

THE WALKERTON INQUIRY

Commissioned Paper 2

**CONSTITUTIONAL JURISDICTION
OVER THE SAFETY OF DRINKING WATER**

By
Ronald Foerster

Toronto

2002

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Published by Ontario Ministry of the Attorney General

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General editor, Commissioned Papers: Sheila Protti
Editor and proofreader: Robyn Packard
Design: Madeline Koch, Wordcraft Services; Brian Grebow, BG Communications

Abstract

Jurisdiction over drinking water is shared by provincial and federal levels of government. The provinces generally have power over drinking water within their boundaries, subject only to any conflict with validly enacted federal legislation. This paper examines the constitutional basis for this broad provincial power, potentially conflicting federal legislation, and the case law dealing with environmental and water management issues. Specific provincial statutes and regulations dealing with water quality standards and matters related to the safety of drinking water are also discussed.

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1 Introduction

This paper explores the scope of provincial jurisdiction over drinking water under the *Constitution Act, 1867* (unless otherwise stated section numbers refer to this act). More specifically, the focus is on the scope of the power of the province to regulate the safety of drinking water in Ontario.

As the *Constitution Act, 1867* does not expressly assign responsibility for drinking water to any level of government, we must examine the division of powers set out in section 91 (federal powers), section 92 (provincial powers), and other sections of the *Constitution Act, 1867* to determine where the power to legislate safety of drinking water lies.¹

This paper will demonstrate that jurisdiction over drinking water is shared by provincial and federal levels of government. The provinces generally have power over drinking water within their boundaries, subject only to any conflicts with legislation validly enacted under a federal power. Given the more stringent test for legislative conflict that the Supreme Court of Canada has developed in the post-war period, however, as well as the shift toward cooperative federalism over the same period, a serious federal-provincial impasse over water regulation is highly unlikely. As a result, the provincial power to legislate in this area is quite broad.

The paper begins with a general discussion about the approach to the safety of drinking water as a constitutional subject matter and then examines provincial jurisdiction over the subject matter as well as potentially conflicting federal jurisdiction.

Ronald Foerster is Commission Counsel for Part 2 of the Walkerton Inquiry and is a partner at Borden Ladner Gervais LLP, Toronto. The assistance of Noel Peacock, Juli Abouchar, Tamara Barclay, and Gus Karantzoulis is gratefully acknowledged.

This paper has been prepared for discussion purposes only and does not represent the findings or recommendations of the Commissioner.

¹ Many of the conclusions reached in this paper are based on first principles and reasoning by analogy to the case law, since there are no constitutional cases dealing specifically with drinking water legislation. Fortunately, the analogies are strong ones because various levels of Canadian courts, including the Supreme Court of Canada, have examined issues relating to the environment and to water management generally.

2 Drinking Water as a Constitutional Subject Matter

2.1 Pith and Substance

The distribution of legislative authority in Canada between the federal Parliament and the provincial legislatures is largely governed by sections 91 and 92 of the *Constitution Act, 1867*. These sections set out legislative authority in relation to “matters” falling under “classes of subject,” or heads of legislative power. The exercise of determining whether there is constitutional authority for legislative action involves identifying the “matter” that the legislation deals with and determining which power it falls under.² This exercise is complicated when the same legislation affects both provincial and federal powers.

To assist with the exercise, the courts have developed the “Pith and Substance” doctrine. Briefly stated, this doctrine provides that legislation will be allocated to a power on the basis of the dominant purpose and effect (the pith and substance) of the legislation.³ The application of the doctrine allows provincial legislation, for example, to affect federal powers so long as the dominant purpose of the legislation falls within a provincial power and the impact on federal power is only “incidental.”⁴

Once the pith and substance of legislation is identified, it is still necessary to relate that purpose and effect to one of the powers listed in the *Constitution Act, 1867*. Neither water nor drinking water is expressly mentioned as a power in the *Constitution Act, 1867*. The process of finding a power is complicated by the fact that several distinct elements are involved in regulating the safety of drinking water. First, there is the source – the lakes, rivers, and groundwaters – from which drinking water is taken.⁵ Protection of drinking water sources generally

² Peter W. Hogg, 1997, *Constitutional Law of Canada*, looseleaf, vol. 1 (Toronto: Carswell), p. 15-6.

³ Hogg, pp. 15-12 to 15-18.

⁴ Hogg, p. 15-8. In applying the doctrine, courts have allowed the following: provincial taxation legislation that applied to banks (*Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575) or to a company that operated a railway bridge (*Van Buren Bridge Co. v. Madawaska* (1958), 15 DLR (2d) 763 (NB AD) – both banks and railroads being a federal responsibility; a provincial moratorium law, notwithstanding that it applied only to proceedings against a federally incorporated company (*Abitibi Power and Power Co. v. Montreal Trust Co.*, [1943] AC 536); and a provincial law sanctioning the expropriation of assets of a federally incorporated mining company (*Société Asbestos v. Société nationale de l'amiante* (1981), 128 DLR (3d) 405 (Que. CA)).

⁵ It should be noted at the outset that the constitutional principles governing water that are discussed below apply equally to ground and surface water sources. Gerard V. La Forest, 1973, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Information Canada) stated:

takes the form of environmental legislation. Second, safety of drinking water involves its treatment and distribution. Although safety in relation to treatment and distribution involves environmental issues, the focus is likely to be on public health. It is useful to briefly examine the courts' approach to these matters.

2.1.1 The Environment

Environmental legislation is typically concerned with the regulation of activities that may affect the physical environment around us as well as the people who inhabit it. For the most part, the provinces have jurisdiction over such regulatory activities, although, again, this authority does not stem from an explicit constitutional provision. As Professor Hogg states,

The environment, comprising as it does “all that is around us,” is too diffuse a topic to be assigned by the Constitution exclusively to one level of government. Like inflation, it is an aggregate of matters, which come within various classes of subjects, some within Federal jurisdiction and others within Provincial jurisdiction.⁶

This point was also made by Mr. Justice La Forest in *Friends of the Oldman River v. Canada (Minister of Transport)*,⁷ one of a number of Supreme Court of

The designation “ground water” applies to water that collects or flows or percolates beneath the surface of the land and is invisible to the naked eye of one who stands on the surface. For most purposes, however, ground water is classed with casual surface water and, insofar as they are applicable, the rules respecting surface water govern the rights to use and interfere with ground water. (p. 405)

Generally speaking, jurisdiction over surface and ground water rests with the provinces, not the federal Parliament. Apart from exercising general control over water located on lands subject to its jurisdiction, ... the federal government exercises no direct control over surface and ground water within the provinces. (p. 433)

The only complicating issue arising from groundwater stems from any geological and hydrological limitations on ascertaining whether such water is static or constitutes a subterranean watercourse that potentially flows across provincial boundaries, and therefore ought to be classified as interjurisdictional waters.

⁶ Hogg, p. 29-19.

