. Q-2 div. II., § 2(c)(1977).

⁸⁵ Land Use Planning and Development Act, QUE. STAT. ch. 51, §§ 158-165 (1979).

⁸⁶ Lakes and Rivers Improvement Act, ONT. REV. STAT. ch. 229 (1980).

⁸⁷ *Id.* § 2(a).

⁸⁸ *Id.* § 2(b).

⁸⁹ *Id.* § 2(c).

- the shores and banks thereof;⁹⁰ and
- (e) ensuring the suitability of the location and nature of improvements in such waters; including their efficient and safe maintenance and operation and, having regard to matters referred to in clauses (a), (b), (c) and (d), their operation in a reasonable manner.⁹¹

Under section 14 of the Act, no person may construct a “dam” (which is defined to include any work forwarding, holding back or diverting water)⁹² without first having its location, plan and specifications approved by the Minister of Natural Resources.⁹³ Section 14 approvals are handled through the regional offices of the Ministry. In considering applications, the MNR assesses projects in terms of the purposes of the Act.⁹⁴ A proposed dam location that is not consistent with the purposes of the Act may be refused.⁹⁵ The principal considerations governing where to locate a dam are: impact on fish habitat, structural soundness of the project, and the potential effects of the project upon flooding and erosion.⁹⁶ Although there is no legislated requirement to examine other environmental impacts, they are often considered after consultation with the Ministry of the Environment. Liaison with the federal Department of Transport occurs when navigable waters are involved.

Section 23 of the Act empowers the Minister to order the owner of a dam, structure or work to alter the operation within a specified time so as to maintain, raise or lower the level of water in the lake or river.⁹⁷ Under the Act, the Minister has broad powers to resolve disputes between persons who have rights to use a lake or a river. The guiding principle is set out in section 22. It requires the Minister “to afford to persons having diverse interests on the lake or river or in the works or improvements a fair and reasonable use of the waters.”⁹⁸ This allows out-of-court settlement of conflicts and provides a useful alternative to litigation.

Finally, section 24 empowers the Minister to enter onto any land for the purposes of removing any obstruction in any river or lake, the removal of which is considered necessary or expedient for the achievement of the purposes of the Act.⁹⁹ Therefore, unless the activities of an individual, firm or agency are specifically exempted, any diversion of water

⁹⁰ *Id.* § 2(d).

⁹¹ *Id.* § 2(e).

⁹² *Id.* § 1(a).

⁹³ *Id.* § 14(1)(a)-(b).

⁹⁴ *Id.* § 14(5).

⁹⁵ *Id.* § 14(3).

⁹⁶ *Id.* § 2(a)-(e).

⁹⁷ *Id.* § 23(1).

⁹⁸ *Id.* § 22(1).

⁹⁹ *Id.* § 24.

from a lake or a river in Ontario which is associated with the construction of a dam or other work requires an approval under the Act. Conservation authorities are exempted, for example, from the requirement of section 14 approvals, however, the authorities still require the approval of the Minister for dams or other works undertaken as part of their resource management programs.

The Ontario Water Resources Act¹⁰⁰ regulates water impoundment in Ontario. The primary purpose of the Act is to regulate the allocation of water use in Ontario. The Ministry of the Environment (MOE) is charged with the administration of the Act, and the Minister is given broad powers over the province's water resources, including the power to construct, operate and maintain any works for the collection, production, treatment, storage, supply and distribution of water and to develop and make available supplies of water to municipalities and persons.¹⁰¹ The Act provides that any person or municipality intending to establish or expand any works for the collection, treatment, storage or distribution of water must seek and obtain approval from the MOE.¹⁰² However, this requirement does not apply to non-potable, small-scale, or private waterworks, or those works which are specifically exempted.¹⁰³ Similarly, the Minister is empowered to construct, operate and maintain works for the collection, treatment and disposal of sewage in the province, and approvals for the establishment or expansion of facilities must be obtained from the Ministry.¹⁰⁴

Section 7 expressly provides the Minister with the authority to control and regulate the use of water for public purposes in the province, including any impoundments built upon lakes or rivers for the purpose.¹⁰⁵

The Public Lands Act¹⁰⁶ is also used to license and regulate impoundments upon lakes and rivers located on Crown land or public lands in Ontario. "Public lands" are defined to include waters overlying public lands.¹⁰⁷ The Minister of Natural Resources is empowered to grant, lease or issue a license of occupation in respect of any public lands.¹⁰⁸ The license of occupation may fix any terms and conditions upon which water powers or privileges are granted and terms and conditions for the

¹⁰⁰ Ontario Water Resources Act, ONT. REV. STAT. ch. 361 (1980).

¹⁰¹ *Id.* § 7(1)(a),(b),(d).

¹⁰² *Id.* §§ 1(u), 23(1).

¹⁰³ *Id.* § 6(a)-(f).

¹⁰⁴ *Id.* §§ 9, 24(1).

¹⁰⁵ *Id.* § 7.

¹⁰⁶ Public Lands Act, ONT. REV. STAT. ch. 413 (1980).

¹⁰⁷ *Id.* § 23(1).

¹⁰⁸ *Id.* § 39.

development of the public lands.¹⁰⁹

Part IV of the Act deals with the construction of dams including any dams associated with a water diversion project. Under this part the Minister is given the authority to construct, maintain, and administer dams, along with the power to expropriate and other emergency powers.¹¹⁰ The Act applies to any proposed public or private water diversion from or involving Crown lands.¹¹¹

b. Quebec

The Watercourses Act¹¹² provides the Minister of the Environment with direct control over the province's lakes and rivers, and, therefore, control over any diversions of water from lakes and rivers. Section 5 of the Act states that all riparian owners (including industries) may improve any watercourse, including the construction of any works which are deemed necessary for the efficient running of the improvement, such as flood gates, flumes, embankments, dams, dykes and the like.¹¹³ The only limitations on the riparians are that the province may take any actions deemed necessary to prevent flooding, and that the owner or operator of any work constructed in a watercourse is liable in damages resulting therefrom to any person, whether by excessive elevation of floodgates or otherwise.¹¹⁴

Section 56 of the Act permits any person, with government approval, to create a reservoir for the storage of water with the object of conserving it so as to regulate the flow for the benefit of private and public interests.¹¹⁵ In the approval process, consideration is given to the potential impact of the project. Similarly, approval is required for the construction and maintenance of a dam or work to retain water.¹¹⁶ Unauthorized works can be ordered removed.¹¹⁷

Under the Environment Quality Act,¹¹⁸ in addition to the requirements for environmental assessment and review, and certificates of authorization for certain undertakings, any person intending to construct or operate a waterworks or a water supply intake, or other similar works, must submit plans and specifications of such works to the Deputy Minis-

¹⁰⁹ *Id.* § 40(1).

