JURISDICTION FOR WATER RESOURCE DEVELOPMENT

The purpose of this paper is to examine some of the elementary jurisdictional questions relating to the development of water resources in Canada. As a necessary preliminary, the introductory pages contain a resumé of the common law and civil law relating to water and watercourses. Throughout the paper reference will be made to the jurisdiction of the American federal and state governments over water resources, with particular reference to the manner in which the respective jurisdictions have changed in the past fifty years.

A. THE COMMON LAW.

1. Riparian Rights.

The concept of "negative community" — that running water could not be owned in its natural state — originated in the Justinian Code. The concept was formulated by the Code Napoleon in 1804 and was formally adopted by the English Courts in 1849, and the American Courts in 1827, as the riparian doctrine.[1] In England the riparian doctrine replaced the doctrine of prior appropriation which had originated there in the late 1700's. In the United States the riparian doctrine developed in conjunction with the doctrine of prior appropriation, the latter doctrine being firmly entrenched in the arid or semi-arid Western States.[2] The English riparian doctrine is the common law of water rights in Canada, somewhat modified of course by peculiar variations, and substantially modified by statute.

According to Canadian riparian law, a landowner has no private proprietary rights in water flowing in a defined channel either above or below the surface.[3] In the case of underground

1. S. C. Wiel, Running Water (1908) 22 Harvard Law Review 190; Fifty Years of Water Law, (1936) 50 Harvard Law Review 252.

2. Federal Water Rights Legislation and the Reserved Lands Controversy, (1965) 50 Georgetown Law Journal, 750 at 754, 755.

3. Mason v. Hill (1833) 5 B. Ad. 1 at 24. On Canadian riparian law generally, see Per Gisvold, A Survey of the Law of Water in Alberta, Saskatchewan, and Manitoba.

water, a distinction must be made between water flowing in a known and defined subterranean channel and water which percolates through the soil following no defined course. In the latter case, there can be no property in the water until it has been appropriated,[1] but once appropriated the owner of the land acquires a proprietary right to the water. In such cases the landowner may draw any amount without regard to the claims of neighbouring owners.[2]

In the case of water flowing through a defined channel, the owner of the land through which the water flows, or the owner of the land past which the water flows in the case of a lateral owner, has certain rights to the water, termed riparian rights. These rights do not depend on ownership of the soil of the watercourse, but are derived from possession of the land abutting on the watercourse.[3]

The rights which a riparian owner may have in respect to water may be divided into those consisting of natural rights of user based on access and flow, and those rights based on easement.[4] In addition to the natural rights of ordinary use of water, a riparian owner may use it for any further purpose provided he doesn't interfere with owners above or below him. Thus he may dam or divert the stream for irrigation purposes.[5] There can however be no natural rights to use water for purposes unconnected with the riparian tenement.[6] A riparian owner may acquire rights by easement, including a right to use the water in a manner not justified by his natural right, for example the right to discharge industrial waste into the water. Such an easement is usually only created by a grant or presumption of a former grant.[7]

One riparian owner may maintain an action against another for unreasonable use of waters. An injunction may be granted even though there is no present damage.[8] Pollution of watercourses is actionable by a riparian owner, provided he can establish some damage. In any case, pollution may constitute a nuisance.[9] Also, there exists a public right to have pollution enjoined in an action brought by the Attorney-General.[10]

The law of riparian owners has been greatly modified by statute. In British Columbia for example, the riparian law has been extinguished and the only water rights that can be acquired are

1. Ballard v. Tomlinson (1885) 29 Ch. D. 115.
2. Chasemore v. Richards (1859) 7 H.L.C. 349.
3. Lyon v. Fishmongers' Co. (1876) 1 A.C. 662.
4. Leahy v. North Sydney (1906) 37 S.C.R. 464.
5. Miner v. Gilmour (1859) 12 Moo. P.C. 131, 156.
6. McCartney v. Londonderry & L.S. Rly. (1904) A.C. 301, 302.
7. Beeston v. Weate, (1856) 5 E. & B. 986.
8. Watson v. Jackson (1914) 31 O.L.R. 481.
9. Groat v. Edmonton (1928) S.C.R. 522, 532.
10. A.G. for Canada v. Ewen, A.G. for Canada v. Munn (1895) 3 B.C.R. 468.

those granted either directly or by license, under the Water Act.[1] In Manitoba, the following statutes alter the riparian law to varying degrees: Crown Lands Act, Pollution of Waters Prevention Act, Factories Act, Dyking Authority Act, Expropriation Act, Municipal Act, Water Power Act, Rivers and Streams Act, Power Commission Act, Municipal and Public Utility Board Act, Greater Winnipeg Water District Act, Hydro Electric Development Act, Mines Act, Water Supply District Act, Water Supply Board Act, Water Rights Act, Watershed and Soil Conservation Authorities Act, and the Well-Drilling Act. It is evident from this list that even where riparian rights exist, they are of only limited importance. The most important of these Acts in relation to riparian rights is the Water Rights Act. The Act provides that the property and right to use water in any watercourse is vested in the Crown until an inconsistent right is established.[2] The Act further prohibits any use of water except by authority obtained under the Act.[3] Also, with one minor exception, a riparian owner has the right to use water for domestic purposes only, unless application is made under the Act. Federal legislation, such as the Navigable Rivers Protection Act, has had less, though still significant effect on riparian law.[4]

Riparian law was adopted throughout those Eastern states comprising the United States in 1827.[5] Today most of these states continue under a form of riparian law modified by statute. The prior appropriation doctrine emerged first in the States of New Mexico, Utah and California, eventually extending into all the arid and semi-arid Western States.[6] The appropriation consists of the taking or diversion of water from some natural stream or other source of water in accordance with law, for some beneficial use or purpose. The water taken must be used for this purpose within a reasonable time.[7] The essence of the appropriation doctrine is the principle that the beneficial use of water is the basis, measure and limit of the appropriative right.[8] The right is a property interest independent of the land and does not depend on possession or ownership.[9] Priority is granted to the first apropriator and each subsequent appropriator takes subject to his right. It is interesting to note that

1. R.S.B.C. (1960) C. 405; and see W. S. Armstrong, The British Columbia Water Act: The End of Riparian Rights. (1962) I, 5 U.B.C.L.R. 583.
2. R.S.M. (1954) C. 289, s.6.
3. Section 6(2).
4. Further federal water legislation has however been promised. See House of Commons Debates, May 8, 1967.
5. Federal Water Rights Legislation and the Reserved Lands Controversy, supra, note 2, 754; see also R. E. Clarke, Water and Water Rights, vol. 1, P. 60 (1967).
6. W. A. Hutchins, Background and Modern Developments in Water Laws in the United States. (1962) 2 Natural Resources Journal 416-418.
7. II Kinney, Irrigation and Water Rights, 1216 (2 ed. 1912), quoted in Federal Water Rights Legislation and the Reserved Lands Controversy, supra, note 2, 755.
8. Ide v. United States, 263 U.S. 497, 505 (1924).
9. Boquillas Land and Cattle Co. v. Curtis, 213 U.S. 339, 347 (1909).

