LEGAL CONTROLS OF POLLUTION IN THE GREAT LAKES BASIN

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This article deals with the problems of pollution of ground and surface waters in the Canadian part of the Great Lakes Basin, the existing legal controls and those that may become necessary, the constitutional basis of such controls and the case for provincial rather than federal primacy in this field. Legal controls of pollution in the United States part of the Great Lakes Basin are outside the scope of this article as are riparian and other civil rights of governments, their agencies or of other persons based on their proprietary interests in land and arising from pollution of waters.

By pollution I mean the impairment or the potentiality of impairment of the quality of water for its uses, both present and future. The part of the Great Lakes Basin—the territory which drains into and includes the Great Lakes—located in Canada will be referred to as the Basin. The part of the Great Lakes and their inter-connecting rivers located in Canada which are Boundary Waters (as defined in the Boundary Waters Treaty of 1909) will be referred to as the Great Lakes Boundary Waters. The Basin is entirely within the Province of Ontario and does not include any part of the St. Lawrence River. Unless otherwise stated my remarks will be confined to this Basin and to the Great Lakes Boundary Waters.

I. *Causes and Sources of Pollution.*[1]

The construction and operation of sewage works in the Basin in the past fifteen years has so reduced the discharge of untreated or inadequately treated sanitary sewage into waters that it is no longer

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[1] See the Summary Reports to the International Joint Commission by the Advisory Boards of the Commission on Pollution of the Niagara River

the major cause of pollution that it formerly was. Bacterial contamination from such sewage is of significance only in some localities. The control of the quality of water used for human consumption and domestic purposes has virtually eliminated waterborne disease.

A. At the present time the causes of pollution which require urgent remedial action are:

(a) *Industrial Wastes*

Industrial wastes result from industries such as pulp and paper, iron and steel, chemical, petroleum, food processing, metal plating and finishing, textiles, tanning and rendering, and from activities such as the washing, fuelling and maintenance of railways, trucks and automobiles.

Some of these wastes are treated in municipal sewage works and some in industrial sewage treatment works. The treatment of industrial wastes often impairs the efficient operation of municipal works and the treatment in both municipal and industrial works is frequently inadequate.

In addition some industries discharge untreated wastes directly into waters.

(b) *Pesticides*

In the category of pesticides are chlorinated hydrocarbons such as DDT, dieldrin, endrin, 2,4-D and 2, 4, 5-T which are used in home gardens, farms and in forest management and are not readily amenable to bio-chemical breakdown in receiving waters. Pesticides can cause short term toxic effects and some potentially long term harmful effects, such as sterility, in farm animals and aquatic and other wild life.

(c) *Nutrients*

Nutrients, such as nitrogen and phosphorus, are contained in fertilizers in eroded soil, farm land drainage, detergents, livestock wastes and in effluents from sewage treatment works. When these substances are deposited in waters, the nutrients in them promote the growth of algae and other nuisance vegeta-

(Oct. 1967), on Pollution of the St. Mary's River, St. Clair River and the Detroit River (Sept. 1968) and on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River (Sept. 1969). On Apr. 11th, 1968, letters on pollution of the Niagara River were forwarded by the Commission to the governments of Canada and of the United States and on Jan. 31st, 1969 letters on pollution of the St. Mary's, St. Clair and Detroit Rivers were forwarded to these governments and to the governments of Ontario and of the States concerned. See also Jordan, J.E., Recent Developments in International Environmental Pollution Control (1969), 15 McGill L.J. 279; Gibson, D., The Constitutional Context of Canadian Water Planning (1969), 7 Alta L. Rev. 71; Lucas, A.R., Water Pollution Control Law in British Columbia (1969), 4 U.B.C. L. Rev. 56; LaForest, G.V., Natural Resources and Public Property Under the Canadian Constitution (1969).

tion which may impair its quality for domestic, recreational, aesthetic and industrial uses, and affect the operation of water supply works.

B. The following causes or sources of pollution are becoming of increasing concern:

(a) *Dissolved Salts and Dissolved Organic Chemicals*

Dissolved salts include chlorides, sulphates and carbonates which originate primarily from industrial wastes and impair the quality of water for industrial and domestic purposes, for example, by the creation of scale and corrosion problems in equipment. They may also adversely affect aquatic life.

Organic chemicals such as phenolic compounds, benzene, acetone and toluene, originate from refineries, petro-chemical and synthetic organic chemical industries. Because significant quantities of these chemicals can dissolve when they come into contact with water, they may cause problems of taste, odour and toxicity in water used for human consumption or in aquatic life.