¹¹⁰ *Id.* §§ 69,70,72.

¹¹¹ *Id.* § 72(1).

¹¹² Watercourses Act, QUE. REV. STAT. ch. R-13 (1977).

¹¹³ *Id.* div. III, § 5.

¹¹⁴ *Id.* §§ 7, 13(1).

¹¹⁵ *Id.* div. VII, § 56.

¹¹⁶ *Id.* § 57.

¹¹⁷ *Id.* § 57(2).

¹¹⁸ Environmental Quality Act, QUE. REV. STAT. ch. Q-2 (1977).

ter of the Environment.¹¹⁹ The Deputy Minister must then review the material and following the review may authorize the construction of the works and issue permits for the operation of such works.¹²⁰

Furthermore, under section 19.1 of the Act, "every person has a right to a healthy environment, and to the protection of living species inhabiting it. . ." to the extent provided under the Act.¹²¹ To enforce this right, every person is given the power to apply to a court to enjoin any activity that is interfering with the exercise of this right.

As in Ontario, there are a number of statutes which deal with water development and land use controls that may directly or indirectly affect water diversion and consumptive use questions. For instance, under the Mining Act,¹²² an operator of a mine may either improve and render navigable any watercourse or construct a canal connecting watercourses for transportation routes if the Minister of Energy and Resources so approves.¹²³ Similarly, with such approval, the operator has the right to divert any river or lake.¹²⁴ The operator may also draw such water as is deemed necessary for the running of works from any source if all government regulations are complied with and the rights of other persons using the same sources of supply are not prejudiced.¹²⁵

The above provisions in Quebec legislation would apply, either directly or indirectly, to proposals for the diversion of water from the province, although their applicability to diversions of water from the Great Lakes appears unlikely.

3. Authority to Require Use Permits

a. Ontario

Provincial authority to require use permits for surface and groundwaters in Ontario is derived from the Ontario Water Resources Act.¹²⁶ Section 20 of the Act states that no person may take more than 50,000 litres of water a day from any well, surface water, or by structures or works constructed for the diversion or storage of water, or any combination thereof, without a permit.¹²⁷ Permits are not required for domestic uses, which are defined in the Act as "ordinary household purposes" nor are permits required for the watering of livestock, poultry, home gardens or lawns, or fire fighting purposes; however, water used for irrigating

¹¹⁹ *Id.* § 32.

¹²⁰ *Id.* as amended by § 32.1.

¹²¹ Environmental Quality Act, QUE. REV. STAT. ch. Q-2.

¹²² Mining Act, QUE. REV. STAT. ch. M-13 (1977).

¹²³ *Id.* at div. XXV., § 254.

¹²⁴ *Id.* § 256.

¹²⁵ *Id.* § 255.

¹²⁶ Ontario Water Resources Act, ONT. REV. STAT. ch. 361 (1980).

¹²⁷ *Id.* § 20(3)(a)-(d).

commercial crops does require a permit.¹²⁸

Permits for the taking of water are processed through the six regional offices of the MOE. Applications are assessed solely on the basis of water quantity considerations, not quality, with the primary concern being a proper sharing of competing uses. The MOE considers the capacity of the watercourse to absorb the proposed water taking by examining the quantity of water available and the effect that the taking will have upon the functioning of the watercourse. A permit will not be used to sanction a wasteful or malicious use. In other words, the water must be used for a reasonable purpose. If the taking of water that is not subject to a permit interferes with any public or private interest in water, the Minister of the Environment is empowered to prohibit the person(s) from so taking. The Minister is also empowered to refuse to issue, refuse to renew, revoke or modify at any time the terms and conditions of a well construction permit where he is of the opinion that *inter alia*, "there is or is likely to be a reduction of the quantity of water available for any use that is being or is likely to be made of it."¹²⁹ Finally, under subsection 20(7), where any flowing or leaking of water from a well, any diversion, or the flowing or releasing of water from a hole or excavation site interferes, in the opinion of the Minister, with any public or private interest in water, the Minister may request that the person or owner stop or regulate such flowing, leaking or diversion.¹³⁰

b. Quebec

There are no legislative provisions in Quebec legislation which authorize the government to require permits for the use of waters in the province.

4. Emergency Allocation Powers

a. Ontario

Section 20 of the Ontario Water Resources Act¹³¹ empowers the Minister to refuse to issue or cancel a use permit, to impose such terms and conditions in issuing a permit as he considers proper and to alter the terms and conditions of a permit after it has been issued. This section in essence provides the Minister with the power to prohibit or curtail large consumptive uses and diversions of water in the province if, in his opinion, such uses would be contrary to the purposes of the Act.¹³²

Conflicting demands over inadequate supplies of water are appar-

¹²⁸ *Id.* § 20(1), (4).

¹²⁹ *Id.* § 20(4).

¹³⁰ *Id.* ch. 50, as amended by § 22b (1981).

¹³¹ *Id.* § 20(7).

¹³² *Id.* § 20(6).

ently a rare problem in Ontario with the exception of demands for irrigating waters during dry periods in the southwestern part of the province. To deal with potential conflicts, all use permits contain the condition that the permitted rate of taking of water can be reduced by the Ministry when supplies are short. In this way, the Ministry of the Environment can require that all users share the resource equitably.

b. Quebec

No legislative provisions exist in Quebec legislation which empower the government to undertake emergency measures in regard to the allocation of waters in the province.

C. *Federal Control Over Water Use*

1. Introduction

Federal statutes relating to water management roughly correspond to the constitutional mandate accorded to the federal government with respect to international relations, navigation and fisheries. Parliament has enacted two statutes, the International Boundary Waters Treaty Act¹³³ and the International River Improvements Act¹³⁴ to implement the provisions of the Boundary Waters Treaty of 1909.¹³⁵ It is the policy of the federal government that water management actions and activities which affect boundary and international waters be consistent with the principles of the Boundary Waters Treaty. The International Boundary Waters Treaty Act is administered by the Department of External Affairs. The Inland Waters Directorate of Environment Canada provides support to External Affairs in this regard and administers the International River Improvements Act.

Other federal statutes which have a bearing upon transboundary water developments are the Canada Water Act,¹³⁶ the Navigable Waters Protection Act,¹³⁷ and the Fisheries Act.¹³⁸ The Canada Water Act is primarily administered by Environment Canada, and in particular, the Inland Waters Directorate and the Environmental Protection Service. Day-to-day administration of the Fisheries Act in inland waters has been delegated by Parliament to the provinces, although the Department of Fisheries and Oceans and Environment Canada would be involved were any questions of fish habitat degradation or pollution in waters fre-

¹³³ International Boundary Waters Treaty Act, CAN. REV. STAT. ch. I-20 (1970).