eight states east of the Mississippi have adopted, to varying degrees, the doctrine of appropriation, many since 1955. Apparently this trend is the result of limitations in the riparian doctrine arising from the fact that rights depend on occupation of land adjoining a watercourse.[1]

2. Public Rights of User.

The public right of navigation exists in all navigable waters.[2] The question of the existence of a public right to fish is more difficult. Certainly the right exists in tidal waters. As far as non-tidal waters are concerned, it is well-established that title to the bed of waters carries with it the right to fish, whether the waters are navigable or non-navigable, and whether the bed is owned privately or by the Crown.[3] The problem lies in whether or not there is a public right to fish in navigable waters, the title to the bed of which remains in the Crown, in the right of the province, and where the province has granted no exclusive rights. It has been suggested by one author that the public has a right to fish in such waters, and the case of the *Attorney-General of British Columbia v. Attorney-General of Canada* is cited as authority for this suggestion.[4] There seems however, to be only a contrary statement in that case by Viscount Haldane to the effect that fishing in "navigable non-tidal waters is the subject of property and according to English law, must have an owner, and cannot be vested in the public generally".[5] This statement was expressly approved by Clement J. in a 1915 decision of the British Columbia Supreme Court.[6] The inconsistency between Viscount Haldane's statement of the law and an earlier statement of Knight C. J. in a Supreme Court decision, *Re Provincial Fisheries,* was noted without comment in *McKie v. The K.V.P. Co.*, a decision of the High Court of Ontario.[7] It would seem therefore that there is no public right to fish in navigable non-tidal waters, the title to the bed of which remains in the Crown.

1. Federal Water Rights Legislation, supra, note 2, 756, 757.

2. Simpson Sand Co. Ltd. v. Black Douglas Contractors Ltd. (1964) S.C.R. 333, 340, 341. Spence J., in giving the judgment of the Court did not make any finding as to the ownership of the water bed in question; but for the purposes of the case presumed it was privately owned and held that a public right of navigation existed.
Also see Fort George Lumber Co. v. G.T.P.R. (1915) 24 D.L.R. 527, which has been cited by some authors as authority for the general proposition that the right of navigation exists in all navigable rivers. On a close reading the case does not seem to be authority for this statement, although I believe the law is clear. If the right exists where the bed is privately owned, surely it must exist where owned by the Crown.

3. The Queen v. Robertson, (1882) 6 S.C.R. 52.

4. (1944) A.C. 153; Professor Bora Laskin (Now Mr. Justice Laskin), Jurisdictional Framework for Water Management, Resources for Tomorrow Conference: Background Papers, 211, 212.

5. At p. 173.

6. Fort George Lumber Co. v. G.T.P.R. (1915) 24 D.L.R. 527 at 529.

7. Re Provincial Fisheries (1896) 26 S.C.R. 444 at 512, 513. On appeal to the Privy Council this matter was expressly excluded from the decision: Attorney-General for Canada v. Attorney-General for Ontario, Quebec and Nova Scotia (1898) A.C. 700. This I would think would tend to reinforce Viscount Haldane's statement in the later P.C. case. McKie v. K.V.P. (1948) O.R. 398 at 413. This was affirmed with a variation (1949) S.C.R. 698 but the point was not dealt with.

The public rights of fishing and navigation are superior to the riparian owner's right of access and use.[1] Remedies are available for obstruction of the public rights of fishing and navigation.[2]

In the United States, a public right of navigation exists in all navigable watercourses, regardless of the ownership of the bed.[3] Where the stream is not navigable the public is denied any right to fish.[4] There exists a public right to fish where the title to the bed of a navigable stream remains in the state,[5] but there is some doubt whether this right exists in a navigable stream in which the bed is privately owned. Apparently the better view is that no such right exists.[6]

B. THE CIVIL CODE.

The Quebec Civil Code provides that the owner of land bordering on a running stream, not forming part of the public domain, may use water from the stream for the utility of his land provided he does not interfere with the exercise of similar rights by those to whom it belongs. An owner whose land is crossed by such a stream may use it within the whole area of its course through his property, provided he allows it to take its usual course when it leaves his land.[7]

A land owner has a right to the natural flow of water, and neither a higher nor lower owner may interfere with this right.[8]

Navigable or floatable rivers and streams, and their banks are considered as being dependencies of the Crown domain. Lakes and non-navigable or non-floatable rivers and streams and their banks bordering on lands alienated by the Crown after February 9, 1918 are also dependencies of the Crown domain.[9]

C. THE BRITISH NORTH AMERICA ACT.

To organize an examination of federal and provincial jurisdiction in water management in either an exclusively theoretical arrangement, based on the specific heads of sections 91 and 92 of the B.N.A. Act, or in an exclusively functional arrangement based on specific water management problems is to sacrifice clarity of analysis to consistency of organization. For this reason all the relevant heads of sections 91 and 92 are discussed together in Part C. Those heads that lend themselves to a functional analysis are

1. Laskin, 212, 213.
2. Re Brandon Bridge (1884) 2 Man. R. 14, Regina v. Moss (1896) 26 S.C.R. 322. Fort George Lumber Co. v. G.T.P. Rly. (1915) 24 D.L.R. 527; cited in Laskin, 213.
3. DuPont v. Miller, 141 N.E. 423 (1923).
4. Griffith v. Holman, 63 Pac. 239 (1900).
5. Lincoln v. Davis, 18 N.W. 103 (1884).
6. A. J. Casner, American Law of Property, Vol. II, 481.
7. Article 503.
8. Article 501.
9. Article 400; as to statute law, see, for example, The Watercourses Act, R.S.Q. (1964) C. 85.

also discussed under specific water utilization schemes in Part D. Those heads within the latter category are only mentioned briefly in Part C as they will be subsequently dealt with in some detail.

Section 91 (10) of the B.N.A. Act grants to the Federal Government jurisdiction over navigation and shipping. The extent of the shipping power is not clearly defined but it is doubtful whether it is of much value in relation to water management. The navigation power is of considerable importance at present, and, as a matter of speculation, could become one of the mainstays of future federal activity in the water resource field. Section 91 (12) provides that the Dominion shall have exclusive authority over seacoast and inland fisheries. The development potential of this jurisdiction as a basis for significant federal action is almost nil. The federal authority over beacons, buoys, lighthouses and Sable Island is also an insignificant one. Canals and other works and undertakings connecting a province with any other province, or extending beyond the limits of a province are within Dominion jurisdiction by reason of sections 91 (29) and 92 (10) (a). The significance of this power is chiefly in relation to large scale reclamation or power projects, clearly works that extend beyond one province. This provision may also be of some value in support of an extension of the federal navigation power. Sections 91 (13) and 92 (10) (a), ferries between a province and any British or foreign country or between two provinces, and lines of steamships between a province and any British or foreign country, do not add substantially to federal jurisdiction in water management. The declaratory power, enabling the Dominion to declare any provincial or interprovincial work to be for the general advantage of Canada and hence within federal jurisdiction, may develop into a significant source of federal power in this field; it may also be of value as a support for an extended navigation power.