(b) *Eroded Soil*

Erosion occurs when soils from stream banks and shores and from sites of certain types of construction, farming and forestry operations are carried into waters by surface runoff or by the movement of water in watercourses caused by natural or artificial means.

Apart from nutrients and pesticides contained in eroded soil which I have mentioned above, the deposit of soil in water as sediment or the increased turbidity of water resulting from erosion, may impair its quality for aesthetic, recreational and some industrial purposes, navigation and shipping, the operation of water works and water supply reservoirs, and may adversely affect aquatic life and its environment.

(c) *Industrial Products*

Industrial products, such as petroleum compounds, toxic chemicals and acids, are frequently discharged into waters. They should be distinguished from industrial wastes to which I have referred.

These discharges are an important source of pollution. They may be deliberate for the purpose of disposing of an unwanted product for which no other means of disposal is available, as where a municipal sewage treatment works was not designed for its treatment or existing storage facilities are not adequate. Sometimes the safety of plant employees may require the deliberate discharge of a product into waters. Or, a discharge may be accidental due to an error or carelessness

in the the operation of a plant, or because of a sudden rupture or failure of equipment, storage units or other plant facilities.

There may be short term adverse effects from these discharges, such as tainting of fish flesh, and impairment of water used for municipal and industrial purposes and for recreation. There may also be prolonged damage to aquatic environment.

(d) *Mine Tailings*

In the past, significant quantities of waste mill tailings from mining operations in the Basin were deposited above ground in lakes, watercourses, marshy areas and in engineered impoundment basins. Pollution of waters may result from the leaching of soluble matter in the tailings by surface runoff, erosion occurring on the slopes of dams of impoundment areas, breaches of such dams and from fine dust blown from abandoned areas of tailings by wind. Such pollution may impair the quality of water for domestic and industrial water supplies, aquatic life, recreation and even navigation.

(e) *Heat*

The input of heat, in the form of heated industrial wastes or water used for cooling that has become heated, into receiving waters from industrial and utilities activities such as thermal generating stations, may promote the growth of algae and other nuisance vegetation and change the normal pattern of aquatic life in the areas influenced by the input.

(f) *Wastes from Summer Cottages and Ice Fishing*

The discharge from summer cottages and other recreational dwellings of untreated sanitary sewage or of inadequately treated sanitary sewage flowing from defective septic tank systems, pit privies and cesspools or the deposit, during ice fishing, of such sewage and garbage on ice over waters may impair the quality of water for recreational use, human consumption and aesthetic purposes by contributing to bacterial contamination and the growth of nuisance vegetation.

(g) *Wastes from Combined Sewers*

Many years ago when treatment of sanitary sewage was not commonly required, storm and sanitary sewers were combined and installed to discharge, from one sewer, both storm water and sanitary sewage, without any treatment, into receiving waters. Later when sewage treatment was required, it was not considered economically feasible either to provide treatment works of sufficient capacity to treat the maximum flow in combined sewers or to separate the sewers and to provide treatment works for the sanitary sewage alone.

During heavy surface runoff caused by rain or melting snow and ice, flows in combined sewers of sanitary sewage diluted by storm water, in excess of flows of sanitary sewage under dry-weather conditions, by-pass treatment works connected to the sewers (which treat dry-weather flows of sanitary sewage) and discharge, without any treatment, into receiving waters.

These intermittent discharges contain large quantities of pollutants such as organic and inorganic solids, bacteria and nutrients and may impair the quality of water for all uses.

(h) *Wastes from Storm Sewers*

Storm sewers are designed to discharge storm water directly into receiving waters without any treatment. However even where complete separation of storm water and sanitary sewage exists in sewers, the intermittent discharge from storm sewers of surface runoff containing grit, pesticides, nutrients in fertilizers, petroleum products deposited on paved areas, eroded soil, debris, salt and other substances used on roads, and even at times, liquid industrial wastes or sanitary sewage from unlawful sewer connexions, may impair the quality of water for all uses.

C. Some potential causes or sources of pollution are:

(a) *Radioactive Substances*

Radioactive substances resulting from the mining and refining of uranium ores, the increasing use of radioactive isotopes for medical and industrial purposes and the use of nuclear materials to generate power are potential causes of pollution. Such pollution could impair the quality of water for most uses depending on the level of radioactivity and the half-life of the substance involved.

(b) *Discharge of Substances from Ships and Boats*

Pollutants from this potential source would include oily water from bilges or tank cleaning, chemicals used for winterizing, sanitary and domestic wastes, garbage, and in the event of distress, cargo of certain kinds, fuel oil, flotsam and jetsam.