¹³⁴ International River Improvements Act, CAN. REV. STAT. ch. I-22 (1970).

¹³⁵ Treaty relating to Boundary Waters and Boundary Questions, Jan. 11, 1909, United States - United Kingdom, T.S. No. 548. [hereinafter cited as the Boundary Waters Treaty of 1909].

¹³⁶ Canada Water Act, CAN. REV. STAT. ch. 5 (Supp.1 1970).

¹³⁷ Navigable Waters Protection Act, CAN. REV. STAT. ch. N-19 (1970).

¹³⁸ Fisheries Act, CAN. REV. STAT. ch. F-4 (1970).

mented by fish to arise in a transboundary water development proposal. The Department of Transport is responsible for administration of the Navigable Waters Protection Act, although it is aided in the fulfillment of its duties by the Environmental Protection Service of Environment Canada. This Act was passed pursuant to the federal government's power over navigation and shipping and, among other things, prohibits the construction of any work in a navigable water without the permission of the Minister.

While the federal Environmental Assessment and Review Process (EARP) does not have the force of an act passed by Parliament, it is nonetheless an important environmental policy of the federal government. In this sense, environmental impact assessment is an overriding consideration for all projects with federal involvement including private projects financed by the federal government.

It is worth noting that although the above synopsis presents the principal federal actors involved in water management and development issues, programming and funding activities in the Great Lakes are the responsibility of the user departments. For example, the Department of Transport is charged with responsibility for most harbours and ports in Canada, but the St. Lawrence Seaway Authority, a Crown corporation, administers the Welland Canal and all works of the Seaway. In addition, the Department of Public Works is the agency charged with the responsibility of constructing the majority of federal works. Therefore, administrative responsibility and authority with respect to a water development project involving a diversion of water from the Great Lakes would vary depending upon the nature of the project.

This section examines the provisions in the federal statutes which have a bearing upon water use. The section is divided into two subsections: (a) legislative provisions that mandate information gathering and basin planning activities; and (b) legislative authority to license and regulate impoundments of water.

2. Information Gathering and Basin Planning

In 1970, the federal government began comprehensive freshwater management legislation with the passage of the Canada Water Act.¹³⁹ The Act provides broad scope for federal water management activity, including information gathering and comprehensive water resource management. However, because Parliament has limited constitutional authority to undertake water management, the Act is intended to be a mechanism to facilitate federal-provincial cooperation in water management and development matters.

Part I of the Act titled "Comprehensive Water Resource Manage-

¹³⁹ Canada Water Act, CAN. REV. STAT. ch. 5 (Supp.1 1970).

ment”¹⁴⁰ is of particular importance to water quantity management in Canada. Under this part, the Minister of the Environment is given the authority, with the approval of Cabinet, to enter into agreements with the provinces for the purposes of: (a) consulting on priorities for research, planning, consultation, development and utilization of waters; and (b) advising on the formulation and facilitating the coordination and implementation of water policies and programs. Further, under section 4 of the Act, the Minister is empowered, with the approval of Cabinet, to:

- (a) establish and maintain an inventory of those waters;
- (b) collect, process and provide data on the quality, quantity, distribution and use of those waters;
- (c) conduct research in connection with any aspect of those waters or provide for the conduct of any such research by or in cooperation with any government, institution, or person;
- (d) formulate comprehensive water resource management plans, including detailed estimates of the cost of implementation of those plans and of revenues and other benefits likely to be realized from the implementation thereof, based upon an examination of the full range of reasonable alternatives and taking into account views expressed at public hearings and otherwise by persons likely to be affected by implementation of the plans;
- (e) design projects for the efficient conservation, development and utilization of those waters; and
- (f) implement any plans or projects referred to in paragraphs (d) and (e), and establishing or naming joint commissions, boards or other bodies empowered to direct, supervise and co-ordinate such programs.¹⁴¹

The Act empowers the government to act unilaterally with respect to programs in waters over which it has full jurisdiction.¹⁴² However, in interjurisdictional waters, international waters or boundary waters, the federal government may only act unilaterally if the Cabinet is satisfied that all reasonable efforts have been made by the Minister to reach an agreement under section 4 with the one or more provinces having an interest in the waters, and that those efforts have failed.¹⁴³

The Canada Water Act therefore provides an important statutory framework for federal-provincial cooperation in water resource management. Numerous federal-provincial agreements have been negotiated in the fifteen years since the Act's passage resulting in water resource surveys, studies and programs. Under the authority of the Act, the Min-

¹⁴⁰ *Id.* pt.1, § 3(a)-(c).

¹⁴¹ *Id.* § 4(a)-(f).

¹⁴² *Id.* § 5(1)(a).

¹⁴³ *Id.* § 5(2).

ister has entered into several Canada-Ontario Agreements Respecting Great Lakes Water Quality to fulfill Canada's obligations under the Great Lakes Water Quality Agreements of 1972 and 1978.¹⁴⁴

In terms of information gathering activities, the Water Survey of Canada, operated by Environment Canada, is responsible for collecting, archiving, distributing and to some degree interpreting most water quantity data. Data on river and stream discharges and flow velocities, river depths and widths, lake levels, ice thicknesses and temperatures are collected at gauging stations and stored at the national water data bank, HYDAT. The provinces contribute to the operation of the water quantity monitoring network under federal-provincial agreements, such as the Canada-Ontario Agreement.¹⁴⁵ Research on water quantity and water quality, and on implementation of water uses, is undertaken by the National Hydrology Research Institute.

Other federal acts also contain information gathering provisions which in some way relate to water quantity. Under the Fisheries Act¹⁴⁶ the Minister of Fisheries and Oceans is authorized to collect water data where fisheries are involved, and under the Canada Shipping Act,¹⁴⁷ to conduct hydrographic surveys. Other federal legislation that authorizes water research, although not necessarily research directly related to water quantity, includes the Environmental Contaminants Act,¹⁴⁸ the Pest Control Products Act,¹⁴⁹ and the International Boundary Waters Treaty Act.¹⁵⁰

Proposals for water diversions and consumptive uses of Great Lakes waters may be subject to the information gathering requirements of the federal government's Environmental Assessment and Review Process (EARP). The EARP was established by cabinet directives, with the most recent being the Environmental Assessment and Review Process Guidelines Order-in-Council in 1984.¹⁵¹ According to these directives, the Minister of the Environment, in cooperation with other Ministers, is authorized to ensure that federal departments and agencies:

¹⁴⁴ Agreement between Canada and the United States of America on Great Lakes Water Quality, April 15, 1972 23 U.S.T. 301, T.I.A.S. No. 7312; Agreement between Canada and the United States of America on Great Lakes Water Quality, Nov. 22, 1978 30 U.S.T. 1383, T.I.A.S. No. 9257.