⁷ (1992), 88 DLR (4th) (SCC) [hereinafter *Oldman River*]. See also *Interprovincial Co-operative Ltd. v. Manitoba (A.G.)* (1975), 53 DLR (3d) 321 (SCC); *Northwest Falling Contractors Ltd. v. R.* (1980), 113 DLR (3d) 1 (SCC) [hereinafter *Northwest Falling Contractors*]; *Fowler v. R.* (1980), 113 DLR (3d) 513 (SCC) [hereinafter *Fowler*]; *R. v. Crown Zellerbach Canada Ltd.* (1988), 49 DLR (4th) 161 (SCC) [hereinafter *Crown Zellerbach*]; and *R. v. Hydro-Québec* (1997), 151 DLR (4th) 151 (SCC) [hereinafter *Hydro-Québec*].

Canada decisions that dealt specifically with the issue of constitutional jurisdiction over the environment in the context of water pollution. In *Oldman River*, Justice La Forest noted:

The *Constitution Act, 1867* has not assigned the matter of “environment” *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government ...

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.⁸

The reason for its diffuseness as a subject matter is the very ubiquitousness of the environment itself and the variety of human activities that affect it. As the Supreme Court of Canada noted in *Crown Zellerbach*,

All physical activities have some environmental impact ... But environmental pollution alone is itself all-pervasive. It is a by-product of everything we do. In man’s relationship with his environment, waste is unavoidable. The problem is thus not new, although it is only recently that the vast amount of waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere and water to absorb and assimilate it on a global scale.⁹

In the case of water, moreover, the issue is made even more complex because water cannot be confined within geographical and jurisdictional boundaries. Again, this was noted by the Court in *Crown Zellerbach*:

It should require no demonstration that water moves in hydrologic cycles and that effective pollution control requires regulating

⁸ *Oldman River*, p. 42, per La Forest J.

⁹ *Crown Zellerbach*, pp. 200–202.

pollution at its source. That source may, in fact, be situated outside the waters themselves. It is significant that the provision of the *Fisheries Act* upheld by this court in *Northwest Falling Contractors Ltd. v. The Queen* ... as a valid means of protecting the fisheries not only prohibited the depositing of a deleterious substance in water, but *in any place* where it might enter waters frequented by fish. Given the way substances seep into the ground and the movement of surface and ground waters into rivers and ultimately into the sea, this can potentially cover a very large area.¹⁰

2.1.2 Public Health

Legislation dealing with the safety of drinking water may also relate to public health. Public health legislation generally focuses on the well-being of those living in the province, and on that basis provincial jurisdiction may be invoked. Like the environment, public health is an “amorphous topic,” which, as Professor Hogg notes, “is distributed to the federal Parliament or the provincial Legislatures depending on the purpose and effect of the particular health measure in issue.”¹¹ Similarly, the ultimate conclusion as to whether public health legislation is within provincial jurisdiction will depend on whether its pith and substance relates to a provincial power.

2.2 Paramountcy

As noted in the previous section (and dealt with in greater detail in sections 3 and 4 below), clearly, both provincial and federal jurisdiction exist over matters that directly and indirectly affect drinking water safety. On the issue of environmental management, such shared jurisdiction was approved by the Supreme Court of Canada in *Crown Zellerbach* as reflecting the appropriate balance of constitutional powers under Canada’s federalist system:

To allocate the broad subject-matter of environmental control to the federal government under its general power would effectively gut provincial legislative jurisdiction ... In Canada, both federal and

¹⁰ Ibid., p. 194.

¹¹ Hogg, p. 15-40. See also *Schneiderv. R.* (1982), 139 DLR (3d) 417 (SCC) [hereinafter *Schneider*].

provincial levels of government have extensive powers to deal with these matters. Both have enacted comprehensive and specific schemes for the control of pollution and the protection of the environment. Some environmental pollution problems are of more direct concern to the federal government, some to the provincial government. But a vast number are inter-related, and all levels of government actively cooperate to deal with problems of mutual concern ...

To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the principles of federalism enshrined in the Constitution. As Professor William R. Lederman has indicated in his article, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 Can. Bar Rev. 597, p. 610, environmental pollution "is not limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implications." If, he adds, it "were to be enfranchised as a new subject of federal power by virtue of the federal general power, then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial powers." And I would add to the legislative subjects that would be substantially eviscerated the control of the public domain and municipal government.¹²

Notwithstanding the cooperative approach referred to in this passage, jurisdictional conflict remains, at least theoretically, possible. In cases of conflict, a mechanism must exist for determining which competing jurisdiction is valid. This mechanism is the doctrine of paramountcy, which dictates that where federal and provincial laws are inconsistent, the federal law prevails.¹³

Two things must be said to qualify this admittedly basic description of the paramountcy doctrine. First, it is important to remember that the doctrine in no way precludes the possibility of intergovernmental cooperation. This possibility was implied by Professor La Forest (as he then was), who wrote in *Water Law in Canada*: "As in other cases, where Federal and Provincial legislation conflict, the Federal legislation will prevail, but it seems doubtful that courts

¹² *Crown Zellerbach*, pp. 200–202, per La Forest J. While La Forest J. wrote for the dissent, this aspect of his decision was not contested by the majority. See also *Oldman River*, p. 41.

¹³ Hogg, p. 16-2.

will be over-assiduous in finding conflict.”¹⁴ Similarly, in *Hydro-Québec* the Supreme Court of Canada held:

The use of the criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action. The situation is really no different from the situation regarding the protection of health where Parliament has for long exercised control over such matters as food and drugs by prohibitions grounded in the criminal law power. This has not prevented the provinces from extensively regulating and prohibiting many activities relating to health. The two levels of government frequently work together to meet common concerns ... Nor, though it arises under a different technical basis, is the situation, in substance, different as regards federal prohibitions against polluting of water for the purpose of protecting the fisheries. Here again there is a wide measure of cooperation between the federal and provincial authorities to effect common or complementary ends. It is also the case in many other areas. The fear that the legislation impugned here would distort the federal-provincial balance seems to me to be overstated.¹⁵

Second, even in the absence of purposive cooperation between levels of government, a provincial law that happens to affect matters that are in the federal domain will not necessarily be negated on this basis alone. This is because the paramountcy doctrine has developed from its original form, in which jurisdictional conflict was found to exist on the basis of the “covering the field” or “negative implication” test, to its present form, in which the test is that of express conflict. Thus, an explicit conflict between a federal and a provincial law must be demonstrated before the latter will be found to be constitutionally invalid. As will be seen in the discussion of the decision in *Canadian National Railway Co. v. Ontario (Director under the Environmental Protection Act)*,¹⁶ below, the application of this higher threshold has tended to work in favour of the provinces with respect to their ability to regulate the environment in areas where federal control is otherwise exerted.

¹⁴ La Forest, p. 15.

¹⁵ *Hydro-Québec*, p. 104.

¹⁶ (1991), 3 OR (3d) 609 (Ont. Gen. Div.) [hereinafter *Canadian National Railway*]. See section 4.2.1, below.