(c) *Dredged Sediments*

The quality of water may be impaired for many uses by dredging polluted sediments from the beds of rivers and lakes and their subsequent deposit in waters in other locations. Dredging occurs chiefly in harbours and shipping channels and polluted sediments primarily affect the waters in such harbours and channels. However the effects of dredging and

of the deposit of polluted sediments can be more widespread.

(d) *Oil and Gas*

Potential sources of pollution are the drilling, operation and plugging of oil and gas wells and abandoned oil and gas wells which were not plugged or were improperly plugged. There are many gas and oil wells on land in the Basin and while there are no operating oil wells under water, there are numerous gas wells in Lake Erie.

The handling, storing, transporting, and dispensing of petroleum products, particularly in marinas or by tankers, pipelines or ship to shore transfer facilities, are also potential sources of pollution.

(e) *Subsurface and Surface Disposal of Wastes*

The subsurface injection of waste brine and of industrial wastes not handled by conventional sewage treatment works into underground rock formations by means of wells, and the surface disposal of such industrial wastes, garbage, municipal refuse, sludge from sewage treatment works and domestic wastes are potential sources of pollution.

II. *Provincial Controls and their Constitutional Basis.*

A. *Provincial Controls.*

(a) *The Ontario Water Resources Commission Act*

The Ontario Water Resources Commission was established as an agent of the Crown in right of Ontario in 1956 by The Ontario Water Resources Commission Act.[2] One of its main purposes is to establish and administer a comprehensive programme of pollution prevention and control for the Province. The Act provides that the Commission may examine any surface or ground waters in Ontario to determine what, if any, pollution exists and the causes thereof,[3] and empowers the Commission subject to the approval of the Lieutenant Governor in Council to make regulations prescribing standards of quality for sewage and industrial waste effluents and for receiving waters.[4] "Sewage" is defined as in-including drainage, storm water, commercial wastes and industrial wastes[5] and "sewage works" are defined as any works for the collection, transmission, treatment and disposal of sewage or any part of any such works but not including plumbing.[6] I shall use

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[2] R.S.O., 1960, c. 281, as am. *Local 804 I.B.E.W. & O.W.R.C.* (1965), C.A. Ont., unreported.
[3] S. 26 (2).
[4] S. 47(1)(g).
[5] S. 1(p).
[6] S. 1(q).

the term wastes and sewage synonymously and refer to the Ontario Water Resources Commission as the Commission.

No regulations have yet been made prescribing standards of quality for waste effluents and for receiving waters. However shortly after the Commission was constituted, it established objectives for water quality in the Province and for the quality of waste effluents in order that the quality of receiving waters should attain the water quality objectives. While these objectives do not have the force of law, The Ontario Water Resources Commission Act provides many legal controls which may be used to secure compliance with them for the purpose of the prevention and control of pollution of waters.

Section 27 of the Act makes it an offence to discharge or deposit or cause or permit the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse. The section applies to discharges from ships and boats into waters and to dredging from beds of lakes and rivers of polluted sediments and their subsequent deposit in waters in other locations. It is not limited to discharges into waters; it also applies to discharges into any place from which the material may enter waters, such as discharges on ice over waters and above or below ground.

This section has been judicially interpreted[7] and in the *Industrial Tankers* case[8] it was held that:

(1) the phrase "may impair" means that the material being discharged need only have the ability or potentiality of injuring or deteriorating the quality of the receiving water;

(2) ". . . to succeed, the Crown does not need to prove that the accused had knowledge, a guilty or criminal intent, or 'mens rea', whichever way one desires to express it";[9]

(3) ". . . the Crown must prove that the pollution was put in the water as a result of an act or omission by the accused or one of its employees which the accused had the power and authority to prevent, and could have prevented, but did not prevent";[10] and

(4) an employer, whether a corporation or an individual, is liable for the acts or omissions of his employees within the scope of their employment.

It would appear from the quotation in (3) above that not even

[7] *Regina* v. *Matspeck Construction Ltd. et al.* (1965), 8 Crim. L.Q. 455; see also [1965] 2 O.R. 730; *Regina* v. *Canadian Motor Lamp Co. Ltd.*, [1967] 1 O.R. 484 and *Regina* v. *Industrial Tankers Ltd.*, [1968] 2 O.R. 142. There have been numerous unreported decisions under this section.

[8] *Regina* v. *Industrial Tankers Ltd., ibid.*

[9] *Ibid.*, at p. 150.

[10] *Ibid.*

negligence in regard to the act or omission causing the waste input would be necessary for an offence.

The quality of water must be related to the uses made or proposed to be made of the water, for instance the quality required for human consumption may differ from that required for industrial use or for conservation of aquatic life. Since the section does not refer to the quality of water for any particular use the courts have proceeded on the principle that the ability or potentiality of the material discharged to impair the quality of the water for any of the uses for which it was suitable at the time of the discharge is sufficient for an offence.