The federal trade and commerce power, 91 (2), provides some interesting possibilities. It is possible that future development of Canadian water resources will involve large scale interprovincial "trade" of water and export of water to the United States. Water can certainly be considered a "commodity" as other natural resources such as lumber, gas, and crude oil. Agreements for the purchase of water can certainly be included in "trade and commerce" activities. There is no doubt that federal jurisdiction under the trade and commerce power extends to interprovincial and international transactions,[1] and on the above reasoning would ex-

1. Lawson v. Interior Tree Fruit and Vegetable Committee of Direction (1931) S.C.R. 357 at 366; Citizens Insurance Co. of Canada v. Parsons (1881) 7 A.C. 96; Gold Seal Ltd. v. Dominion Express (1921) 62 S.C.R. 424, 435, and 456-458.

tend to interprovincial and international water purchase agreements.[1]

The more important question here however, is to what extent this jurisdiction enables the Dominion to regulate local activity in association with its regulation of foreign or interprovincial trade. To illustrate the problem, consider that the province of Saskatchewan agreed to divert water from Lake Athabasca into Manitoba enabling the latter to produce hydro-electric power, 80% of which is returned to Saskatchewan for an additional sum of money. Could the federal government, by reason of its jurisdiction over interprovincial trade regulate such matters as the operation of the power plant in Manitoba? The principle is well established that in the exercise of jurisdiction under a head of section 91, the Dominion can legislate on matters that "trench" on provincial legislation.[2] However a parallel may be drawn between the present problem and that settled in *Re The Natural Products Marketing Act, 1934*.[3] The case concerned an Act passed by the Federal Government purporting to regulate the marketing of natural products including meats, dairy products, tobacco and lumber. Duff C. J. in giving the judgment of the Supreme Court stated:

> "The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority."[4]

It is obvious, from this statement of the law, that the Dominion could not regulate local activities related to interprovincial and foreign water trade. The question still remains however, as to how extensive this jurisdiction under the trade and commerce power is. No detailed answer can be given to this question. The Privy Council only pointed the way in their decision on the Natural Products Act when they stated that the problem can be dealt with only by

1. It is likely also that this jurisdiction extends to the type of agreement whereby one province agrees to regulate the flow of water into another province to assist in the development of hydro-electric power, in exchange for the transfer of power back to the former province. Such an agreement is a trade agreement in its original sense of an "exchange" of goods or services. It is reasonable to assume that this type of agreement will be a common one. A third variation would be the part-exchange-part-payment type. It is submitted that, aside from exporting water between provinces or to the United States which the province or United States would not otherwise receive (by natural flow) an agreement to regulate water which would flow into the other province or the United States regardless, would still be a trade agreement.

2. Attorney-General of Ontario v. Attorney-General of Canada, (1894) A.C. 189, 200.

3. (1936) S.C.R. 398; aff'd by Privy Council (1937) A.C. 377.

4. Id. 412.

combined action by Parliament and the Legislatures so that each could within its own sphere, in co-operation with the other, achieve complete regulation.[1]

Section 91(27) grants to the Dominion jurisdiction to legislate on criminal matters. Professor Laskin points out that the Dominion could legislate to prevent pollution in exercise of its criminal power; but this is unlikely by reason of the well-established provincial jurisdiction in this area, as well as federal jurisdiction under other heads.[2] Also, as Professor Laskin suggests, the criminal law is essentially prohibitory rather than regulatory. The general power of the Dominion to legislate for the peace, order, and good government could provide the jurisdictional base for extensive federal legislation in the water management field, but this of course is entirely a matter of speculation.

The federal defence power is contained in two sections of the B.N.A. Act. Section 117 provides that the provinces shall retain all their public property not otherwise disposed of in the B.N.A. Act, "subject to the right of Canada to assume any lands or public property required for fortification or the defence of Canada." Section 91(7) grants the Dominion power in relation to militia, military, naval service and defence. The defence power in Section 117 has been held to be an executive and not a legislative power.[3] The value of this section is questionable as the Dominion could likely expropriate for defence purposes under Section 91(7), although the flexibility of the exercise of this power through executive as opposed to legislative action is of some advantage. The peace time limits of the federal power under 91(7) have not been established, but it is doubtful whether anything is added to Dominion water management jurisdiction by it.

Section 132 of the B.N.A. Act provides that the Parliament of Canada shall have all authority necessary to perform its obligations or those of a province, as part of the British Empire, towards foreign countries arising under treaties between the Empire and foreign countries. Canada's independent status has rendered this section obsolete and it has been held to be the only independent treaty implementing power in the B.N.A. Act.[4] Certainly an independent treaty power exists to the extent that the federal government may enact legislation to fulfill its obligations insofar as they are under federal jurisdiction, but there is doubt as to whether or not treaty implementation also requires provincial

1. Id. 389; noted by A. Smith, The Commerce Power in Canada and the United States, (1963).
2. P. 218. The federal government has stated however that its Canada Water Act, scheduled for the late fall of this year, will include provision relating to water pollution. See The House of Commons Debates, May 8, 1967.
3. Attorney-General of Quebec v. Nipissing Central Ry. (1926) 3 D.L.R. 545.
4. Attorney-General of Canada v. Attorney-General of Ontario (1937) 1 D.L.R. 673.

legislation on matters within their jurisdiction. There is considerable support for the view that an independent treaty implementing power must be included in the Dominion's general power to legislate for the peace, order, and good government.[1] These statements on federal power to implement treaties must of course be distinguished from the federal executive power to negotiate treaties, which is unlimited.[2]

Under Section 91(3) the federal government has authority to raise money by any mode or system of taxation, and by 91(1) has exclusive jurisdiction over public property. The money raised by taxes becomes Dominion property and may be disposed of in any manner. The federal government has used this authority on numbers of occasions in the past in the form of grants-in-aid or conditional subsidies. This jurisdiction was argued as a basis for federal legislation in the *Unemployment Insurance Act Reference* in 1937.[3] Lord Atkin in giving the judgment of the Privy Council, stated that while the Dominion had the power to tax and spend tax money for public purposes, it did not necessarily follow that any legislation disposing of it was within Dominion competence.