3 Provincial Jurisdiction over Drinking Water

As noted above, the provinces generally have a broad jurisdiction over drinking water regulation. Professor La Forest wrote in *Water Law in Canada*:

Power to make laws respecting the supply and distribution of water, whether for domestic or industrial purposes, generally lies with the Provinces. This would include the control of pollution, chemical treatment, fluoridation and the like. In doing so a Province must not interfere with the public right of navigation, Federal public property and Indian lands, and valid Federal legislation within its own fields, for example, prohibitions against pollution, but the area of Provincial control is obviously wide.¹⁷

3.1 Provincial Powers

Provincial jurisdiction generally stems from one or more of four provincial powers:

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

Sections 92(13) and 92(16) clearly establish provincial jurisdiction in respect of the protection of drinking water sources and related environmental concerns. Submissions made to the federal Standing Committee on the Environment emphasize how broadly these powers can be interpreted:

The provinces have jurisdiction with respect to pollution matters by virtue of their primary jurisdiction over “Property and Civil Rights in the Province” (s. 92(13)) and “Generally all matters of a merely

¹⁷ La Forest, p. 14. See also David Percy, 1988, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resources Law); J. Owen Saunders, 1988, *Inter-Jurisdictional Issues in Canadian Water Management* (Calgary: Canadian Institute of Resources Law); Dale Gibson, 1973, “Constitutional jurisdiction over environmental management in Canada,” *University of Toronto Law Journal*, vol. 23, p. 54; and William R. Lederman, 1975, “Unity and diversity in Canadian federalism: Ideals and methods of moderation,” *Canadian Bar Review*, vol. 53, p. 597.

local or private nature in the Province” (s. 92(16)). It can be said that property and civil rights are the provincial equivalent of peace, order and good government. Given that a good deal of pollution arises in the context of land use and land use planning, pollution regulation appears to be of a local and regional nature.¹⁸

The power under section 92(16) has also been used to authorize provincial regulation of public health. The Supreme Court of Canada held in *Schneider*:

The Rowell-Sirois Commission recommended that:

Provincial responsibilities in health matters should be considered basic and residual. Dominion activities on the other hand, should be considered exceptions to the general rule of provincial responsibility, and should be justified in each case on the merits of their performance by the Dominion rather than by the province ... Dominion jurisdiction over health matter is largely, if not wholly, ancillary to express jurisdiction over other subjects ...

Thus historically, at least, the general jurisdiction over public health was seen to lie with the provinces under s. 92(16):

92(16) ... Matters of a merely local or private Nature in the Province.

although the considerable dimensions of this jurisdiction were unlikely foreseen in 1867.

This view that the general jurisdiction over health matter[s] is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the emergency power under peace, order and good government) has prevailed and is now not seriously questioned.¹⁹

¹⁸ P. Muldoon and B. Rutherford, 1991, “Environment and the Constitution: Submission to the Standing Committee on Environment,” Appendix E, Canadian Environmental Law Association and Pollution Probe, in E.L. Hughes, A.R. Lucas, and W.A. Tilleman, eds., 1998, *Environmental Law and Policy*, 2d ed. (Toronto: Emond Montgomery Publications), p. 37.

¹⁹ *Schneider*, p. 439.

The same heads of provincial power can be used to authorize provincial legislation dealing with regulation of drinking water quality and treatment standards as well as the provision, maintenance, and regulation of treatment facilities and distribution systems. Moreover, to the extent that these systems supply drinking water to municipalities, they are further justified under section 92(8). As Professor Hogg states,

The power over property and civil rights (s. 92 (13)) authorizes the regulation of land use and most aspects of mining, manufacturing and other business activity including the regulation of emission that could pollute the environment. This power, and the power over municipal institutions (s. 92 (8)), also authorizes municipal regulation of local activity that affects the environment, for example, zoning, construction, *purification of water*, sewage, garbage disposal and noise.²⁰

3.2 Sample Legislation

Acting under the authority of these heads of power, Ontario enacted the *Ontario Water Resources Act (OWRA)*,²¹ which establishes a regulatory scheme providing water quality standards, the inspection and monitoring of water supplies, and the imposition of administrative penalties to deter the contamination of these supplies.²² Drinking water protection is specifically dealt with by O. Reg. 459/00, made under the *OWRA*, which establishes a process of water sampling and analysis, as well as the requirement to notify the medical officer of health and the minister of the environment when testing results fall outside the parameters established in the regulation.

The province has also enacted a broad range of other legislation pursuant to the heads of power discussed above – for example, the *Environmental Assessment Act*, which requires environmental assessments of new undertakings;²³ the

²⁰ Hogg, p. 29-22-3 [emphasis added].

²¹ RSO 1990, c. O.40, as am.

²² Waters are defined in the *OWRA* as “a well, lake, river, pond, spring, stream, reservoir, artificial watercourse, intermittent watercourse, ground water or other water or watercourse.”

²³ *Environmental Assessment Act*, RSO 1990, c. E.18, as am., ss. 1(1) “environment”; “water”; 5(1), 6.1(1), (2)(c). Section 1(1) defines “undertaking” as

(a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities, or

Environmental Protection Act (EPA), which aims to protect drinking water by regulating activities that affect the environment (including groundwater and surface water);²⁴ the *Health Protection and Promotion Act*, which established provincial health units and empowers the units and medical officers of health to perform various services related to the maintenance of public health;²⁵ the *Farming and Food Production and Protection Act*,²⁶ which regulates farming practices in the province – which in turn have a potentially significant impact on the safety of drinking water; the *Municipal Act*,²⁷ and the *Planning Act*, which includes numerous mechanisms related to the planning process and which can have an impact on the safety of drinking water.²⁸

Provincial jurisdiction in the area is clearly broad and well established in the constitutional jurisprudence. Indeed, the scope of provincial jurisdiction can be characterized as encompassing all matters related to the safety of drinking water except those that have been delegated expressly to Parliament and, in the case of overlapping delegation, matters where the paramountcy doctrine applies. The remainder of this paper explores the areas where provincial legislative policy may conflict with and, thus, be limited by federal jurisdiction.

4 Potentially Conflicting Federal Jurisdiction

A number of constitutional powers authorize federal legislation that may conflict with provincial management of drinking water. These heads, which can be divided into ‘functional’ and ‘conceptual,’ are as follows:

Functional powers

- navigation and shipping (section 91(1));
- sea coast and inland fisheries (section 91(12));
- federal works and undertakings (sections 91(29) and 92(10));

(b) a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or business enterprise or activity of a person or persons other than a person or persons referred to in clause (a) that is designated by the regulations.

²⁴ *Environmental Protection Act*, RSO 1990, E.19, ss. 1(1) “water”; 24.

²⁵ *Health Protection and Promotion Act*, RSO 1990, c. H.7.

²⁶ SO 1998, c. 1.

²⁷ RSO 1990, c. M.45.

²⁸ *Planning Act*, RSO 1990, c. P.13, s. 2.

- canals, harbours, rivers, and lake improvements (section 108);
- “Indians, and lands reserved for Indians” (section 91(24)).

Conceptual powers

- taxation (section 91(3));
- trade and commerce (section 91(2));
- public debt and property (the spending power, section 91(1A));
- criminal law (section 91(27));
- peace, order, and good government (section 91).