Dilution is not a defence. In other words, there need only be a potentiality to impair the water at the point of deposit or discharge and not the entire body of receiving water. Any other interpretation would mean that the section does not apply where there was sufficient dilution of the material discharged in the receiving water. On this view the section would have little practical significance. In any event the courts have not considered dilution as relevant to the defence.

The Act empowers the Commission to apply to a court, without notice to any person who may be affected, for an order limited in the first instance to a period of twenty-one days, to prohibit the discharge or deposit of any material into or near any well, lake, river, pond, spring, stream, reservoir or other body of water or watercourse that, in the opinion of the Commission, may impair the quality of the water. The order may be continued by the court beyond the period of twenty-one days on application by the Commission with notice to any person who may be affected.[11] This provision is used only in an emergency. Its application is not expressly limited to the usual circumstances in which an ex parte injunction may be obtained, rescinded or varied.[12]

The Commission is empowered to define an area that includes a source of public water supply wherein, *inter alia,* no person shall swim or bathe or no material that may impair the quality of water in the area shall be deposited, discharged or allowed to remain. Notice of the area so defined must be given, as may be directed by the Commission, by the municipality or person who has a right to use the water for a public water supply. Contravention of these prohibitions is an offence.[13]

The Act prohibits the addition of substances, such as pesticides, to waters for the purpose of controlling aquatic life, including aquatic nuisances, without a permit from the Commission. The Commission is given a discretion to issue, refuse to issue or cancel the

[11] S. 26(3).
[12] R.R.O., 1960, Reg. 396, as am.. Rules 213; 218; 219.
[13] S. 28.

permit, to impose terms and conditions in the permit and to alter the terms and conditions after the permit is issued. Contravention of the prohibition or of the terms and conditions of a permit is an offence.[14]

The Commission exercises supervisory authority, both general and specific, over sewage works. With certain very limited exceptions, when a municipality or any person proposes to establish, extend or alter sewage works, the approval of the Commission must first be obtained for the proposed works. Plans, specifications and an engineer's report of the works to be undertaken and the location of the discharge of effluent together with any required information must be submitted. It is an offence to undertake the works or to pass a by-law for financing them without first obtaining such approval. The approval can be refused in the public interest or it can be granted on terms and conditions. Contravention of the terms and conditions of the approval granted to any person, except a municipality, is an offence. Where works are undertaken without prior approval, the Commission is given power to order investigations of, or to direct changes in, the works and the location of the discharge of effluent. Failure by any person (not a municipality) to comply with any direction or order is an offence.[15]

Works to be established, extended or altered for the transmission and disposal of mine tailings slurry on the surface of the ground come under this requirement of approval as they are "sewage works for the distribution of sewage on the surface of the ground for the purpose of disposing of the sewage".[16] Before approval is given the Commission can require information *inter alia*, of the location, nature and possible duration of the mining operations, the location of inhabited areas and of lakes, streams or other waters in the vicinity, the extent of land that might be affected by the disposal of the slurry, present uses of lands and waters which may be affected, the potential effects of the disposal operations on water and soil environment and the programme for stabilization of the tailings disposal area.[17]

A duty is imposed on the owner of sewage works to provide the Commission with any required information within thirty days and the failure to do so is an offence.[18]

All works must be "maintained, kept in repair and operated in such manner and with such facilities as may be directed from time to time by the Commission". The failure of any person (not a municipality) to comply with such direction is an offence.[19]

[14] S. 28b; s. 47(1)(ja); O. Reg. 70/63.

[15] S. 31; for a municipality see s. 38; see also s. 47(1)(ka), no regulations for exemptions have been made.

[16] Ss 1(p), 1(q), 31(4).

[17] S. 31(1).

[18] S. 36.

[19] S. 37; for a municipality see s. 38.

In the case of a municipality, the Act imposes a duty to implement forthwith a report of the Commission to the clerk that the Commission is of the opinion that it is necessary in the public interest that sewage works be established, maintained, operated, improved, extended, enlarged, altered, repaired or replaced. Failure to carry out this duty is an offence, and the Commission, with the approval of the Ontario Municipal Board may itself implement the report at the expense of the defaulting municipality.[20]

In a few cases the Commission has required the installation of equipment in municipal sewage treatment works to remove nutrients from sewage as part of the treatment process. In many cases it has required the separation of existing combined municipal sewers into storm and sanitary sewers. The Commission has also required the installation of equipment in municipal sewage treatment works to treat the flow of wastes in combined storm and sanitary sewers in excess of the flow under dry weather conditions.