¹⁴⁵ Canada-Ontario Agreement Respecting Great Lakes Water Quality, July 12, 1982; revised March 6, 1986, administered jointly by Environment Canada and Ontario Ministry of the Environment, Ann. Rpt. 1983.

¹⁴⁶ Fisheries Act, CAN. REV. STAT. ch. F-14 (1970).

¹⁴⁷ Canada Shipping Act, CAN. REV. STAT. ch. S-9 (1970).

¹⁴⁸ 1974-75-76 Can. Stat. c. 72.

¹⁴⁹ Pest Control Products Act, CAN. REV. STAT. ch. P-10 (1970).

¹⁵⁰ International Boundary Waters Treaty Act, CAN. REV. STAT. ch. L-20 (1970).

¹⁵¹ Environmental Assessment and Review Process Guidelines Order, SOR 84-467, 118 Can. Gaz. No. 14, at 2794 (1984).

- (a) take environmental matters into account throughout the planning and implementation of new projects, programs and activities;
- (b) carry out an environmental assessment for all projects which have adverse effects on the environment before commitments or irrevocable decisions are made; and
- (c) use the results of the assessments in planning, decision-making and implementation.¹⁵²

The EARP applies to any proposal put forth by a federal department, a non-regulatory agency or a non-proprietary crown corporation:

- (a) that is to be undertaken by an "initiating department" (i.e. the department that is the decision-making authority behind the proposal);
- (b) that may have an environmental effect on an area of federal responsibility;
- (c) for which the federal government makes a financial commitment; or
- (d) that is located on lands which are administered by the federal department.¹⁵³

In the latter three situations, the federal department is considered to be the sponsor of a proposal where a province, company or other organization intends to undertake the proposal as the proponent. Thus, the federal department or agency which intends to undertake or sponsor the proposal is the initiator and required to comply with federal environmental policy. For the EARP to apply to a water diversion proposal involving the Great Lakes, a federal department would have to be involved in the proposal in some capacity.

The Environmental Assessment and Review Policy requires that the initiating department assess the proposal for possible environmental impacts. If, after a preliminary assessment, significant impacts are expected to occur, the Federal Environmental Assessment and Review Office, the agency which administers EARP, is informed and a panel is convened to consider the proposal. Guidelines for an environmental impact statement are produced by the panel, and the proponent is required to prepare an impact statement. The proposal and impact statement are then open to public review. Following this review, the panel considers the proposal and impact statement and makes a recommendation as to whether the proposal should proceed, proceed with modifications, or be rejected. This recommendation is then forwarded to Cabinet, which decides

¹⁵² Federal Environmental Assessment and Review Office, *Environmental Assessment and Review Process*, established by Cabinet Directives of June 8, 1972 and Dec. 20, 1973, described in A GUIDE TO THE FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS (Feb. 1977).

¹⁵³ *Id.* at 2795-96, §§ 6(a)-(d).

whether to accept or reject the proposal, and if it is accepted, the terms and conditions on which it may proceed.

3. Authority to License and Regulate Impoundments

The Navigable Waters Protection Act¹⁵⁴ provides the government with authority over dredging activities and the placement of obstructions to navigation. Under section 5 of the Act, no work may be built or placed in, upon, over, under, through or across any navigable water unless: (a) approval for the work is given by the Minister of Transport; (b) the approved work is completed within three years of the approval; and (c) the work is built in accordance with the terms and conditions of the approval.¹⁵⁵ The effect of the approval therefore is to authorize an interference with the public rights of navigation but only upon the terms and conditions set down by the Minister.¹⁵⁶

The Act is limited in a number of ways. First, because the Act is only concerned with navigation, all other requisite approvals under other federal and provincial statutes dealing with zoning, land use, pollution control, among others, still apply. Second, although the Act clearly states that no works may be constructed which may affect navigation, it is not an offense to construct such works without an approval. Instead, it is only an offense when there is a refusal to remove or alter the undertaking during construction or after it is completed. If the undertaking or project would not interfere with navigation, no approval is required under the Act. Third, the Act does not bind the federal government, that is, the Department of Public Works, which can either initiate works of its own or construct works for other federal departments, is not required to submit to the Act. However, it appears that the policy of the Public Works Department is to follow the approvals procedure established in the Act.

It is unlikely that the Navigable Waters Protection Act could be used to prevent a diversion of water from the Great Lakes. Because the focus of the Act is upon works which interfere with navigation, the Act could only be used as authority for removing works which facilitate a diversion if those also interfere directly or indirectly with navigation.

Federal government authority to license and regulate impoundments of water is also derived from the International River Improvements Act.¹⁵⁷ Parliament quickly passed this Act in 1955 to aid the federal government in enforcing the rights and obligations assumed by

¹⁵⁴ Navigable Waters Protection Act, CAN. REV. STAT. ch. N-19 (1970).

¹⁵⁵ *Id.* at pt. I, § 5(1)(a)-(c).

¹⁵⁶ *Id.* § 5(2).

¹⁵⁷ International River Improvements Act, CAN. REV. STAT. ch. I-22 (1970).

Canada under the Boundary Waters Treaty¹⁵⁸ in order to prevent British Columbia from constructing a dam on the Columbia River which would have precluded larger scale coordinated development favoured by the federal government. The Act prohibits the placement of any dam, obstruction, canal, reservoir, or other work on an international river where the effect is to: (a) increase, decrease or alter the natural flow of water flowing from a place within Canada to a place outside Canada; or (b) interfere with, alter or affect the actual or potential use of the international river outside of Canada, unless approval is obtained from the Minister of the Environment.¹⁵⁹

The Act established a licensing system for works which would effect any of the above changes on an international river. There are a variety of situations in which the Act does not apply, such as works:

- (a) constructed under the authority of a federal statute;
- (b) situated within boundary waters as defined in the Boundary Waters Treaty;
- (c) constructed, operated or maintained solely for domestic, sanitary or irrigation purposes or "other similar consumptive uses";
- (d) in the opinion of the Minister, of a kind that will have in its operation an effect of less than one-tenth of one foot or less than ten cubic feet per second on the flow of water at the Canadian boundary; or
- (e) in the opinion of the Minister, of a temporary nature.¹⁶⁰

This Act, in effect, circumscribes the authority of provincial governments to license water projects and limits them to water projects within their boundaries. Limiting the power of the provinces in this case is considered justifiable under the Peace, Order and Good Government clause powers under the Constitution¹⁶¹ (Inquiry on Federal Water Policy). The Act would not apply to a proposed Great Lakes diversion because "boundary waters" are excluded from the licensing requirements. However, any diversion from an international river which would affect flows or actual or potential uses of the water, would require a license under the Act.