4.1 Federal Deference and Cooperation

Before we examine the various federal powers, it is useful for the purposes of understanding the interrelationship of federal and provincial powers in respect of drinking water to examine briefly one of the centrepieces of the federal legislative approach to water management, the *Canada Water Act* (*CWA*).²⁹ The *CWA* clearly recognizes significant provincial interest and jurisdiction in the matter of water safety. Like the *OWRA*, the *CWA* sets out a comprehensive water resource management scheme, much of which contemplates cooperation with provincial governments. For example, section 4 of the *CWA* provides the following:

For the purpose of facilitating the formulation of policies and programs with respect to the water resources of Canada and to ensure the optimum use of those resources for the benefit of all Canadians, having regard to the distinctive geography of Canada and the character of water as a natural resource, the Minister may, with the approval of the Governor in Council, enter into an arrangement with one or more provincial governments to establish, on a national, provincial, regional, lake or river-basin basis, intergovernmental committees or other bodies

- (a) to maintain continuing consultation on water resource matters and to advise on priorities for research, planning, conservation, development and utilization relating thereto;
- (b) to advise on the formulation of water policies and programs; and
- (c) to facilitate the coordination and implementation of water policies and programs.

²⁹ RSC 1985, c. C-11.

Similarly, section 5 of the *CWA* provides for the establishment of federal-provincial water resource management programs, and section 11 of that act provides for federal-provincial agreements for the management of federal waters. Section 11 provides:

- (1) The Minister may, with the approval of the Governor in Council, enter into agreements with one or more provincial governments that have an interest in the water quality management of
 - (a) any federal waters; or
 - (b) any waters, other than federal waters, the water quality management of which has become a matter of urgent national concern.

In addition to recognizing the need for interjurisdictional initiatives for water management, section 11 acknowledges the distinction between federal and provincial waters for the purpose of water management. Section 2 of the *CWA* defines federal waters as “waters under the exclusive legislative jurisdiction of Parliament.” The act also recognizes the existence of interjurisdictional waters, which are defined in section 2 as “any waters, whether international, boundary or otherwise, that, whether wholly situated in a province or not, significantly affect the quantity or quality of waters outside the province.”

While section 11 allows for federal-provincial water management agreements with respect to federal waters, the *CWA* expressly reserves to the federal government the right to manage interjurisdictional waters if such management has become “a matter of urgent national concern.” Section 13 provides the following:

- (1) Where the water quality management of any inter-jurisdictional waters has become a matter of urgent national concern, the Governor in Council, subject to subsection (2), may, on the recommendation of the Minister, designate those waters as a water quality management area and authorize the Minister to name an existing corporation that is an agent of Her Majesty in right of Canada, or that performs any function or duty on behalf of the Government of Canada, as a water quality management agency to plan, initiate and carry out programs described in section 15 in respect of those waters.
- (2) The Governor in Council may exercise the powers referred to in subsection (1) where either

- (a) the Governor in Council is satisfied that all reasonable efforts have been made by the Minister to reach an agreement under section 11 with the one or more provincial governments having an interest in the water quality management of the inter-jurisdictional waters in question and that those efforts have failed, or
- (b) although an agreement was reached under section 11 in respect of those inter-jurisdictional waters and an agency was incorporated or named under the agreement, the Minister and the appropriate minister of each provincial government that was a party to the agreement disagreed with the recommendations of the agency with respect to water quality standards for those waters and were unable to agree on a joint recommendation with respect thereto and, as a result of the failure to agree, the agreement under section 11 was terminated.

Thus, where national concern requires federal management of interjurisdictional waters, the *CWA* permits such management only after reasonable attempts have been made to reach agreement with the provinces or, where there is intergovernmental disagreement, only on the recommendations of the agency assigned to water management under the agreement.³⁰

Taken as a whole, then, the *CWA* indicates federal acknowledgement of provincial jurisdiction over non-federal waters and an inclination toward cooperation over waters that do not fall neatly within either a federal or a provincial ‘water-tight’ compartment.³¹ This is significant because the absence of any indication that Parliament is guarding a head of power for itself means that there is a greater likelihood that provincial powers will be broadly interpreted.

³⁰ See discussion of the POGG power in section 4.3.3, below.

³¹ A willingness on the part of the federal government to cooperate on such issues extends beyond the *CWA*. Cooperation regarding environmental management between the federal government and the provinces and territories also stems from federal-provincial agreements such as the *Canada-Wide Accord on Environmental Harmonization (Accord)*. The *Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, 1994 (COA)* provides a cooperative framework between Canada and Ontario specifically with respect to the Great Lakes area.

The *Accord* was signed by members of the Canadian Council of Ministers of the Environment (with the exception of Quebec) in January 1998 and establishes a common vision, objectives, and principles relating to environment quality. It is designed to govern the partnership among

4.2 Functional Powers

4.2.1 Navigation and Shipping

In *Canadian National Railway*, the Ontario Divisional Court found that provisions of the Ontario *EPA*, permitting the making of orders requiring property owners to submit reports about the nature of contamination from their land, was within provincial jurisdiction. In this case, the director had ordered such a report to be made by corporations who had discharged pollution into the harbour of the Port of Thunder Bay. The corporations challenged the order on the basis that the waters in question fell under the federal power over navigation and shipping (section 91(10)) and that even though the province might have some interest in pollution, the existence of federal legislation dealing with the harbours meant that the doctrine of paramountcy applied and the provincial legislation was invalid in that respect.

The Court noted that the modern test for paramountcy required more than mere duplication of federal legislation by provincial legislation. Instead, express conflict was required:

The test of inconsistency recognized by the courts as to whether a provincial law is to be rendered inoperative under the doctrine of paramountcy has progressed over the years from one of “covering

jurisdictions, and the development and implementation of subagreements. The objectives of the *Accord* are to enhance environmental protection; promote sustainable development; and achieve greater effectiveness, efficiency, accountability, predictability, and clarity of environmental management for issues of Canada-wide interest.

To date, the subagreements dealing with inspections, standards, and environmental assessment have been signed. The environment standards subagreement specifically provides that Canada-wide environmental standards should “encompass qualitative or quantitative standards, guidelines, objectives and criteria for protecting the environment and human health” and that the subagreement’s primary focus is on environmental standards for, *inter alia*, the quality of water.

The *COA* was signed in April 1994 by the federal ministers of agriculture and agri-food, fisheries and oceans, the environment, and health, and by the Ontario ministers of environment and energy, natural resources, food and rural affairs, and health. This agreement focuses on the Great Lakes basin ecosystem and strives to renew and strengthen planning, cooperation, and coordination between Canada and Ontario. It provides that programs and actions shall be undertaken to achieve progress toward three objectives: (1) restoration of degraded areas, (2) prevention and control of pollution, and (3) conservation and protection of human and ecosystem health. The objective of restoration of degraded areas includes, for instance, the requirement for joint efforts between the federal government and the various levels of the Ontario government to restore water quality and beneficial uses (including drinking water consumption) and to remediate groundwater contamination.

the field” to one of express contradiction where the compliance with one law involves the breach of the other. The test today is clearly such that mere duplication by the provincial legislature of laws enacted by Parliament is no longer sufficient to invoke the doctrine of paramountcy. Actual conflict between two pieces of legislation is required ... It was incumbent on CN, NWP and Abitibi to establish that they could not comply with the provincial law or the order without committing a breach of the federal legislation.³²

The Court then found that the purpose of the *EPA* was not to regulate the areas of navigation and shipping, and on this basis found that no express conflict existed between it and the federal power over those areas:

One of the main purposes of the Act is to regulate business activities to ensure they operate in an environmentally safe manner. As stated above, another is to protect persons and property from the perils of toxic waste. As such, neither the Act nor the order to study and ultimately clean up alleged contamination of the harbour has the purpose of dealing with the essential federal aspects of the federal power over navigation and shipping as described.³³

While this passage does not deal expressly with the subject of drinking water, it strongly implies that provincial attempts to control drinking water quality would similarly be unlikely to trigger the doctrine of paramountcy, since their purpose would not be to control navigation and shipping.