Notwithstanding any Act, order or regulation, the Commission may, when in its opinion it is in the public interest to do so, with the approval of the Minister of Energy and Resources Management, make an order defining and designating an area as an area of public sewage service. "Sewage service" means the acceptance, collection, transmission, storage, treatment and disposal of sewage. After such definition and designation the Commission may, by order, from time to time, for the purpose of controlling, regulating, prohibiting, requiring or providing sewage service in the area,

(a) impose such terms and conditions in the area as the Commission deems necessary;

(b) terminate or amend any contract with respect to sewage service in the area;

(c) impose charges upon any municipality or person in the area for the provision of sewage service by the Commission to such municipality or person.

A public hearing is required before the definition and designation of an area and compensation is payable where a contract is terminated or amended. An appeal lies to the Lieutenant Governor in Council from an order defining or designating an area or imposing charges for the provision of sewage service. The decision on appeal is final. Any contravention of an order is an offence.[21]

Where economically feasible and in the absence of radical technological advances in sewage treatment, the collection, transmission and treatment of sewage on a regional basis could greatly

[20] S. 38; see on the predecessor sections of s. 38, *Clarey* v. *Ottawa* (1914), 5 O.W.N. 673, aff'd, 6 O.W.N. 116; *PUC of Thorold and Thorold* (1926), 60 O.L.R. 429; *Dilworth* v. *Bala*, [1952] O.R. 703, aff'd, [1953] O.R. 787, aff'd, [1955] S.C.R. 284.

[21] S. 46a.

reduce the effects of pollution. The substitution of larger and fewer for smaller and more numerous treatment works[22] would mean a higher standard of operation and more effective, and perhaps more economical treatment. Multiple discharges of treated sewage effluents into receiving waters with insufficient capacity for assimilation and dispersion would be substantially eliminated, thereby improving the quality of these waters. The transmission of sewage to, and its treatment at, the Great Lakes Boundary Waters or their tributaries where there is adequate capacity for assimilation and dispersion, and the controlled introduction of effectively treated sewage effluents into these waters would reduce to a minimum the effects of pollution.

When municipalities cannot agree to establish such service on a regional basis[23] or to have the Commission do so,[24] the Commission can under the power to create an area of public sewage service compulsorily establish such service in a defined area in a fair and equitable manner.

The Commission, with the approval of the Lieutenant Governor in Council, may make regulations to regulate the content of sewage entering sewage works;[25] prescribe operating standards for sewage works;[26] require and regulate the storage, treatment and disposal of sewage in boats and ships and the equipment therefor, prohibit the use and installation of such equipment unless the equipment and installation conform to the regulations, provide for and require the approval of the Commission for any such equipment, and prohibit and regulate the discharge of sewage from such boats and ships.[27] A regulation respecting the storage, treatment and disposal of sewage by approved equipment in and from pleasure boats has been made.[28] Regulations for the purpose of

[22] About fifteen treatment works located on streams and rivers in Metropolitan Toronto were taken out of operation and the sewage directed to two larger works on Lake Ontario and treatment at an Ontario Water Resources Commission plant on the same lake.

[23] The Municipal Act, R.S.O., 1960, c. 249, as am., ss 250a, 379(1) paras 52, 70, 83; ss 377.4, .5, .6, .15; The Local Improvement Act, R.S.O., 1960, c. 223, ss 2(1)(d), 66; The Municipality of Metropolitan Toronto Act, R.S.O., 1960, c. 260, part IV; The Regional Municipality of Ottawa-Carleton Act, S.O., 1968, c. 115, part IV; The Regional Municipality of Niagara Act, S.O., 1968-69, c. 106, part IV.

[24] Ss 16(1)(d), 16a, 39.

[25] S. 47(1)(f).

[26] S. 47(1)(h).

[27] S. 47(1)(ha).

[28] O. Reg. 284/69; The first conviction under this Regulation was recorded, in the Provincial Court in Newmarket, Ontario, on Dec. 9th, 1969, against Petroleum Research Co. On February 9th, 1970, in prosecutions of Peter A. Allen and J. P. Bell, in the Provincial Court, Old City Hall, Toronto, the Regulation was held to be valid and the accused were convicted notwithstanding the amendment of the Canada Shipping Act regarding control of pollution from boats. See *infra*, footnote 150 and *Regina* v. *McMahon* (1964), 44 D.L.R. (2d) 752.

preventing or reducing pollution may also be made to control and regulate places adjacent to waters where moorings or any services are provided for boats or ships or their occupants, and to regulate persons providing such services or moorings.[29] Sewage may be defined for these latter purposes.[30] The power to make regulations with respect to water wells has been exercised by the Commission, *inter alia*, to prevent pollution of ground waters that may result from the construction, operation and abandonment of such wells.[31]

Where the Commission is dissatisfied with the arrangements made by an industrial or commercial enterprise for the collection, transmission, treatment or disposal of sewage, or where the enterprise makes no such arrangements, the Commission, with the approval of the Minister, may require it to make investigations and submit reports in respect of the collection, transmission, treatment and disposal of sewage, and to install, construct, maintain, repair and operate such facilities in regard thereto as may be directed. Contravention of any such order is an offence.[32]

Under this authority the Commission could require an industry to undertake, at its own expense, the research necessary to determine the most suitable method of treatment of its wastes.