¹⁵⁸ *Id.* §§ 2, 4.

¹⁵⁹ *Id.* § 7(a)-(c).

¹⁶⁰ CANADIAN INQUIRY ON FEDERAL WATER POLICY, CURRENTS OF CHANGE: FINAL REPORT OF THE INQUIRY ON FEDERAL WATER POLICIES 72 (Sept. 1985) [hereinafter cited as THE PEARSE INQUIRY].

¹⁶¹ Constitution Act, 1867, 30 & 31 Vict. art. VI, § 91(2).

V. LEGAL OPTIONS

A. Introduction

Because the issue of major water diversion involving the Great Lakes has never been addressed by Canadian courts, the legal options available to the federal and provincial governments to control interbasin transfers of water within Canada are, at best, speculative. Owing to divided jurisdiction over water resource management, legal options invariably relate to the constitutionality of the proposed undertaking, especially where interprovincial or international waterways are involved. In practice, it is expected that a cooperative approach would be taken.

Part V examines the legal options available to government in two hypothetical situations. The first involves a non-basin province or federal proposal to transfer Great Lakes water out of the basin which is opposed by a basin province. The second arises from a basin province proposal to transfer water out of the basin which is opposed by another province or by the federal government. In both cases, it is assumed the basin province is Ontario.

While Part V discusses Canadian scenarios, it should be recognized that the most likely source of a proposed diversion are U.S. state or federal governments. This would alter some of the following arguments and markedly strengthen the case of the federal government by virtue of its power with respect to international relations.

B. Diversion Opposed by a Basin Province

The power of a basin province (Ontario) to regulate or prohibit exports of water from the Great Lakes basin is not entirely settled. The province likely has the power to prohibit the export of water, but it may not have the power to cut back on already authorized exports.

Generally speaking, constitutional authority over the export of goods from a province rests with the federal government under its power over trade and commerce.¹⁶² However, the province's proprietary interest in water gives it certain legislative powers over the resource. How would this clash of governmental power and authority be resolved by a court today? Because the federal trade and commerce power has grown in recent cases, there is some question whether a Canadian court would approve provincial restrictions on the export of water from a province. Recently, the Supreme Court of Canada struck down a royalty surcharge imposed by Saskatchewan on Crown oil leases — an exercise of proprietary authority similar to that found in earlier cases dealing with water — on the ground that it interfered with federal power over indirect taxa-

¹⁶² See generally Moull, *National Resources: Provincial Proprietary Rights, The Supreme Court of Canada, and The Resource Amendment to the Constitution*, 21 ALTA L. REV. 472 (1983).

tion.¹⁶³ Because of the modern strength of federal power over trade and commerce, Professor Moull suggests that a provincial exercise of proprietary authority which interfered with federal legislative power would very likely be struck down.¹⁶⁴

A recent example of the restriction on export of resources by a province is the 1980 Alberta reduction in crude oil production and prohibition of export to eastern Canada in retaliation for increased federal restrictions on the oil industry under the National Energy Program. Alberta's authority to take such action was never challenged, so there is no clear answer as to whether it would have been upheld. It is only safe to conclude, therefore, that a province *may* have such authority, but if challenged the restriction *may* be vulnerable. If, on the other hand, the province refused an export permit rather than restricted an existing permit, the provincial action would more likely be constitutional.

For some natural resources owned by the provinces it is clear that export controls and prohibitions would be valid. Section 92A of the Constitution Act, 1982 gives the provinces legislative authority over the "development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom" and over "the export from the province to another part of Canada" without discrimination in prices or supplies of such resources and electrical energy.¹⁶⁵ Because 92A is concerned with non-renewable resources, it is unlikely that the provision applies to water, and thus would be of little assistance to the province.

Ontario's power to control exports would be exercised through its permit granting power under the Ontario Water Resources Act.¹⁶⁶

C. *Diversion by a Basin Province*

In the situation where a basin province (Ontario) undertakes a water resource project to divert Great Lakes basin water and Quebec, the lower riparian owner, opposes the project, Quebec would have a variety of options open to it. These options include challenging the validity of the authorizing statute, urging the federal government to assert its federal authority or seeking compensation.

1. Challenging the Validity of the Authorizing Statute

When one province attempts to authorize the diversion of waters

¹⁶³ *Canada Indus. Gas & Oil Ltd. v. Government of Sask.*, 80 D.L.R.3d 449 (1977).

¹⁶⁴ Moull, *supra* note 162, at 485.

¹⁶⁵ Constitution Act, 1982, Consolidation of the Constitution Acts 1867 to 1982, art. VI, § 92A(1)(b), (2).

¹⁶⁶ Ontario Water Resources Act, ONT. REV. STAT. ch. 361, § 20 (1980).

out of the basin to the detriment of a downstream province, the most direct route for the downstream interest would be to challenge the validity of the authorizing statute on the basis that the statute encroaches upon federal legislative competence and hence is *ultra vires* the province. While provincial ownership of water carries with it the right to dispose of that interest on terms and conditions the province deems appropriate, if works are constructed that have the effect of interfering with matters within federal power, the legislation authorizing the works may be struck down. Depending upon the nature of the project, the legislation may be *ultra vires* on the basis that it creates a "federal work," or it encroaches upon the areas of federal competence dealing with navigation, inland fisheries, the regulation of trade and commerce, or federal proprietary rights.

a. Federal Works: (Section 92(10)(a))

Although provincial governments have power over "local works and undertakings,"¹⁶⁷ section 92(10)(a) of the Constitution Act, 1867 makes this authority subject to any works "connecting the province with any other or others of the Provinces, or extending beyond the limits of the Province."¹⁶⁸ However, the federal authority under this section has been held to apply only to "works and undertakings concerned with transportation and communication."¹⁶⁹ Hence, the federal reach under this power in a water development project may depend on the nature of the project itself. If the project was designed to export water resources outside of a province (for example, by pipeline) the federal jurisdiction may be triggered under the guise of transportation works. The same principle would apply if the development included a canal, although it is unclear whether federal jurisdiction would extend only to that aspect of the project, or to all the water passing through it and thus include the whole water diversion scheme.

Nevertheless, it is clear that this federal power is only triggered once a provincial scheme is planned or commenced—it does not empower the federal government to encroach on provincial competence by initiating a water development scheme itself. In light of the divided jurisdiction, a cooperative effort on the part of provincial and federal governments would be mandatory.

b. Navigation and Shipping: Section 91(10)

Historically, the power to regulate navigation and shipping under

¹⁶⁷ Constitution Act, 1867, 30 & 31 Vict. art. VI., § 92(10).

¹⁶⁸ *Id.* § 92(10)(a).