On the other hand, the federal power over navigation and shipping may authorize federal environmental regulation within a province. In *Oldman River*, the Supreme Court of Canada discussed the constitutionality of the *Environmental Assessment and Review Process Guidelines Order*,³⁴ made under the *Department of the Environment Act*.³⁵ The *Guidelines Order* required all federal departments and agencies having decision-making authority for any initiative or undertaking that may have an environmental effect on an area of federal responsibility to conduct an environmental assessment of the undertaking before proceeding. The appellants

³² *Canadian National Railway*, pp. 629–30.

³³ *Ibid.*, pp. 628–9.

³⁴ SOR 84/467.

³⁵ RSC 1985, c. E-10.

sought an order compelling the federal minister of transport to conduct such a study with respect to the construction of a dam located within Alberta. They did so on the basis that the project required approval of the minister under the *Navigable Waters Protection Act*³⁶ since it constituted work in a navigable water under section 5 of that act. The appellant argued that the application of the act in turn triggered the *Guidelines Order*. The Court agreed with this argument, going on to find that the order was within the power of the federal government to the extent that it required a study that related to the specific head of federal power involved – navigation and shipping. The Court held:

The *Guidelines Order* has merely added to the matters that federal decision-makers should consider. If the Minister of Transport was specifically assigned the task of weighing concerns regarding fisheries in weighing applications to construct works in navigable waters, could there be any complaint that this was *ultra vires*? All that it would mean is that a decision-maker charged with making one decision must also consider other matters that fall within federal power. I am not unmindful of what was said by counsel for the Attorney-General for Saskatchewan who sought to characterize the *Guidelines Order* as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction. However, on my reading of the *Guidelines Order* the “initiating department” assigned responsibility for conducting an initial assessment, and if required, the environmental review panel, are only given a mandate to examine matters directly related to the areas of federal responsibility affected. Thus, an initiating department or panel cannot use the *Guidelines Order* as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power.³⁷

The requirement that federal environmental legislation relate specifically to a head of federal power clearly limits the scope of such legislation and reduces the likelihood of a conflict that would trigger paramountcy. This reasoning would of course apply to all federal heads of power, and therefore significantly limits federal regulation of water management in provincial waters.

³⁶ RSC 1985, c. N-22.

³⁷ *Oldman River*, p. 47.

4.2.2 Sea Coast and Inland Fisheries

Similar principles apply to federal attempts to regulate water management indirectly through the federal power over fisheries (section 91(12)). It is useful to contrast the Supreme Court of Canada's decisions in *Fowler* and *Northwest Falling Contractors* since they illustrate the difference between valid and invalid legislative attempts in this regard. *Fowler* involved the constitutionality of section 33(3) of the *Fisheries Act*,³⁸ which provides as follows:

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

Mr. Justice Martland noted that the federal jurisdiction over fisheries is concerned with the protection and preservation of fisheries as a public resource, and was directed toward a definition of fishery as both the right to catch fish and the place where that right may be exercised. He went on to say the following:

The legislation in question here does not deal directly with fisheries, as such, within the meaning of those definitions. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. *Prima facie* s. 33(3) regulates property and civil rights within a Province. Dealing, as it does, with such rights and not dealing specifically with “fisheries”, in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject-matter of sea coast and inland fisheries.³⁹

Justice Martland concluded that the breadth of the legislation in question made it impossible to view it in this way:

Section 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which

³⁸ RSC 1970, c. F-14.

³⁹ *Fowler*, p. 520.

does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal Parliament.⁴⁰

By contrast, the Court in *Northwest Falling Contractors* considered the validity of section 33(2) of the *Fisheries Act*, which provides the following:

Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

In this case, Justice Martland noted that “deleterious substance” was defined in the act as “deleterious to fish or fish habitat or to the use by man of fish that frequent that water.” He then contrasted section 33(2) of the *Fisheries Act* with section 33(3), which had been dealt with in *Fowler*:

Unlike ss. (2), ss. (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat ... In my opinion, s. 33(2) was *intra vires* of the Government of Canada to enact. The definition of “deleterious substance” ensures that the scope of s. 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.⁴¹

These decisions, as well as the *Crown Zellerbach* case discussed under Paramountcy above, establish that in order to be valid under section 91(12), any federal legislation that seeks to control water management must do so for the specific purpose of regulating fisheries. It is difficult to perceive how such regulation would come into conflict with provincial regulation of drinking water, even if the necessarily incidental effect of such legislation was to require water purity standards different from those required by the provincial law

⁴⁰ Ibid., pp. 521–2.

⁴¹ *Northwest Falling Contractors*, p. 8.

applicable to the same waters. As long as meeting one set of standards does not preclude the simultaneous meeting of the other set, for example, there is no express conflict and the principle of paramountcy would not be triggered.

4.2.3 Federal Works and Undertakings

In *Ontario v. Canadian Pacific Ltd.*,⁴² the Ontario Court of Appeal considered the application of Ontario's *Environmental Protection Act* to a federal undertaking (the federal power falling under section 92(10)). Canadian Pacific (CP) conducted a number of controlled burns of dead grass on its right of way pursuant to its obligations under section 223 of the *Railway Act*.⁴³ Smoke from the burn caused the owner of a nearby property to suffer an asthma attack, and required cleaning of his and neighbouring property. CP was subsequently tried and convicted under section 13(1)(a) of the *EPA*, which provides the following:

Notwithstanding any other provisions of this Act or the regulations, no person shall deposit, add, emit or discharge a contaminant or cause or permit the deposit, addition, emission or discharge of a contaminant into the natural environment that,

- (a) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it;

CP appealed its conviction on the grounds that as a federal undertaking it was not subject to provincial legislation. In rejecting the appeal, the Court of Appeal applied the Supreme Court of Canada's decision in *Québec (Commission de la santé et de la sécurité du travail) v. Bell Canada*,⁴⁴ in which the Court considered the test for interjurisdictional immunity. The Court of Appeal concluded:

⁴² (1993), 13 OR (3d) (Ont. CA), aff'd [1995] 2 SCR 1028 [hereinafter *Canadian Pacific*]. In dismissing the appeal, the Supreme Court of Canada simply applied the decision of the Privy Council in *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] AC 367, in which the Court stated:

The British North America Act, whilst it gives the legislative control of the appellants' railway *qua* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, on other respects, be exempted from the jurisdiction of the provincial legislatures.

⁴³ RSC 1985, c. R-3.

⁴⁴ (1988), 51 DLR (4th) 161.