This authority would empower the Commission to order a mining company to discharge mine tailings slurry into impoundment basins for the settling of the suspended tailings. Where the decanted effluent might pollute waters, the Commission could require that the effluent be treated by neutralization and that metals be removed from it before discharge into waters. In addition, stabilization could be ordered of the area where the mine tailings have been deposited.

If in the Commission's opinion the discharge of sewage into a sewage works may interfere with the proper operation of a sewage works, the Commission may, by a notice to the municipality or person responsible for such discharge, prohibit or regulate the discharge or require such measures to be taken in relation thereto as are set out in the notice. Failure to comply with the notice is an offence.[33]

These powers to control commercial, municipal and industrial sewage works enable the Commission to require that their design be in accordance with sound engineering principles, to give directions for the maintenance of proper operating standards, to assess from time to time the quality of effluent being discharged from them into receiving waters and to order any repairs, improvements or enlargements of the works that may be necessary to ensure the

[29] S. 47(1)(hb).
[30] S. 47(1)(hc).
[31] S. 47(1)(i); O. Reg. 46/69, ss 6, 7, 8, 10, 11, 12, 13, 17, 18.
[32] S. 50.
[33] S. 50a.

maximum practicable treatment in order to produce the least deleterious effluent.

Certain general matters relating to the enforcement of the Act and regulations should be noted:

1. The employees and agents of the Commission may at any time for its purposes, without consent or compensation, enter into any municipal, provincial or private property or boats or ships to which the regulations apply, and make investigations, inspections or examinations.[34] This authority does not extend and cannot be extended, to any property of, or boats or ships belonging to, the Crown in right of Canada or its agencies.[35]

2. Where the Commission has authority to require that any thing be done and there is default, it can have the work done itself and recover the expense by legal action.[36]

3. The Commission, in addition to other legal remedies, can apply for an injunction to restrain any contravention of the Act, regulations, orders, approvals, notices or permits thereunder.[37]

4. A certificate of an analyst of the Commission as to the analysis, ingredients or quality of any water or of any material is *prima facie* evidence of the facts stated in the certificate.[38]

5. The giving of false information to the Commission in respect of any matter under the Act or regulations is an offence.[39]

6. The limitation period for proceedings to enforce any provision of the Act or any regulations is one year[40] instead of the usual six months for summary conviction offences.

The powers under The Ontario Water Resources Commission Act and the publication of factual reports and expert opinions and recommendations have enabled the Commission to influence industries to restrict the expansion of existing plants and the location of new ones in certain areas of the Basin because of the potentially polluting effects of their waste effluents on receiving waters or because of the inadequacy of existing municipal sewage works to treat them. Food processing, textile, petroleum products and paper converting industries are examples. Many industries such as pulp and paper, mining, metal-finishing and food processing, have modified their processes in order to eliminate or reduce

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[34] S. 18(1).

[35] The Interpretation Act, R.S.O., 1960, c. 191, s. 11; *Gauthier* v. *The King* (1918), 56 S.C.R. 176; *Bowers* v. *Hollinger*, [1946] O.R. 526, at p. 536; *Re Sternschein* (1965), 50 D.L.R. (2d) 762; *Deeks McBride Ltd.* v. *Vancouver Assoc. Cont. Ltd.*, [1954] 4 D.L.R. 844, at p. 848; *Halifax* v. *Halifax Harbour Commissioners*, [1935] S.C.R. 215.

[36] S. 53.

[37] S. 54.

[38] S. 49.

[39] S. 57.

[40] S. 52.

certain potential pollutants such as suspended solids, dissolved salts and toxic substances, in their waste effluents. Mining, pulp and paper, chemical and food processing industries have altered processes to re-use process water that has become polluted. The plating industry by the use of re-circulation and recovery systems, the steel industry by re-generation of hydrochloric acid and the pulp and paper industry by the use of save-alls and bark burning facilities, have reduced the loss of potential pollutants to their waste disposal systems.