¹⁶⁹ P. HOGG, CONSTITUTIONAL LAW OF CANADA 324 (1977), *Canadian Pac. Ry. v. Attorney Gen. for B.C. (Empress Hotel Case)* 1950 A.C. 122 (P.C.).

Section 91(10) of the Constitution Act 1867¹⁷⁰ has given federal authorities broad powers. As one authority noted, this power can:

[A]uthorize works for improvement of navigation, may prohibit under penalty or require removal of obstructions to navigate and hence may require a license or permission to erect dams, bridges or other structures and may regulate their operation and their effect upon navigation.¹⁷¹

As a consequence of this power, any provincial legislation which unilaterally authorizes work interfering with navigation is beyond provincial competence, irrespective of the ownership of the water.

On the other hand, the navigation power would not vest federal jurisdiction over the development only on the basis of some navigational aspect. The court would look at the "pith and substance" of the impugned legislation, and determine the extent to which it affects navigation. Federal involvement in the matter would be shared with provincial authorities to the extent of the respective interests of each.

c. Seacoast and Inland Fisheries (Section 91(12))

Under its authority over seacoast and inland fisheries,¹⁷² the federal government is empowered to regulate any work, activity or undertaking which may adversely affect fish or their habitat, even if this interferes with provincial management of water.¹⁷³ To the extent that a proposed transboundary water project adversely affected fish, it would be subject to federal control. Such control could include the requirement that sufficient quantity of water remain in a water body to ensure the safety of fish;¹⁷⁴ however, this is not likely to represent a significant obstacle in the Great Lakes.

d. Regulation of Trade and Commerce

Judicial interpretation of the federal trade and commerce power has restricted it to the general regulation of trade affecting Canada as a whole, including interprovincial and international trade. The export of natural resources from Canada such as oil, natural gas and electric power are regulated under federal law. The exclusive power of the federal government over export of resources has been modified somewhat by the 1982 amendment to the Constitution, section 92A, discussed above.¹⁷⁵ To the extent that water can be viewed as a commodity capable of being

¹⁷⁰ Constitution Act, 1867, 30 & 31 Vict. art. VI., § 91(10).

¹⁷¹ LASKIN'S CANADIAN CONSTITUTIONAL LAW 211 (Abel, 4th ed. 1973).

¹⁷² Constitution Act, 1867, 30 & 31 Vict. art. VI., § 91(12).

¹⁷³ Attorney-General of Canada v. Aluminum Co. of Canada 115 D.L.R.3d 495, 496 (1981).

¹⁷⁴ See *id.*

¹⁷⁵ Constitution Act, 1867, amended by § 92A(1982).

exported, then this power would seem to give the federal government an avenue to control the terms of water exports from Canada, even though the water may be the property of a province.

2. Assertion of Federal Authority

Another option available to the downstream province would be to persuade the federal government to assert jurisdiction over the undertaking under the "peace, order and good government" clause or the declaratory power. Alternatively, the federal government could use existing legislation to unilaterally manage Great Lakes waters. Use of the declaratory power would apply after a province has erected works while the use of legislation such as the Canada Water Act¹⁷⁶ would preempt a province from putting such a scheme into place.

a. "Peace, Order and Good Government"

The power of the federal government to legislate for the "peace, order and good government" (POGG) of Canada is found in the preamble to section 91 of the Constitution.¹⁷⁷ The scope of this power has oscillated from expansive to narrow, leaving it clouded in uncertainty, but somewhat on the expansive side.

Generally it seems that the POGG power is applicable in two situations: first, if immediate action is necessary in times of national emergency and, second, in a residual sense, where the subject matter in question is new and not covered under the Constitution and the subject matter is not by its nature within provincial power. There is no specified federal power over interprovincial concerns or disputes and this, combined with judicially imposed limitations on the ability of a province to act on interjurisdictional matters, has created a vacuum in this area.¹⁷⁸

Once the POGG power is involved, it is clear that it is one of the strongest tools available to the federal government. However, in light of the conditions that must be met before it is employed it is unlikely it could be easily employed by the federal government to take control over a transboundary water project. First, the circumstances would be extremely rare where courts would define any such project as a national "emergency." Second, with respect to POGG as a residual power, it is doubtful whether a transboundary water project could be considered of "national dimension." Moreover, when this aspect of POGG is used, federal intervention on the provincial subject matter is "limited and specific" and "not so very sweeping and general as to pose the danger of

¹⁷⁶ Canada Water Act, CAN. REV. STAT. ch. 5 (15th Supp. 1970).

¹⁷⁷ Constitution Act, 1867, 30 & 31 Vict. art. VI., § 91.

¹⁷⁸ *Interprovincial Co-ops v. The Queen*, 53 D.L.R.3d 321 (1975).

severe erosion of customary provincial authority."¹⁷⁹

b. The Declaratory Power: Section 92(10)(c)

As noted previously, the provinces have the legislative authority over all "local works and undertakings" except to the extent that such works extend beyond the province or connect two or more provinces.¹⁸⁰ Another exception to this principle is contained in section 92(10)(c), which states that the federal government may declare a provincial work situated wholly within a province to be for the "general Advantage of Canada."¹⁸¹ To activate this power, the federal government need only make an explicit declaration in a statute with reference to the specific work(s) in question. Unless the property on which the project was constructed was expropriated, proprietary rights would remain with the provinces. Hence, subject to federal regulation, revenues from the project would flow to the provinces.

The scope of the power is great. A work declared to be for the "general Advantage of Canada" does not have to have a "national dimension," as it would to invoke the POGG power, and is not limited to transportation and communication projects as under section 92(10)(a). However, this provision can only be used by the federal government to assume control over specific works under construction or in existence. The declaratory power could be used in cases of water diversions. In fact, it was employed by the federal government in order to develop the St. Lawrence Seaway and bring the Welland Canal diversion under federal control.¹⁸²

The major limitation to using this power stems from the serious political risks involved in taking control of provincial works. Indeed, unlike other federal powers in which the federal government must show that there is an interprovincial or an international aspect to the project before the federal government may act the declaratory power is available for a project "wholly within a province," political sensitivity to the use of this power may explain, in part, why it has not been invoked since 1961.¹⁸³

3. Canada Water Act

The federal government has existing legislation which would allow it to assert control over a water diversion project. Under the Canada

¹⁷⁹ *In Re Anti-Inflation Act*, 2 S.C.R.373, 440 (1976) (Beetz, J. dissenting).

¹⁸⁰ *Constitution Act*, 1867, 30 & 31 Vict. art. VI., § 92(10)(a).

¹⁸¹ *Id.* § 92(10)(c).

¹⁸² *See Van Buren Bridge Co. v. Madawaska*, 15 D.L.R.2d 763 (1958).