> "It may still be legislation affecting the classes of subjects enumerated in Section 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to . . . . encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation, it is found that in reality in pith and substance the legislation . . . . encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain."[4]

There can be no doubt that 91(1) and (3) provide the Dominion with no more extensive a jurisdiction in the field of water management than it possesses by virtue of other sections of the B.N.A. Act. That is not to say however that the Dominion cannot enter into agreements with the provinces by which federal finances are supplied, subject to restrictions and conditions imposed by the Dominion and agreed to by the provinces. Indeed there have been a number of such agreements in the field of water management, for example, the Maritime Marshland Rehabilitation scheme, 1943, the South Saskatchewan Dam project in 1958, the Okanagan Flood Control project, 1950, and the Saskatchewan River Reclamation and Irrigation Scheme.[5] It might be of some value to describe

1. Laskin, Canadian Constitutional Law, (3rd edition) p. 290; Rand: Some Aspects of Canadian Constitutionalism (1960) 38 C.B.R. 135, 142. See also W. R. Lederman, Legislative Power to Implement Treaty Obligations in Canada, in The Political Process in Canada, p. 171.
2. Laskin, Jurisdictional Framework 220; all further references to Laskin will be to this article rather than the casebook, unless otherwise indicated.
3. Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 327.
4. Id. 336, 367.
5. Federal-Provincial Conditional Grant and Shared-Cost Programmes 1962, Queen's Printer, (1963) pp. 6 - 9.

one scheme, the last one mentioned above. In 1953 the Dominion entered into an agreement with the Province of Manitoba to reclaim and eliminate flood damage to lands in a portion of the Saskatchewan River delta. The Dominion entered the agreement under authority of an Order-in-Council, and agreed to bear the costs of engineering services, of acquiring private lands necessary to the project, and of constructing the necessary works. Manitoba was to provide, without charge, Crown lands necessary to the project and to survey, subdivide, and supervise settlement of the reclaimed lands, subject to the condition that it make 50% of such lands available for resettlement of farmers from crop failure areas and that it give preference to war veterans. Manitoba was to pay to Canada 50% of the principal monies received from the sale of the reclaimed land, except on sales to leaseholders whose leases predated the reclamation.[1] It is obvious then that Dominion participation in water management schemes is more extensive than apparent from a literal reading of its legislative jurisdiction. While the Dominion may lack legislative control in most of the areas covered by such agreements, it has nevertheless a substantial degree of financial control — a fair substitute. However, the constitutionality of such agreements has apparently never been considered by the Courts. Dominion commitments in such agreements are authorized by an Order-in-Council, simply an executive exercise of legislative authority delegated to the executive by Parliament. Clearly therefore such agreements must be subject to the limits set out in the *Unemployment Insurance Act Reference.*

The sections of the constitution supporting provincial participation in water management are 92(13) — property and civil rights in the province, section 92(16) — matters of a local and private nature in the province, and section 92(10) — local works and undertakings other than those reserved to the Dominion. All of these sections have been construed widely in relation to water management and have supported the present provincial domination of the water resource field. The province has concurrent authority with the Dominion over agriculture, by reason of section 95, although in case of a conflict, Dominion legislation takes priority. The potential of this head of jurisdiction as a basis for provincial and/or federal water legislation relates mainly to irrigation and flood control.

The provinces have no treaty power as such, but they can enter agreements with foreign countries or neighbouring states of the United States. These agreements are not treaties and have no

1. Id. p. 13.

binding effect between parties, but could be the subject of legislation, likely under section 92(16) — 'matters of a purely local nature.'[1] Such agreements in the field of water management are often entered into by provincially created commissions or other statutory bodies; agreements made between such commissions may be enforceable in contract, depending on the nature of the agreement. The Niagara Parks Commission created by an Ontario statute and granted authority to enter into agreements with, among others, New York State authorities, covering some aspects of water management is a good example.[2] The provinces could likely enter agreements on matters within federal jurisdiction but could not of course legislate on matters within federal jurisdiction.

It is necessary at this point to establish the distinction between legislative power and a proprietary right. An excerpt from the decision of the Privy Council in *Attorney-General of Canada v. Attorney-General of Ontario* is instructive in this regard.

> "It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remained vested in them except such as are by any of its express enactments transferred to the Dominion of Canada. It is clear that the Dominion acquired no proprietary right over seacoast and inland fisheries by reason of 91(2), nor did it acquire any such rights by reason of its navigation power. The Dominion may certainly legislate on the subject of the administration of its proprietary rights, but this does not in itself mean that it is asserting its power as legislator, rather than, or as well as, proprietor."[3]

A second principle emerges from the above quotation that is relevant to this immediate topic, namely, that all proprietary rights remained vested in the provinces, other than those specifically transferred to the Dominion. The statement is supported by section 117 of the B.N.A. Act which provides that the provinces shall retain all their respective public property not otherwise disposed of in the Act. British Columbia and the three prairie provinces are now in the same position as the original provinces by reason of the B.N.A.

1. Attorney-General for Ontario v. Scott and Attorney-General for Canada, (1956) S.C.R. 137 at 141.
2. R.S.O. (1960) C. 262, Sections 3(d) and 12.
3. (1898) A.C. 700.

Act of 1930.[1] Newfoundland is likewise in the same position although Prince Edward Island's position is substantially different. The Crown property specifically referred to is enumerated in Section 108 of the B.N.A. Act and the Third Schedule; this provision of course applies only to the original provinces. The only property relating to water management is listed under items 1-5 and of these only the following have any significance: canals with lands and water power connected therewith, public harbours and rivers and lake improvements. The last head has been held to refer only to "improvements", and not to the rivers or lakes themselves.[2] The Crown in the right of the province therefore owns all lands and natural resources within its boundaries, except those specifically granted to the Dominion, or to private individuals or corporations. As regards Crown ownership of property, whether in right of Canada or a province, its rights are no higher than private proprietary rights.[3]

Competent federal legislation applies to provincial property, but the reverse is not true, by reason of the provision for exclusive federal control over public property in 91 (1A).[4] Apparently lessees or licensees of federal lands are in the same position *vis á vis* provincial legislation as if the Crown itself occupied the land.[5]

One of the most important of the American federal government's heads of jurisdiction in water management is interstate navigation, derived from its power to regulate interstate commerce.[6] A second significant federal power relates to federal control of interstate relations. For water management problems the significance of this power lies in the congressional authority to refuse to consent to specific interstate compacts. This power has been exercised on two occasions, once in which the President vetoed an act of Congress approving the Connecticut and Merrimac Rivers Compact in 1937, and once in which Congress itself refused to approve a compact.[7] The property clause of the Constitution, giving Congress the power to dispose of all U.S. property is also of considerable significance. This property includes 750 million acres of

1. B.N.A. Act. (1930) (Imp) C. 26. The three prairie provinces were originally part of the territory acquired by the Dominion from the Hudson's Bay Company; the three provinces had no jurisdiction over crown lands within their boundaries until 1930 when, by virtue of agreements in 1929 and 1930 with the Dominion and of the amendment to the B.N.A. Act, jurisdiction over these lands and resources was granted to them. By the same amendment British Columbia was returned its remaining interest in the large land area it had transferred to the Dominion in connection with the construction of the C.P.R.; Laskin, Canadian Constitutional Law, 551, 552.
2. Attorney-General of Canada v. Attorney-General of Ontario (1898) A.C. 700.
3. Laskin, 214.
4. Burrard Power Co. v. The King (1911) A.C. 87.
5. Spooner Oils Ltd. v. Turner Valley Gas Conservation Board (1933) 4 D.L.R. 545 and Laskin, Canadian Constitutional Law, 556.
6. Article 1, Section 8.
7. F. J. Trelease, Water Rights of Various Levels of Government-States' Rights v. National Powers (1965) 19 Wyoming Law Journal 189, 192.

public land acquired by treaty, purchase or other means.[1] The ownership of this land, in addition to the property clause of the constitution, has enabled the federal government to dominate many fields of water management, particularly in the Western States, that in Canada are dominated by the provinces through their land ownership and the property and civil rights clause.