However, many industries modify their processes to recover most of the potential pollutants because the value of these materials or the saving in costs from not treating them generally outweighs the cost of constructing and operating treatment works for them or of paying recurring fees to have them treated in municipal sewage works. The difficult challenge remains: to influence industries—by public opinion, financial incentives or assistance or legal sanctions—to undertake costly waste treatment programmes which not only yield no profit to them but will result in loss unless the cost of waste treatment can be fully recovered from consumers within a reasonable time.

(b) *The Municipal, Drainage, Public Parks and Planning Acts*

The major local municipalities in the Basin have passed by-laws under The Municipal Act to prohibit and regulate the discharge of pollutants into land drainage works, private drains and connexions to any sewer or sewage works for the disposal of domestic sewage and industrial wastes.[41] The purposes of such by-laws are to protect municipal sewage works from damage or obstruction, to enable sewage treatment works to treat, adequately, all wastes being discharged into them so as to produce the least deleterious quality of effluent before it is discharged into waters, to prevent or reduce pollution that, in the absence of such by-laws, would be caused by the discharge of wastes directly into waters without treatment, to protect municipal employees from injury and to prevent certain wastes from adversely affecting bacteria used in the sewage treatment method known as the activated sludge process which is commonly used by municipalities. The Commission assists municipalities to determine proper standards of quality for wastes to be discharged into their works. These standards are then incorporated into municipal sewage control by-laws.

Under other provisions all municipalities may pass by-laws, *inter alia*, for preserving shores, bays, harbours, rivers and waters and the banks thereof, for prohibiting the injuring, fouling, filling up or encumbering of such areas or waters, and for requiring and

[41] R.S.O., 1960, c. 249, as am., s. 379(1)125.

regulating the removal therefrom of all sunken, grounded or wrecked vessels, rafts, logs or other obstructions or encumbrances.[42]

These provisions authorize a municipal by-law for prevention of pollution to apply to all waters, including those of federal harbours and canals, within the municipality. The by-law would not necessarily encroach on a legislative field within exclusive federal jurisdiction such as management of federal harbours and canals or navigation and shipping. Nor would it necessarily conflict with section 27 of The Ontario Water Resources Commission Act or with a valid provision of federal legislation, a regulation thereunder or a valid by-law of a federal harbour or canal authority for management of a harbour or a canal, for navigation and shipping or for prevention of pollution relating thereto.

If the municipal by-law encroached on a field within exclusive federal jurisdiction or if there was such a conflict or if it was otherwise within an occupied legislative field, it would be invalid.[43]

The Municipal Act contains other provisions which may be used to control the discharge of pollutants into waters or in places from which they can reach waters within the municipality.[44]

The extent to which the foregoing powers to control pollution are conferred upon a metropolitan or regional municipality and are retained by the area municipalities within the metropolitan or regional municipality depends on the provisions of the statute establishing the metropolitan or regional municipality.[45]

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[42] Ss 377.43, 377.45, 377.50.

[43] *Re Neilson Engineering Ltd.* v. *City of Toronto*, [1968] 1 O.R. 271; *R.* v. *Rice*, [1963] 1 C.C.C. 108; *Re Wheatley, Re Kodak & Marsh* (1958), 24 W.W.R. 323; *R.* v. *C.S.L. Ltd.*, [1961] O.W.N. 89; *R.* v. *Karchaba* (1966), 52 D.L.R. (2d) 438; *McKay* v. *R.*, [1965] S.C.R. 798; *C.P.R.* v. *Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; see also *Regina* v. *Morin* (1966), 52 D.L.R. (2d) 644.

[44] Ss 379(1)62; 379(1)68a—"private property" probably includes such property that is covered with water; 379(1)69; 379(1)76; 379(1)112—"land" probably includes land covered with water; 379(1)116.

[45] The Municipality of Metropolitan Toronto Act, R.S.O., 1960, c. 260, as am. (referred to as the "Metro Act"). Para. 116 of sub. s. (1) of s. 379 of The Municipal Act has been made applicable to the Metropolitan Corporation by virtue of s. 255(7) of The Metro Act but paras 62, 68a, 69, 75, 76, 112 and 125 of sub. (1) of s. 379 and paras 43, 45 and 50 of s. 377 have not been made applicable. However, as to s. 379(1) 75, 76 and 112, see s. 73a (5) and (12) of The Metro Act which gives Metro paramount authority over the area municipalities. It is not clear whether any provision of The Metro Act and in particular s. 60 or s. 65, authorizes the Metropolitan Corporation to exercise powers as broad as those contained in ss 379(1)125 and 377.43, .45 and .50 of The Municipal Act. See Metropolitan Toronto by-law 2520 of November 2nd, 1965.