[W]hile there are exceptions to it, the rule of Canadian constitutional law is that undertakings within the exclusive jurisdiction of Parliament usually are subject to provincial statutes of general application. The only exception to that rule which could be applicable in this case is the exception which applies when the provincial statute as a whole bears essentially upon the management and control of the undertakings to which the provisions of the statute are directed.⁴⁵

The Court went on to examine the *EPA* and concluded that its purpose was not the management of federal undertakings. Instead, it was a statute of general application designed to protect multiple aspects of the provincial environment:

Notwithstanding the fact that it contains some provisions which may purport to regulate management of undertakings, a reading of the *EPA* as a whole demonstrates to me that it is not about management of undertakings. The *EPA* is a complex, many-faceted attempt to protect the environment of Ontario in a great number of ways and from many points of view. It applies not only to persons managing works or undertakings, but also applies to individuals engaged in the widest spectrum of human activity. It provides for investigation, research, studies, education, dissemination of information, and training in matters relating to the environment and its protection in the broadest sense. It deals specifically with a broad range of matters including motors, vehicles, water, ice shelters, waste and its management, sewage systems, litter, and spills of pollution.⁴⁶

On this basis, the Court held that the *EPA*'s application to federal undertakings such as railways was not beyond the power of the province. It is clear from *Canadian Pacific* that provisions of the *EPA* that are directed toward the prevention of water pollution may apply to federal undertakings.⁴⁷

⁴⁵ *Canadian Pacific*, p. 171.

⁴⁶ *Ibid.*, p. 177.

⁴⁷ See also *R. v. Nitochem Inc.* (1993), 14 CELR (NS) 151 (Ont. Prov. Ct.) p. 159, where the Court held that the *Ontario Water Resources Act* applied to spills into the St. Lawrence River even though the river is, at least in part, a federal responsibility.

4.2.4 Canals, Harbours, Rivers, and Lake Improvements

Section 108 contains another federal head of power (canals, harbours, rivers, and lake improvements) that, in theory, could conflict with provincial jurisdiction regarding the safety of drinking water. There are no cases dealing with this aspect of section 108; however, the principles discussed above would apply equally. Thus, for example, legislation enacted with respect to provincial waters that imposes obligations on persons and companies in order to maintain drinking water standards is not likely to intrude on federal jurisdiction, and thus will not raise an issue of paramountcy. Moreover, federal undertakings conducted for the purpose of making improvements to the types of waters enumerated in section 108 will be subject to provincial water regimes, even if such undertakings are conducted pursuant to federal legislation that itself contains provisions intended to protect these waters from contamination in the course of such improvements.

4.2.5 “Indians and Lands Reserved for the Indians”

Section 91(24) provides Parliament with jurisdiction to make laws in relation to two areas: (1) Indians and (2) lands reserved for Indians. The federal government has traditionally taken the view that this head of power permits it to enact legislation with respect to aboriginal peoples that would otherwise fall under provincial jurisdiction. While this specific proposition has yet to be tested before the courts, there is no doubt that Parliament has taken a broad view of the power.

The principle legislation in which the federal government has exercised its power under section 91(24) power is the *Indian Act*.⁴⁸ The *Indian Act* regulates a broad range of activities relating to Indians and lands reserved for Indians, including the purposes for which reserve land may be used, the rights of individual Indians in possession of reserve lands, trespass on reserves, surrenders of reserves, and the management of reserve lands and surrendered lands. The *Indian Act* clearly regulates aspects of Indian life that are otherwise covered by provincial heads of power, including property and civil rights of Indians and education.

With respect to water safety regulation, section 81(1) of the *Indian Act* allows Indian band councils to make bylaws for many purposes, including

⁴⁸ RSC 1985, c. I-5.

- (f) the construction and maintenance of water courses, roads, bridges, ditches, fences and other local works; and
- (g) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies.⁴⁹

No cases have considered the effect of sections 81(1)(f) and (g) of the *Indian Act* on provincial water management or safety legislation. However, these sections could be interpreted as the federal government's assertion of jurisdiction over water management with respect to lands reserved for Indians.

The effect of provincial legislation on Indians or Indian lands is also dealt with by the *Indian Act* itself. Section 88 of the act provides the following:

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

⁴⁹ Many Indian bands have passed bylaws with respect to the maintenance and regulation of waterworks systems. A sample bylaw obtained from Indian and Northern Affairs Canada deals with the construction, maintenance, and regulation of a waterworks system. The bylaw provides the following:

36. No person shall pollute any reservoir from which water is conveyed by the waterworks system or water flowing through the waterworks system or deposit anywhere any deleterious substance which may in any way contaminate such reservoir or such water.

37. No person shall deposit into or on the ice of or on the shores of any waters lying within the reserve any night soil, garbage, manure, dead animal matter, decaying vegetable matter or any substance or substance or substances that in any way may contaminate such waters and tend to make the waters therefrom unfit for human consumption.

The sample bylaw also includes a provision whereby the Indian band, the council of the band, any member of the council, or any employee or agent of the Indian band expressly denies any liability for any damages to any property or person in any way relating to or arising out of any (1) interruption in the provision of water, (2) variation in or inadequacy of water pressure, or (3) inadequate quality of water. With respect to regulating the taking of water from Indian reserve lands, the sample bylaw sets out water use prohibitions precluding people from selling or otherwise disposing of water through a connection line or permitting water supplied through a connection line to be taken away or applied for the benefit of any other person or lands, without the prior written consent of the manager of public works of the council of the band. (See Canada, By-law Advisory Service, Indian and Northern Affairs Canada, "Sample Construction, Maintenance and Regulation of Waterworks System By-law," ss. 23, 32, 36, and 37.)

This section was introduced into the *Indian Act* in 1951. Originally it was thought to be merely declaratory since it had long been established as a constitutional position that provincial laws of general application applied to Indians on Indian lands.⁵⁰

However, in the 1980s, section 88 was revisited by the Supreme Court of Canada in *Dick v. R.*⁵¹ In that case Mr. Justice Beetz (for the Court) stated:

I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them qua Indians.

Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s. 88 in 1951 – then numbered s. 87, Statutes of Canada, 1951, c. 29, s. 87 – and quite apart from s. 88: *vide R. v. Hill* (1908), 15 O.L.R. 406 (CA), where an Indian was convicted of unlawful practice of medicine contrary to a provincial medical act, and *R. v. Martin* (1917), 29 C.C.C. 189, 39 D.L.R. 635, 41 O.L.R. 79 (C.A.), where an Indian was convicted of unlawful possession of intoxicating liquor, contrary to a provincial temperance act.

I have come to the view that it is to the laws of the second category that s. 88 refers.⁵²

⁵⁰ See *Kruger and Manuel v. R.*, [1978] 1 SCR 104, p. 110. The courts have held that provincial laws governing medical practitioners (*R. v. Hill* (1907), 15 OLR 406 (Ont. CA)), labour (*Four B Manufacturing v. United Garment Workers*, [1980] 1 SCR 1031), and traffic regulation (*R. v. Francis* [1983] 1 SCR 1025) are laws of general application and apply to Indians. Hogg explains the effect of these decisions:

These decisions establish that the provincial Legislatures have the power to make their laws applicable to Indians on Indian reserves, so long as the law is in relation to a matter coming within a provincial head of power. The situation of Indians and Indian reserves is thus no different from that of aliens, banks, federally-incorporated companies and interprovincial undertakings. These, too, are subjects of federal legislative power, but they still have to pay provincial taxes, and obey provincial traffic laws, health and safety requirements, social and economic regulations and the myriad of other provincial laws which apply to them in common with other similarly-situated residents of the province. (p. 27-9)

⁵¹ (1985), 23 DLR (4th) 33 (SCC) [hereinafter *Dick*].

⁵² *Dick*, *ibid.*, pp. 59–60.