¹⁸³ *See Emond, The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution*, 10 OSGOODE HALL L.J. 647 (1972).

Water Act, the federal government can unilaterally develop a "comprehensive water resource management plan" if efforts to reach an agreement with the relevant provinces have failed.¹⁸⁴ However, the plan can only be implemented with respect to:

- waters under the exclusive legislative jurisdiction of the Parliament of Canada;¹⁸⁵
- international or boundary waters where there is a significant natural interest.¹⁸⁶

For "interjurisdictional waters," i.e., those which, whether wholly situate within a province or not, significantly affect waters outside such a province,¹⁸⁷ unilateral implementation of the water management plan is not provided for under the Act and cooperative action is necessary.¹⁸⁸

Despite the broad power conferred on the federal government under the Act, it is unlikely that the government would find unilateral action politically viable. Moreover, there is real concern whether such unilateral action is constitutional, especially with respect to those waters of an interjurisdictional character. Presumably the constitutional basis for this power is section 92(10)(a), the provision that gives the federal government legislative competence over works and undertakings connecting two provinces or extending beyond a province.¹⁸⁹ Because the Act defines interjurisdictional waters to include waters which may be situated wholly within a province, the works or undertakings may be beyond federal jurisdiction since they would neither connect two or more provinces, nor extend beyond the limits of a province.¹⁹⁰

4. Compensatory Action

In the event that the diversion project was held *intra vires*, the affected province could seek compensation for injury sustained as a result of the project. Should Quebec, for example, wish to sue Ontario, the first question is, in which province should the action be commenced? Because Canada does not have a specific forum to settle interprovincial suits or a body of law upon which to adjudicate the claim, common law principles would apply. Due to the local action rule (which states that a court has no jurisdiction to adjudicate for injuries to foreign land) Quebec would be forced to sue for compensation in Quebec courts. Unfortunately, Que-

¹⁸⁴ Canada Water Act, CAN. REV. STAT. ch. 5 §§ 4(d), 5(2) (Supp.1 1970).

¹⁸⁵ *Id.* §§ 5(1), 2(c).

¹⁸⁶ *Id.* § 5(1)(c).

¹⁸⁷ *Id.* § 2(1).

¹⁸⁸ *Id.* § 9.

¹⁸⁹ Constitution Act, 1867, 30 & 31 Vict. art. VI., § 92(10)(a).

¹⁹⁰ Stein, *An Opinion on the Constitutional Validity of the Proposed Canada Water Act*, 28 V. TORONTO FAC. L. REV., 74, 78 (1970).

bec civil law has very narrow rules permitting its courts to assert *in personam* jurisdiction over interests outside of the province.¹⁹¹ Indeed, it would have to be asserted that the "cause of action arose" in Quebec. This could be a difficult hurdle if the only connection between the parties is the injurious activity in one province and the injury suffered in the other.

Furthermore, once the jurisdictional problems have been resolved, Quebec courts would have to ascertain whether to apply Quebec or Ontario law. Quebec, a civil law jurisdiction, applies the traditional common law choice of law rule as enunciated in *Phillips v. Eyre*.¹⁹² In accordance with the riparian rights doctrine outlined in the Quebec Civil Code, the impaired interests could be appropriately compensated.¹⁹³

The situation, however, becomes far more complicated if Ontario has statutorily modified riparian law. For instance, if Ontario licensed the diversion project, Quebec residents might be left remediless. Even though Quebec conflicts rules apply to Quebec law, they also permit the defendants to plead as a defense that the activities were authorized under foreign law. If the Ontario defendants had the appropriate license, then Quebec residents could be left without compensation for their injuries arising from the Ontario diversion.

In this extraordinary situation, Quebec could enact remedial legislation to deny Ontario the defense of statutory authorization, as Manitoba attempted to do in an analogous situation.¹⁹⁴ In this latter instance, Manitoba enacted legislation that, in effect, denied this defense to companies in Ontario and Saskatchewan who were discharging pollutants in rivers flowing into Manitoba and causing injury to fishing interests in that province. The injured interests assigned their rights to Manitoba who in turn sued the responsible parties for damages.

Unfortunately, in striking down the legislation, the Supreme Court of Canada left many questions unanswered. Justices Pigeon, Martland and Beetz (concurring) reasoned that, due to the interprovincial effects of the defendants' activities, Ontario and Saskatchewan were without authority to license the activities as the acts were a subject matter within the exclusive authority of the federal government.¹⁹⁵ The federal government had competence to deal with the matter either because of its jurisdiction over fisheries or under its residual legislative power over matters

¹⁹¹ Glenn, *De La Cause D'action et de la Competence Internationale*, 27 MCGILL L.J. 793, 793-97 (1982).

¹⁹² *Phillips v. Eyre*, 6 L.R.-Q.B. 1 (1870). *O'Connor v. Wray*; *Boyd v. Wray* 1930 S.C.R. 231 applies *Phillips* to Quebec.

¹⁹³ CIVIL CODE OF QUEBEC arts. 501-03.

¹⁹⁴ *Interprovincial Co-ops. v. The Queen*, 53 D.L.R.3d 321 (1975).

¹⁹⁵ *Id.* at 321-22.

not specifically allocated to the provinces of Parliament.¹⁹⁶ Ritchie, J., on the other hand, rested his opinion on the principle that a province cannot legislate with respect to conduct and rights of persons outside of the territorial limits of the province.¹⁹⁷ In other words, Manitoba could not legislate with respect to the conduct and rights of persons in other provinces.

VI. CANADIAN POLICY RESPECTING GREAT LAKES DIVERSIONS

Canadian governments have traditionally opposed the large-scale export of water from Canada, particularly proposals to divert water from the Great Lakes Basin. This position has been maintained despite the approval of large-scale water diversions within Canada for purposes of generating hydroelectric power, much of which has been exported to the U.S. In light of recent diversion proposals, some involving the Great Lakes, Canadian governments are reassessing these policies on water export.

A. Existing Policy

Historically, the government of Canada has consistently maintained the position that the nation's water resources are not for export. Since the early 1960s, when projections of water shortages in some parts of the United States and proposals for large-scale diversions of water first began to appear, government's responses in Parliament have been that Canada is not prepared to negotiate water sales and, in any event, no formal request for a purchase of water has ever been received from the United States. For example, Charles Caccia, former federal Minister of the Environment, has stated that

Canada's position to oppose the export of water hasn't changed. . . . We reject the contention that water is available for export. This will be a very important commodity for Canadians in the decades ahead. We therefore reject any such notion whether it comes from provinces, municipalities or regions in the north.¹⁹⁸

The federal government's position with respect to diversions of Great Lakes water resources is to oppose water exports. It opposes any new, unilateral or "temporary" increases in diversions from the Great Lakes system because of the potentially adverse environmental and economic consequences to the provinces of Ontario and Quebec. As an indication of the government's position on the issue of diversions, the Environmental Conservation Service (ECS) of Environment Canada has

¹⁹⁶ *Id.* at 322.