Congress, by reason of article 1, section 8 of the Constitution, has power to levy taxes and appropriate funds for the general welfare of the country. The effect of this power on water management has been striking, particularly in contrast to the limited significance of the corresponding Canadian powers to levy taxes and legislate for the peace, order and good government. It has been held that this power enables Congress to undertake large scale reclamation and irrigation projects.[2]

The treaty power of the federal government, article 11, section 2, is more definite and more extensive than in Canada. It enables Congress to pass treaty legislation binding on all states. One example of such a treaty is the Colorado River Compact between Mexico and the U.S., requiring the U.S. to deliver a specific quantity of water to Mexico annually, even though states' rights are thereby restricted.[3] The war power, article 1, section 8, as similar defence provisions in the B.N.A. Act, does not make any substantial addition to federal power, except for storage and supply purposes related to defence. All of the above powers are of course bolstered by article IV of the Constitution, providing that federal laws are supreme over state laws.

Federal competence in water management is limited to express constitutional grants of authority and resulting implied powers.[4] State jurisdiction in water management is found in its general residuary power rather than in specific delegations from the Constitution, subject of course to the supremacy clause.[5] The nature of this residuary power will become evident as specific examples are cited throughout this paper.

D: Water Management.

1. *Navigation*

The navigation power of the federal government, under section 91 (10) of the B.N.A. Act is to be widely construed.[6] Local as well as

1. Federal Water Rights Legislation and the Reserved Land Controversy (1965) 53 Georgetown Law Journal 750, 757.
2. United States v. Gerlach Livestock 339 U.S. 725 at 738 (1950).
3. 59 Stat. 1219 (1944); Colorado River Compact, III (e) (1922); and see Trelease, supra, note 7, page 230, at page 192.
4. United States v. Butler, 297 U.S. 1, 63 (1936).
5. Martin v. Hunter's Lessee, 14 U.S. 304, 325, (1810)
6. Montreal v. Montreal Harbour Commissioners (1926) 1 D.L.R. 840.

interprovincial, and of course international navigation fall under this head of authority. The federal government may extend this authority to include any work or object interfering with the navigability of a watercourse.[1] Likewise this section would probably enable the Dominion to erect works or other operations to create and maintain navigability, regardless of the ownership of the bed.[2] Any provincial legislation directing or authorizing work interfering with navigation is ultra vires.[3] The federal government may regulate the public right of navigation where it exists, although this power is subject to certain qualifications where water is running over provincial Crown land.[4] Section 91 (10) appears to give Parliament power to establish public rights of navigation over waters where no right has existed, where the bed is privately held but not where held by the province.[5]

The extension of the navigation power to enable the Dominion to participate in water utilization schemes on a greater scale presents interesting possibilities. Certainly there appears to be little hope for an extension of the navigation power by combining it with the trade and commerce power, as the two are combined in the United States. There are two early judicial statements hinting at this possibility, but as Laskin points out, there has been no substantial indications of such support in recent times.[6] Professor Laskin also states that Parliament may improve rivers in order to make them navigable, at least rivers over private lands, and that Parliament may also legislate for flood control under its navigation power.[7] However, the former exercise is of little value for water utilization schemes unless the Dominion can in addition use the navigation power to mount schemes for power development, reclamation and irrigation, even within a single province. This, it appears, it cannot do.[8]

American development of the navigation power provides a useful analogy to Canadian experience. Control over interstate navigation is a part of U.S. control over interstate commerce delegated to Congress in article I, section 8 of the Constitution.[9]

Navigability is defined as "susceptible to being used as highways of commerce",[10] and once within this definition federal power

1. Attorney-General of Canada v. Attorney-General of Ontario (1898) A.C. 700, Booth v. Lowery (1917) 35 D.L.R. 303.
2. Smith v. Ontario and Minnesota Power Co. (1919) 45 D.L.R. 266.
3. Re Brandon Bridge (1884) 2 Man. R. 14; Fleming v. Spracklin (1922) 64 D.L.R. 382.
4. Laskin, Canadian Constitutional Law, 528.
5. Fort George Lumber Co. v. G.T.P. Rly., (1915) 24 D.L.R. 527.
6. Laskin, 217, Paquet v. Quebec Harbour Pilots Corp. (1920) A.C. 1029 at 1031, and Queddy River Driving Boom v. Davidson (1883) 10 S.C.R. 222.
7. Laskin, 217, 218.
8. Reference re Waters and Water Powers (1929) S.C.R. 200 at 225.
9. Gibbons v. Ogden, 22 U.S. (9 Wheat), 190 (1824).
10. The Daniel Ball, 77 U.S. (10 Wall) 557 (1870). The term does not appear to have been satisfactorily defined by the Canadian Courts.

extends the entire length of the river, even over non-navigable parts.[1] Navigability is not just a question of fact, but may also refer to whether a river would be navigable after reasonable improvement.[2] Also where the navigability of a navigable river is in any way affected by a non-navigable river or stream the United States may assert its jurisdiction over that river or stream.[3] In theory, because of this expansion of the navigability concept, no waters in the United States are free from Congressional jurisdiction.[4]

The definition of navigability has not always been this broad, but has developed as the need for federal action developed, and as state action proved inadequate. The degree to which purposes "related" to navigation may justify U.S. action has developed equally with the navigability concept. As late as 1921, the federal government was limited in its power over navigable rivers to their control for navigation purposes.[5] The next development in the scope of purposes for which the United States could exercise its navigation power came in 1940 with the case of *United States v. Appalachian Power Co.* in which flood control and watershed development were held to be within federal power.[6] Finally, in *United States v. Twin City Power Co.*, 1956, it was established that the United States Government could develop navigable waterways, under its navigation power, for multi-purpose projects, including power development, as long as improvement to navigation was at least an incidental purpose.[7] This power coupled with the definition of navigability, has enabled congress to dominate the water management field in the United States.

It is conceivable, on the basis of American experience, that the Dominion navigation power — presently corresponding to U.S. jurisdiction in 1940 — could be extended to include a great many multi-purpose projects including irrigation, power development, and reclamation, as the necessity for federal legislation increases. However, the question of whether federal action will be required is an important one. Comparing Canadian and American geography, it is worth noting that the United States has 50 state jurisdictions over a much smaller land mass than Canada's 10 provinces and two territories share. It is inevitable that in the United States the jurisdictional conflicts in any major water utilization project would be numerous; the same cannot be said for Canada, and hence the

1. United States v. Rio Grande Dam and Irrigation Co. 174 U.S. 690 (1899).
2. United States v. Appalachian Power Co. 311 U.S. 377 (1940).
3. United States v. Grand River Dam Authorities 363 U.S. 229 (1960).
4. G. F. Lynch, Eminent Domain, (1956) 55 Michigan Law Rev. 273, 274.
5. Port of Seattle v. Oregon & W.R.R. 255 U.S. 56 (1921)
6. 311 U.S. 377 (1940).
7. 350 U.S. 222 (1956).

argument for federal action here, although not without merit, is certainly weaker. Also, the United States has 10 times the population on a smaller land mass, making water a much more valuable commodity than in Canada at the present time.