Accordingly, the section appears to have created two classes of provincial legislation relating to Indians. The first class includes laws of general application that do not affect “Indianness.” Such laws apply to Indians and Indian lands independently of section 88. The second class is made up of laws that regulate Indians *qua* Indians or that affect Indianness. Such laws, if they are of general application, are arguably governed by section 88 and are deemed to be applicable to Indians “except to the extent that those laws make provision for any matter for which provision is made by or under this Act.” Given that aspects of the regulation of drinking water could have an impact on land or even culture, such legislation (or aspects thereof) may be found to be subject to section 88. To the extent that this is the case, it can be reasonably argued that provincial legislation does not apply, at least on those reserves where bylaws governing the same issues have been passed. Further, given the breadth of the final clause of section 88, it can be argued that legislation dealing with any matter set out in section 81(1) of the *Indian Act* has no application to Indians on reserves.⁵³

One commentator has suggested that in respect of lands reserved for Indians, water rights were appropriated along with the lands so that the objectives for setting the lands apart could be met. He concludes that aboriginal title includes water rights.⁵⁴ He also suggests that the legislative scheme of the *Indian Act* with respect to reserve land and resources “appears almost comprehensive” and that “the clearest indication of intention must be demonstrated before general legislation is applied to abrogate water rights attaching to reserve lands.”⁵⁵ Accordingly, he concludes that provincial limits on water use, such as in the *OWRA* – which prohibits the taking of water in excess of certain amounts per day and without a permit – are inapplicable to Indian water rights. He asserts that such provincial limits “came into effect long after most reserves in Ontario were set apart and are *ultra vires* insofar as they would purport to restrict Indian

⁵³ The final passage of section 88 has the effect of providing federal paramountcy where the subject matter of the provincial law has already been provided for in the *Indian Act*. Several commentators believe this is a broadening of the paramountcy doctrine, which applies only where there is an express contradiction between a federal and a provincial law. (See Hogg, p. 27-15. See also Jack Woodward, 1990, *Native Law*, looseleaf (Toronto: Carswell), p. 108.) Accordingly, “it seems probable therefore that the closing words of s. 88 go further than the paramountcy doctrine and will render inapplicable to Indians some provincial laws of general application which are not in direct conflict with the Indian Act.” (Hogg, *ibid.*) See also Kerry Wilkins, 2000, “‘Still crazy after all these years’: Section 88 of the Indian Act at fifty,” *Alberta Law Review*, vol. 38, no. 2, p. 458, para. 15.

⁵⁴ Richard H. Bartlett, 1988, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law).

⁵⁵ *Ibid.*, p. 139.

water rights.”⁵⁶ Furthermore, he goes on to say that this reasoning is also applicable to the variety of powers of expropriation of water rights declared in an *ad hoc* manner in provincial statutes and that “such could only be exercised in accordance with the provisions of the *Indian Act*.”⁵⁷

Even this interpretation allows for some provincial involvement.⁵⁸ The issue with respect to Indians and Indian lands is complex and confusing. The application of provincial legislation respecting safety of drinking water in this area must be determined separately for each act, or even each section, looking at factors such as the effect of the legislation on Indianness and whether the subject matter has been dealt with in the *Indian Act* or a local bylaw.

An added complication is that section 88 of the *Indian Act* is, in its opening language, made “subject to the terms of any treaty.” This makes it necessary to ensure that provincial legislation does not conflict with treaty rights as well. Even in the absence of section 88, section 35 of the *Constitution Act, 1982*, gives constitutional protection to aboriginal rights, which imposes another potential restriction on the provincial power to legislate in this area.

4.3 Conceptual Powers

4.3.1 Taxation, Trade and Commerce, and Public Debt and Property (the Spending Power)

While no cases have considered the powers of taxation (section 91(3)), trade and commerce (section 91(2)), and public debt and property (or the spending power) (91(1A)) in relation to the environmental or health impact on the safety of water, academic commentators have offered them as potentially relevant heads of federal power in these areas; however, only one commentator has provided an example of the way these powers would be triggered. Professor Lederman suggests that the spending power in section 91(1A) would enable the federal government to play a prominent role in pollution abatement through the financing of sewage systems and pollution research, and through making loans to corporations conditional on the adoption of anti-pollution measures.⁵⁹

⁵⁶ Ibid., p. 149.

⁵⁷ Ibid.

⁵⁸ These arguments do not seem to preclude provincial regulation of drinking water standards.

⁵⁹ Lederman, p. 81.

4.3.2 Criminal Law

Section 91(27) gives the federal government the power to criminalize certain activities relating to the contamination of water. The relevant provision in the *Criminal Code* itself is section 180, which provides the following:

- (1) Every one who commits a common nuisance and thereby
 - (a) endangers the lives, safety or health of the public, or
 - (b) causes physical injury to any person,is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
- (2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
 - (a) endangers the lives, safety, health, property or comfort of the public; or
 - (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.⁶⁰

This section introduces what could be called the offence of unlawful nuisance, defining it as conduct that endangers human life, safety, health, or property. Professor La Forest comments that this section may capture water pollution: “[P]resumably, then, the fouling of well water intended for beneficial use, or surface water accumulated in a reservoir, may amount to a common nuisance under the *Code* provided the rather difficult element of *mens rea* can be attributed to the person polluting the water.”⁶¹

Commentators have recognized that the criminal law power anchors penalties, in addition to ‘true crimes,’ outside the scope of the *Criminal Code* itself. Thus, as we have seen above, the *Fisheries Act* makes it an offence to deposit deleterious substances in any water frequented by fish. Similarly, the *Migratory Birds Convention Act* makes it an offence to deposit or permit the introduction of oil, wastes, or other substances harmful to migratory water fowl into waters frequented by such fowl.

⁶⁰ RSC 1985, c. C-46, ss. 180(1), (2).

⁶¹ La Forest, p. 435.

The power of the federal government to pass criminal legislation with respect to the environment was affirmed by the Supreme Court of Canada in *Hydro-Québec*, which dealt with the validity of an interim order made pursuant to sections 34 and 35 of the *Canadian Environmental Protection Act*.⁶² The case involved an appeal by the Crown from the Court of Appeal's decision that Hydro-Québec's conviction (pursuant to the order) for releasing PCBs into a Québec river was outside the jurisdiction of the federal government because it was not a true criminal offence. In holding that the order was validly enacted under section 91(27) of the Constitution, Mr. Justice La Forest, writing for the majority, said:

The purpose of criminal law is to underline and protect our fundamental values. While many environmental issues could be criminally sanctioned in terms of protection of human life or health, I cannot accept that the criminal law is limited to that because "certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health" ... But the stage at which this may be discovered is not easy to discern, and I agree ... that Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values.⁶³

It is important to recognize, of course, that while the criminal power gives the federal government jurisdiction over such offences, it does not preclude provincial governments from enacting administrative penalties in the interest of public safety. Thus, both Ontario's *OWRA* and the *EPA* contain pollution-related offences that are within the province's jurisdiction.

The criminal law power also authorizes federal incursion into the health sphere. Criminal laws relating to health are common in the area of food and drug regulation. In theory, nothing prevents the federal government from criminalizing behaviour that results in drinking water becoming a danger to health.⁶⁴

⁶² *Chlorobiphenyls Interim Order*, PC 1989-296, made pursuant to the *Canadian Environmental Protection Act*, RSC 1985, c. 16 (4th Supp.).