¹⁹⁷ *Id.*

¹⁹⁸ *B.C. Water Sale Promoter Stirs Federal Action*, Vancouver Sun, Aug. 15, 1984, at A12.

stated as a priority for inland waters that inter alia, "emphasis will be placed upon avoiding preemptive uses of water in transboundary rivers and lakes."¹⁹⁹ The government of Canada also supports the recommendation of the International Joint Commission that lake levels should not be manipulated further through existing diversions.

The government of Canada has no formal policy on the issue of consumptive uses of Great Lakes water. Since the Constitution accords the provinces proprietary rights over water resources, the federal government is powerless to enact legislation which would affect the manner of allocation of the resources intraprovincially. Traditionally, however, the federal government has taken a leadership role in environmental matters, providing advice and guidance to the provinces. As a result, ECS has stated that, "with the cooperation of the provinces [it] will encourage better use of existing water supplied and develop efficient water use technologies."²⁰⁰

The Province of Ontario is in agreement with the government of Canada's policy with respect to diversions of water from the Great Lakes. It is opposed to any new, unilateral or "temporary" diversions to the extent that such diversions would have adverse economic and environmental consequences for Canada. Ontario has not developed any specific policy position with respect to inter and intrabasin transfers of water.

The province has taken the position that there are inequities in the existing usage of waters diverted into the Great Lakes system which should be addressed through negotiation with the United States. Ontario diverts water from the Albany River basin into the Long Lac and Ogoki diversions. Hydroelectric generating stations are located on each of the diversions, which are owned and operated by Ontario Hydro. On average, 5,600 cfs of water enters Lake Superior through the diversions, with each 1,000 cfs annually being valued at \$10,000,000 in hydroelectricity generation. In accordance with the Niagara River Treaty, this water is credited to Ontario at Niagara Falls. Under the St. Lawrence Seaway and Power Project agreement, this water is shared equally at Cornwall. However, at Sault Ste. Marie, no formal agreement exists, and the province loses both water rental income and the value of the hydroelectric power which is generated from the diverted water. Ontario has taken the position that water diverted into the Great Lakes system from other watersheds in Ontario should be considered its water throughout the length of the system.

The Province of Ontario believes the inequities between the United

¹⁹⁹ ENVIRONMENT CANADA, DEPARTMENTAL STRATEGIC PLAN, 1984-1989 25 (Oct. 20, 1983).

²⁰⁰ *Id.*

States and Canada with regard to consumptive uses of Great Lakes water should be addressed. It has expressed concern about the future trends in consumptive uses insofar as the most likely projections indicate that over eighty per cent of the increase will occur in the United States. In view of the provisions in the Boundary Waters Treaty which state that the parties are to have equal rights to the use of the boundary waters,²⁰¹ the province believes that existing and projected consumption imbalances must be examined, and that the issue of compensation must be addressed.

The Province of Quebec has taken the position that it would be very reluctant to establish any permanent diversion from within the province. As a signatory party to the Great Lakes Charter, it also opposes any new, unilateral or "temporary" diversions of water from the Great Lakes without full consultation and concurrence among the signatory parties. Lowered lake levels and small outflows into the St. Lawrence River would have adverse consequences on the province's environment and economy.

Quebec has a more open policy toward the concept of exporting water in small amounts through dedicated water tankers. Four guiding principles have been established for consideration in reviewing such proposals:

1. the water resources of the province of Quebec are, first and foremost, for the people of Quebec;
2. the exportation of water shall in no way cause or create any hindrance to any other user(s) of the resource;
3. the exportation of water shall not damage or prejudice in any way the natural ecology of the province; and
4. the province shall apply a levy to any waters exported.²⁰²

B. Recent Policy Initiatives.

The two most important policy developments in Canada affecting Great Lakes are, first, the Ontario and Quebec government participation in the Great Lakes Charter²⁰³ and, second, the recent release of the Report of the Federal Inquiry on Water Policy (The Pearse Inquiry).²⁰⁴

The Great Lakes Charter²⁰⁵ is an agreement among the states and provinces bordering on the Great Lakes on approaches to Great Lakes

²⁰¹ International Boundary Waters Treaty Act, CAN. REV. STAT. ch. I-20, § 4 (1970).

²⁰² Personal communication with M. Jean Piette of the Quebec Ministry of the Environment (April 12, 1985).

²⁰³ Reprinted in GREAT LAKES GOVERNORS TASK FORCE, COUNCIL OF GREAT LAKES GOVERNORS, FINAL REPORT AND RECOMMENDATIONS ON WATER DIVERSION AND GREAT LAKES INSTITUTIONS 40 app. III (1985). [hereinafter cited as THE CHARTER].

²⁰⁴ THE PEARSE INQUIRY *supra* note 160.

²⁰⁵ THE CHARTER *supra* note 203.

Basin management and in particular on how best to respond to proposals to divert water from the Basin. Under the Charter, proposed diversions would be opposed by Ontario and Quebec unless all basin states, Ontario, Quebec and the two federal governments concurred with the proposal.²⁰⁶ The Charter requires each jurisdiction to adopt a use permit system and to permit all other jurisdictions to make representations with regard to any proposed water diversion.²⁰⁷ Ontario and Quebec apparently intend to adopt this approach to Great Lakes diversions although it is not yet clear whether they will expand their existing permit system to include criteria for water diversions.

The *Report of the Inquiry on Federal Water Policy*²⁰⁸ was released in September 1985 and made a number of recommendations on how the federal government should approach the questions of water export and interbasin diversions. The Commission does not recommend a blanket rejection of all exports regardless of size and impact but instead suggests that the government develop a policy and criteria for proposed water exports. The Commission also recommends that water exports be approved by the federal government in addition to approval by the provincial government.²⁰⁹ For interbasin transfers, the report recommends that the federal government decide if such projects should be considered at all and, if so, under what conditions, how they will be assessed, and grounds for approval.²¹⁰ Despite its call for caution with regard to interbasin transfer proposals, the commission strongly favours establishing machinery now to deal effectively with future proposals, should they be made.²¹¹

The Commission's report points in the direction of a strong federal presence in future approvals of large scale water projects. However, it is still too early to predict to what extent this advice will be adopted and implemented by the Government of Canada.

²⁰⁶ *Id.* at Principle IV.

²⁰⁷ *Id.*

²⁰⁸ See THE PEARSE INQUIRY *supra* note 160.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