Canada may expropriate provincial or private land for the purposes of navigation, provided the latter purpose is a legitimate one.[1] While the constitutional requirement for compensation in such cases is in doubt, it is "practically speaking unthinkable that compensation would be denied if a property interest were taken".[2]

In addition to its power of eminent domain under which the United States may expropriate private or state property provided it makes compensation, the United States has a navigation servitude, or superior navigation easement in navigable waterways.[3] This latter power enables Congress to take private rights in watercourses without compensation. The scope of this navigation servitude is not commensurate with the navigation power itself, but is nevertheless very extensive.[4]

2. *Water Supply*

The constitutional problems relating to water supply are of only secondary importance in the larger context of constitutional issues raised by water management and water utilization schemes. The question of legislative authority for water supply, for both domestic and industrial purposes is well settled in favour of the provinces. Provincial competence in this field stems from four heads of section 92 of the B.N.A. Act: local works and undertakings, other than the express exceptions: (10), property and civil rights in the province (13), generally all matters of a merely local or private nature in the province (16), and municipal institutions in the province (8).

Approximately half of the Manitoba legislation mentioned earlier relates to water supply and this proportion appears to be the same for all provinces. In legislating for water supply, provinces have usually provided sanctions against pollution, by a general prohibition and by providing for the granting of licences authorizing discharge of waste into watercourses in certain limited cases.[5] In some cases, provinces have authorized, directly or indirectly, chemical treatment of water supply, such as fluoridation.

1. Montreal v. Montreal Harbours Commission (1926) A.C. 299.
2. Laskin, 214.
3. F.P.C. v. Niagara Mohawk Power Corp. 347 U.S. 239, 249 (1954).
4. E. Morreale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, (1963) 3 Natural Resources Journal 1, 1 at 31.
5. Pollution of Water Prevention Act, R.S.M. (1954) C. 201.

As mentioned earlier, legislation for domestic supply varies from province to province in its effect on riparian rights. Where they have been extinguished, the only remedies available are those provided by the statute: where these rights co-exist with riparian rights, then of course riparian remedies are still available.

Provincial legislation in this field is subject to competent federal legislation on navigation and to the public right of navigation, alteration of this public right requiring federal legislation.[1]

The immediate problems presented by water utilization for domestic and industrial purposes are slight. It is unlikely that the demand for water in large Canadian urban areas will pose such a grave problem in terms of existing resources, as it has in New York and Los Angeles for example, certainly not over the next 20 - 50 years. When and if requirements outstrip the water resources available to large Canadian cities, a good case could be made for Dominion legislation under its general power. More will be said on this legislative power later.

In the United States, domestic supply is generally dealt with by the states under the residual power. However, the supply problem has already extended well beyond state competence. The lengthy dispute between Arizona and California over the waters of the Colorado River, California requiring additional sources of domestic supply, is indicative of the scope of the problem in the U.S.[2]

3. *Fisheries*

Parliament has authority over fisheries by reason of section 91(12). The only significance of this power in relation to water management is that it enables the Dominion to legislate on the subject of pollution of fishing waters.[3] Even this significance is limited in practice by the fact that provincial competence with regards the pollution of waters is very broad.

However, it is necessary to define the various rights that relate to fishing, as any major reclamation, irrigation, or power scheme will likely affect these rights. As mentioned earlier the right to fish goes with the title to the bed of the watercourse, whether the title is held privately or by the Crown in the right of a province or Canada. This right may be severed from the title to the bed and be disposed of separately as a *profit á prendre*. The Dominion and the provinces may grant exclusive rights to fish in their respective properties, but the power to do this is merely a proprietary right

1. Re Snow and Toronto (1924) 56 O.L.R. 100.
2. Arizona v. California 373 U.S. 546 (1963) (to be discussed later).
3. The Queen v. Robertson (1882) 6 S.C.R. 52 at 120; Laskin, 218.

exercisable in the same manner as if owned privately.[1] There are *dicta* to the effect that the provinces exercise this right under one of two heads of section 92 — management and sale of public lands (5), or property and civil rights (13),[2] but it is doubtful whether authority need be found in the Constitution where the Crown owns the property in question.

The foregoing apparently applies to tidal and non-tidal waters alike.[3] In tidal waters the public right to fish takes priority, although it is difficult to understand how the right to fish as a *profit á prendre* could co-exist in a meaningful way with the public right to fish, particularly since the latter takes priority. At any rate, the public right to fish may only be altered by federal legislation, and not by any federal grant or other exercise of the Crown's prerogative, nor by any provincial action.

As mentioned, the federal power over seacoasts and inland fisheries includes no proprietary rights. In exercise of this power, the Dominion may exclusively control the methods and seasons for fishing and impose a tax in the form of a licence duty as a condition of the right to fish, even where property in the fishery is in the provincial government.[4]

In the United States control over fisheries is within state jurisdiction.

4. *Irrigation*

As mentioned briefly above, riparian owners have the right to use or divert water for irrigation purposes, provided the use is reasonable and does not interfere with the rights of other riparian owners.[5]

That both the federal and provincial legislatures have authority in this area of water management is a well established fact. Two related federal statutes are Canada Water Conservation Assistance Act and the Dominion Water Power Act.[6] The two related provincial acts are The Land Rehabilitation Act and the Water Rights Act.[7] The exact authority for this provincial legislation is likely 92(5), the management and sale of public lands, 92(10), local works and undertakings, and 92(13), property and civil rights in the province. The source of authority for the federal legislation seems to be 91 (29), 92 (10) (a), and the general power.

1. Attorney-General of B.C. v. Attorney-General of Canada (1914) A.C. 153.
2. Attorney-General of Canada v. Attorney-General of Ontario (1898) A.C. 700.
3. Attorney-General of B.C. v. Attorney-General of Canada (1914) A.C. 153.
4. Attorney-General of Canada v. Attorney-General of Ontario (1898) A.C. 700.
5. Miner v. Gilmour (1859) 12 Moo. P.C. 131, 156.
6. 1952-53 (Can.) C. 21; R.S.C. (1952) C. 90.
7. R.S.M. (1954) C. 34; R.S.M. (1954) C. 289.

Professor Laskin has suggested that the concurrent powers of the federal and provincial legislatures over agriculture, section 95, may be a further source of constitutional authority in relation to irrigation.[1] Any Act purporting to be in exercise of the power must be for the encouragement or support of agriculture,[2] or it must be concerned with the agricultural operations of the farmers.[3]

As Professor Laskin points out, there is authority for both a national and a local irrigation policy.[4] Technically, federal legislation will prevail in case of conflict. The possibilities of using federal grants-in-aid for joint irrigation projects has been discussed.