⁶³ *Hydro-Québec*, p. 102.

⁶⁴ See, for example, *R. v. Wetmore* (1983), 2 DLR (4th) 577 (SCC).

4.3.3 Peace, Order, and Good Government

The opening words of section 91 confer on Parliament the power to “make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.” This power is in addition to the power to make laws on subject matters falling specifically under the classes of subject enumerated in section 91. This power of peace, order, and good government (POGG power) is residuary in that it is confined to matters not already enumerated.⁶⁵

The Supreme Court of Canada has recognized three distinct aspects of the POGG power. First is the gap aspect: the POGG power is used “to fill lacunae or gaps in the scheme of distribution of powers.”⁶⁶ For example, in *Oldman River*, the Supreme Court determined that the POGG power authorized procedures for the assessment of the environmental impact of projects affecting federal heads of power.⁶⁷ Second is the national concerns aspect, which, in the words of Lord Watson in the Privy Council decision in the *Local Prohibition* case, recognizes that matters “in their origin local or provincial, might attain such dimension as to affect the body politic of the Dominion.”⁶⁸ Thus, the POGG power might be used by Parliament to deal with a water-related issue that affects the nation as a whole. Third is the emergency aspect of the power, which allows Parliament to legislate to deal with national emergencies and could, of course, include water-related health or environmental emergencies.⁶⁹

The POGG power has been used to justify federal jurisdiction over water systems that extend across provincial boundaries, on the basis that such waters are beyond the control of the province. In *Crown Zellerbach*, the Supreme Court of Canada dealt with the question of when this power authorized federal control over water pollution within a province. In that case, a company was charged with violating section 4(1) of the *Ocean Dumping Control Act*,⁷⁰ which regulated the dumping of harmful substances at sea, a term that included the internal waters of Canada other than inland waters. The accused had been convicted of

⁶⁵ *Canada Temperance Federation*, [1946] AC 193, pp. 205–206; Hogg, p. 17–10.

⁶⁶ Hogg, p. 17–5.

⁶⁷ *Oldman River*. In addition, the POGG power arguably fills the gap in the *Constitution Act, 1867* with respect to Canada’s obligations arising under treaties that it has entered into as an independent party. (See Hogg, p. 17–5.)

⁶⁸ *Ontario (A.G.) v. Canada (A.G.) (Local Prohibition)*, [1986] AC 348.

⁶⁹ See *Crown Zellerbach*.

⁷⁰ SC 1974-75-76, c. 55.

dumping in waters that were within the province of British Columbia. It appealed on the basis that the act's application to waters within the province was beyond the jurisdiction of the federal government.

In dismissing the appeal, the Court summarized the test to be met to trigger federal jurisdiction under the POGG power as an issue of national concern. Mr. Justice Le Dain, writing for the majority, began by noting that the national concern (or national dimensions) doctrine was separate from the national emergency doctrine under the POGG power:

From this survey of the opinion expressed in this court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:

- (i) The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature.
- (ii) The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern.
- (iii) For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.
- (iv) In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra provincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter.

Thus, under the national concern doctrine, the federal government has constitutional jurisdiction only with respect to matters that have a singleness, distinctiveness, and indivisibility that clearly distinguishes them from matters

of provincial concern. Moreover, as part (iii) of Justice Le Dain's description of the doctrine indicates, the doctrine cannot be employed to upset the fundamental division of powers under the *Constitution Act, 1867*. Finally, the consideration of whether a province is unable to effectively deal with the subject matter itself without assistance from other provinces or from the federal government is relevant to, though not determinative of, the question whether a piece of federal legislation is valid.

In *Crown Zellerbach*, the Court held that marine pollution was a distinct subject matter that was sufficiently beyond the regulatory power of provincial governments as to justify federal legislation under the national concern doctrine. It is clear from the decision, however, that this conclusion is reached on the basis of marine pollution's extraprovincial and international character.⁷¹ On this reasoning, legislation aimed at management of waters within a province would clearly not trigger the national concern doctrine; but interprovincial waters, on the other hand, would likely trigger the doctrine, since their management would require interprovincial cooperation. While the Supreme Court of Canada has pronounced on the issue of interprovincial waters in *Interprovincial Co-Operatives v. Manitoba*,⁷² it did so in the context of the federal power over fisheries, since the facts in that case involved the compensation of injuries sustained by Manitoba fishermen as a result of discharges from chlor-alkali plants in Ontario and Saskatchewan. Nevertheless, it seems clear that the contamination of interprovincial waters would be held to be a valid subject of federal legislation on the basis of the national dimensions doctrine as set out in *Crown Zellerbach*.

It is worth noting, in this regard, that to date no constitutional challenge has been made to the interjurisdictional waters provisions of section 13 of the

⁷¹ *Crown Zellerbach*, p. 187, per Le Dain J.

⁷² (1975), 53 DLR (3d) 321, in which the Supreme Court of Canada held that section 4(1) of Manitoba's *Fishermen's Assistance and Polluters' Liability Act, 1970* was *ultra vires* the province's constitutional power under section 92(14) because it attempted to have extraterritorial effect. In this case, the appellants had caused damage to Manitoba's fisheries by allowing mercury to be discharged from their respective chlor-alkali plants in Saskatchewan and Ontario. The mercury was carried into Manitoba by the natural flow of the rivers in which the discharge took place. The impugned section provided for liability for financial loss incurred by the discharge of a contaminant into waters that then carried the contaminant into the waters of Manitoba. The provision was determined to be *ultra vires* the province of Manitoba because the legislation purported to have extraterritorial effect. Specifically, the Supreme Court found that the provision was directed at acts done outside the province and thus enacted legislation purporting to deny a civil right granted in another province (i.e., the right to discharge contaminants into water).

Canada Water Act. Nevertheless, as mentioned above, this section of the act clearly envisages federal-provincial cooperation in the management of such waters. Moreover, in doing so it employs the language of national concern used by the courts in enunciating the national concern doctrine.

4.4 Concurrent Jurisdiction: Agriculture

One final head of constitutional power is worth mentioning in light of the specific circumstances of the Walkerton situation. Section 95 of the *Constitution Act, 1867* provides the following:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

The concurrent federal and provincial jurisdiction with respect to agriculture has only once been the subject of a constitutional challenge. In *Brooks v. Moore*,⁷³ the British Columbia Supreme Court held that the *Animal Contagious Diseases Act, 1903*, which provided for the testing of farm animals for disease, was within federal jurisdiction. The Court held that agriculture was not limited to “those things that grow and derive their substance from the soil,” but included animals as well. Thus, both levels of government have the power to make laws with respect to farm animals, including, presumably, laws regulating animal wastes and the routes by which they contaminate local drinking water supplies. If the pith and substance of such legislation is actually to protect drinking water, it may be necessary for the federal government to invoke the POGG power in addition to section 95 to make the legislation valid. If such legislation is passed, all the principles discussed above with respect to paramountcy and interjurisdictional cooperation will apply.

⁷³ [1906] 4 WLR 110 (BC SC).

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Note that court cases and legislation, which are fully cited in footnotes, have not been included in the references.