American jurisdiction over irrigation rests largely with the United States by reason of the property clause of the constitution, and the general welfare clause.[5] In the Western sector of the United States the most important national property is land; there is some doubt as to the extent of federal ownership of the waters on these lands, but it is well settled that the United States may use the water.[6] In the most recent case on the federal power over water on the public domain, *Arizona v. California*, 1963, the Court held that the United States could use the water to irrigate all the practicably irrigable acreage on the reserved lands in question, even though many of the prior users of water on the Colorado River would be required to relocate or find another source of water supply without financial assistance from Congress.[7]

The general welfare power of Congress is of equal importance in this area. By article 1, section 8 of the constitution, Congress has the power to levy taxes and appropriate funds to provide for the general welfare. In spending the money thus acquired, the United States can exercise control over particular projects over which it otherwise has no jurisdiction. The power has been used frequently by the federal government to establish and control irrigation schemes, either as a separate project or as one aspect of a large river basin development. In *United States v. Gerlach Livestock Company*, the Court defined the power in this way:

> "Congress has a substantive power to tax and appropriate money for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished for some mere local purpose . . . . Thus the power of Congress to promote the general welfare through large scale projects for reclamation, irrigation and other internal improvement is now . . . . clear."[8]

1. Laskin, 219.
2. The King v. Eastern Terminal Elevator Co. (1925) S.C.R. 434, 457.
3. Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd. (1933) A.C. 168, 174.
4. P. 219.
5. Article III, section 3, article I, section 8.
6. F. J. Trelease Water Rights of Various Levels of Government-States Rights v. National Powers (1965) 19 Wyoming L.J. 189, 193.
7. F. J. Trelease, Arizona v. California: Allocation of Water Resources to People, State & Nation, (1963) Supreme Court Review, 158, 165.
8. 339 U.S. 725, 738.

As in other areas, this power has been interpreted much more liberally in favour of the American federal government than the corresponding Canadian federal power under sections 91 (1A) and (3) of the B.N.A. Act.

5. *Power*

Provincial authority for power development of watercourses within the province is apparently based on 92(13), property and civil rights, 92(16), all matters of a merely local or private nature in the province, and 92(10), local works and undertakings. The province also presumably exercises some authority here as a result of its ownership of the water, water-bed, or banks. Provincial legislation must of course comply with the federal navigation authority. Restrictive federal authority in this area also includes its exclusive control of the public right of navigation.[1]

The federal position regarding power projects is more complicated. The possible bases for federal action in this field, until now dominated by the provinces, are: 91(29) and 92(10)(a), interprovincial works or undertakings, 92(10)(c), the declaratory power, navigation, 91(10), and the general power to legislate for peace, order and good government.

Judicial statements on the jurisdiction of the Dominion over power projects are few. In *Booth v. Lowery*, Fitzpatrick C. J. expressed doubt that works for power purposes alone were within the competence of the Dominion.[2] Duff, J. in the *Water Powers Reference* stated that the federal government would appear to have jurisdiction respecting projects if they extended beyond the limits of a province or connected two provinces, under 91(29) and 92(10)(a).[3] Certainly the Dominion has no jurisdiction over interprovincial rivers per se, but only "works and undertakings" on interprovincial waters. The work or undertaking must exist before the Dominion can exercise its jurisdiction, and so it would seem that the Dominion has no independent initiative in this respect. It has been established that an "undertaking" is not a physical thing but an arrangement, under which of course physical things are used.[4] With regard to the term "work", it is well established that it is not limited to those set out in 92(10(a);[5] hotels, railways, elevators and mills have been held to be works.[6] It is suggested that

1. Re Brandon Bridge (1884) 2 Man. R. 14; Reference re Waters and Water Power (1929) S.C.R. 200.
2. (1917) 54 S.C.R. 421, 424.
3. Reference re Waters and Water Powers (1929) S.C.R. 200, 225.
4. Re Regulation and Control of Radio Communications in Canada (1932) A.C. 304.
5. The Queen v. Thumlert (1959) 20 D.L.R. 335.
6. C.P.R. v. Attorney-General of B.C. (1948) 3 D.L.R. 417 and Laskin, Canadian Constitutional Law, 505.

the following schemes would clearly come under 92(10) (a): a scheme whereby one province agreed to dam and regulate the flow of water into another province for power purposes in the latter province; a scheme whereby one province agrees to divert water by a new route into another province; a scheme whereby one province agrees to divert water within the province to substantially increase the flow of water into another province over an existing bed. It is probable that the future development of water resources, at least in Western Canada, will take the form of one or two vast schemes of interrelated projects of reclamation, irrigation, power development and storage, completed stage by stage. Once an interprovincial connection is established, the project will come under Dominion jurisdiction; this jurisdiction will extend gradually, as the scheme is completed. Once an interprovincial connection is established and Dominion jurisdiction is established, it is likely that any subsequent additions to the existing work or undertaking would also come within Dominion jurisdiction — even though the addition is entirely within one province, as long as it is part of the larger work or undertaking. The declaratory power would likely be complementary to the interprovincial works and undertakings power, particularly if future development proceeded by the pattern suggested. 92(10) (c) provides that Parliament may declare works to be for the general advantage of Canada or two or more provinces, either before or after their execution even though the works may be wholly within one province. The work must of course be a local work, and no "national" dimension is necessary for works to be of general advantage to Canada.[1] The effect of the declaration is not to nationalize such works, but rather leave them under the original ownership, subject to federal legislative authority. Parliament could expropriate any such works brought under its jurisdiction, on the basis of relevant railway and navigation cases.[2] As to the interpretation of "before or after execution", Duff J. has stated:

> "The object of this provision . . . was not to enable the Dominion to take away jurisdiction from the provinces in respect of a given class of potential works; works that is to say, which are not in existence, which may never come into existence and the execution of which is not in contemplation; the purpose of the provision is rather to enable the Dominion to assume control over specific existing works, or works the execution of which is contemplated."[3]

The exercise of the declaratory power is not of itself reviewable by the Courts.[4]

1. Toronto v. Bell Telephone Co. (1905) A.C. 52; and Laskin, Canadian Constitutional Law, 505.
2. Laskin, Canadian Constitutional Law, 506, - for both propositions.
3. Luscar Collieries Ltd. v. McDonald (1925) S.C.R. 460, aff'd (1927) A.C. 925.
4. The Queen v. Thumlert (1959) 20 D.L.R. 335.

The present trend of expansive interpretation of the Dominion's general power to legislate for the peace, order, and good government could conceivably provide a constitutional base for extensive federal control over all matters concerning interprovincial power development as well as other water utilization schemes. The present trend of interpretation of the general power was clearly established by Viscount Simon in *Attorney-General of Ontario v. Canada Temperance Federation*:

> "In their Lordship's opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter of affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures."[1]

This construction of the general power has been approved on a number of occasions, most recently by the Supreme Court of Canada in *Munro v. National Capital Commission*.[2]

The federal government could certainly acquire by purchase the property necessary to develop water power and operate a power plant as a commercial venture free of provincial regulatory legislation, as did the U.S. government in establishing the Tennessee Valley authority.[3] It is doubtful, however, whether the Dominion could expropriate for this purpose. Federal grants-in-aid would also be of value in developing power in the provinces.

In the U.S., Congressional jurisdiction in relation to power development is included in its navigation, property, and general welfare powers. These have been discussed and so only brief mention will suffice here. It was established by the *Twin City Power* case that Congress could legislate for power projects, among others, under its navigation power, provided navigation improvement was at least an incidental purpose.[4] As part of its power to tax for the general welfare, Congress may promote the general welfare by spending monies for large scale power development schemes.[5] The United States may also of course use public lands for power development. Also, other proprietary interests unconnected with land may be used for power development; for example when in the exercise of one of its powers the United States controls the flow of a river by storing water, it owns the power potential in

1. (1946) 2 D.L.R. 1, 5.
2. (1966) 57 D.L.R. 753, 759.
3. Laskin, Canadian Constitutional Law, 563.
4. United States v. Twin City Power Co., 350 U.S. 222.
5. United States v. Gerlach Livestock Co. 339 U.S. 725 (1950).

the stored water and it may produce electric energy with that power and sell it commercially.[1]

The states have some residual authority to develop power projects within the state, or among states by interstate compact, subject of course to competent federal laws.[2]

6. *Reclamation*

The jurisdictional problems relating to land reclamation are similar to those discussed under the separate functions, as any large scale reclamation project may include diversion, irrigation, power development, and storage. In the United States, the federal government dominates the field, although there is some doubt whether, once a scheme is completed, it is subject to state or federal law.[3]

For the purpose of a reclamation project the province may expropriate any but federal Crown lands by reason of its property power under 92(13); this power also applies, of course, to any other provincial project. The Dominion likely does not possess any corresponding general power for expropriation, although it may expropriate under any specific head of jurisdiction[4] and may even expropriate provincial lands.

E: NOTE ON INTERPROVINCIAL WATERS.

Interprovincial waters present a rather complex problem in themselves, without any reference to constitutional authority. What would be the result for example, if a landowner in one province diverted the water of an interprovincial river, impairing the rights of a riparian owner in another province? Presuming the law of the two provinces was riparian law, the only question would be in which province would the riparian owner sue. The answer to this question suggested by Professor Laskin is that the province in which the wrong was committed has jurisdiction.[5] However, if the diversion was specifically authorized by a provincial statute altering riparian law, there would appear to be no claim as the act was lawful in the province in which the riparian owner must sue.

One possible answer to this problem is to maintain that a province cannot, by its legislation, deprive someone outside the province of a right.[6] If Saskatchewan, for example, authorized the

1. Ashwander v. T.V.A., 297 U.S. 288 (1936). Quoted in Trelease, Id. 193.
2. Trelease, supra, note 6, page 237, at 195.
3. J. Sax, Problems of Federalism in Reclamation Law (1964) 37 University of Colorado Law Journal 49.
4. Re Waters and Water Power (1929) S.C.R. 200.
5. P. 221.
6. Ottawa Valley Power Co. v. The Hydro Electric Power Commission (1937) O.R. 265; Royal Bank of Canada v. The King (1913) 9 D.L.R. 337.

diversion of the Saskatchewan River, thereby depriving riparian owners in Manitoba of beneficial use, the act authorizing the diversion is ultra vires the legislature passing it. The cases cited as authority for the above statement refer to civil rights of contract outside the province and may be distinguished on that grounds. However, considering the importance of water resources, and the equality of the claims by respecting provinces to an interprovincial river, it seems only reasonable, on policy grounds, to extend the principle to riparian rights. In establishing such an extension, the Courts would not be preventing the provinces from developing their water resources by diversion and other means affecting lower riparian owners, but would be simply forcing the inevitable — inter-provincial co-operation.

Professor Laskin presents two possible solutions to the problem, one of which is similar to although more comprehensive than the one above. He argues that where rights in respect of interprovincial waters are concerned, they are no longer matters in relation to property and civil rights in the province under 92(13), nor matters of a merely local or private nature in the provinces under 92(16); rather they involve rights outside the province and matters of a non-local nature outside the province, and should therefore be within federal competence. He goes on to state that this view is unlikely to be adopted by the Courts, and that a similar rationale was expressly rejected on another matter in relation to the trade and commerce power.[1] However, the first proposal above would not involve federal action, but rather restrict the provinces in such a way as to encourage provincial co-operation. The first suggestion seems preferable, if for no other reason than it is more practical; no jurisdiction is removed from the provinces, at least collectively, and granted to the Dominion.

One variation in the factual situation described above, on which the two possible solutions were based, would render the first solution doubtful and the second preferable. What would be the result if a riparian owner in Saskatchewan was authorized to divert water from the Saskatchewan River, under a provincial statute, thereby impairing a right held by a riparian owner in Manitoba under a Manitoba statute? This is a very real situation, as both provinces have passed statutes providing for licences granting water rights. The argument raised above that the Saskatchewan provision be held ultra vires would be questionable as the out of province right impaired would be one created by a Manitoba

1. P. 221.

statute. Surely no better case could be made for the necessity of Dominion jurisdiction, most probably under the general power.

Professor Laskin's second argument is that the provinces must be governed *inter se* by principles of law which recognize their common interest and protect it, and moreover which they are unable to change unilaterally to their own advantage. However, no constitutional jurisdiction exists in Canada to entertain disputes between provinces and so no forum where applicable principles can be formulated.[1] Federal jurisdiction over interprovincial rivers would appear to be the shortcut solution to this whole problem, and probably the most effective one in the long run.

The resolution of disputes between states is within the original jurisdiction of the United States Supreme Court by reason of article III, section 2 of the Constitution. The substantive principles developed by the Supreme Court are many and complicated and will not be discussed in this paper.[2] In addition to recourse to the Court, two other methods are available for interstate division of waters.[3] The first of these is by interstate compact following the doctrine of equitable apportionment as developed by the Supreme Court in lawsuits between States. This method is used more frequently than recourse to the Court, and has proved very satisfactory. The third method, Congressional apportionment, was approved by the Supreme Court in *Arizona v. California.*[4]

> "We agree . . . that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between states. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the compact."

The Court made no attempt to specify the source of authority for this "new and to some startling" doctrine, but it has been suggested that it may be part of the federal navigation power.[5]

F. CONCLUSIONS.

It is obvious that the provinces dominate the water resource field within their territorial boundaries at the present time. Dominion jurisdiction over activities within provincial boundaries, navigation and fisheries for example, are of minor consequence. These conclusions are of course qualified by federal financial

1. Ibid.
2. Interprovincial Rivers in Canada: Constitutional Challenge contains a good discussion of these principles: K. C. MacKenzie, (1961) 1 U.B.C.L.R. 499.
3. T. J. Trelease, Arizona v. California.
4. 373 U.S. 546 (1963).
5. Trelease, supra, note 7, page 237, at 176.

participation in joint projects such as the Saskatchewan River Reclamation and Irrigation Scheme mentioned earlier.

However, if future developments in the water resource field follow the pattern suggested earlier, the federal government will likely emerge as the dominant party, by reason of its general power, its declaratory power, and its jurisdiction over inter-provincial works and undertakings. This dominance may of course be modified by the initiative the provinces exercise in using inter-provincial agreements as solution to some of the jurisdictional questions. Authority over water export will likely be shared between the Dominion and the provinces concerned.

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