Area municipalities within Metro continue as local municipalities (s. 150 of The Metro Act) and as such have all the powers of a local municipality under The Municipal Act and other statutes, to control pollution, except so far as their powers have been expressly subordinated to those of Metro, for example, as in s. 73a(5) and (12) of The Metro Act. A by-law of an area municipality is invalid if it conflicts with a valid by-law of Metro. See *Re Neilson Engineering Ltd.* v. *City of Toronto, supra*, foot-

The Drainage Act makes it an offence for any person to discharge or permit the discharge of any substance other than unpolluted drainage water into drainage works constructed for land drainage under the Act unless authorized by a by-law of a municipality approved by the Commission.[46]

The Public Parks Act makes it an offence for any person to throw or to deposit any injurious or offensive matter into water, or upon ice in case the water is frozen, or to foul water in any reservoir, lake or pond in a public park in a municipality.[47]

By virtue of provisions of The Planning Act,[48] the Province and a municipality, by regulating the sale and development of land and land use in the municipality, can control the volume and quality of sewage resulting from the initial stage of future residential, commercial and industrial growth on the land. Such control can ensure that at this initial stage, in accordance with the requirements of the Commission, there will be adequate municipal and other sewage services to collect, transmit, treat and dispose of such sewage. After initial development of land in the municipality takes place, these provisions permit some control of the volume and quality of sewage produced by subsequent activities on the land.

The Act authorizes a municipality to prohibit the use of land or the erection or use of buildings unless, *inter alia*, adequate municipal sewage services are available to collect, treat and dispose of sewage resulting from such use.[49] It can also prohibit the erection of buildings on land that is subject to flooding or where, by reason of its character, the cost of construction of sewage or drainage works is prohibitive thereby preventing the discharge or deposit of pollutants on the land and thence into waters.[50]

(c) *The Public Health and The Pesticides Acts*

Any polluted waters in the Basin that are or may become injurious or dangerous to health or that prevent or hinder or may prevent or hinder the suppression of disease are a nuisance and

note 43. See by-law 22863 of May 12th, 1966, as am. passed by the City of Toronto to control the discharge of pollutants into its sewers or sewers connected therewith.

[46] S.O., 1962-63, c. 39, s. 1(f); s. 59(1), (2).

[47] R.S.O., 1960, c. 329, s. 19(1)(c).

[48] R.S.O., 1960, c. 296, as am.; Part I, especially ss 10, 15, 16—an official plan and its implementation by municipal by-law; Part IV—the powers of a committee of adjustment; s. 20—a redevelopment plan and a redevelopment area; ss 26, 27(1)(b)—designation of an area of subdivision control by by-law or order of the Minister of Municipal Affairs, prohibition conveyances of land in the area except where permitted by s. 26; s. 28—approval of plans of subdivision; ss 27 and 30—the powers of a municipal council to control land use by zoning by-laws and the power of the Minister by order to exercise the same powers.

[49] S. 30(3).

[50] S. 30(1)3.

may be abated as provided under The Public Health Act.[51]

Consideration is being given to a revision of this Act but it is not expected that there will be significant changes in the powers to abate polluted waters which adversely affect the health or well being of the public.

Other provisions of the Act deal with the prohibition of pollution of waters[52] and with the control of septic tanks, cesspools, privy-vaults, polluted wells, ditches, gutters and accumulations of refuse.[53]

Pesticides deposited on or over land or in buildings or vehicles may be carried by wind or runoff or flow into surface waters or infiltrate into ground water or be carried into ground water by rainfall, melting snow or surface water. Buildings and vehicles could be adjacent to or over waters, and land under, adjacent to or surrounded by waters.

The Pesticides Act and regulations apply to "structural extermination", that is, an extermination "in, on or adjacent to a building or vehicle" and to "land extermination", that is an extermination "on or over land".[54] It is not clear whether this latter phrase includes land covered with water such as lakes, rivers, streams and other bodies of water. The wording of the Act seems to indicate that it does not apply to exterminations in waters.[55] I have already referred to section 28b of The Ontario Water Resources Commission Act for the control of the application of pesticides in waters.[56]

The Regulation provides that no person shall use any specified pesticides in an extermination in such a manner that the pesticide comes into contact with an area other than the area to be treated[57] and that no person shall deposit any pesticide from equipment used in an extermination upon any site other than a site used for the deposit of such substances.[58]

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[51] R.S.O., 1960, c. 321, as am., ss 82; 83(b)(c); 5(2) and (3); 33(1); and 1(s), 84-93.

[52] S. 6.16 authorizes the Minister of Health, with the approval of the Lieutenant Governor in Council to make regulations, *inter alia*, for preventing pollution of lakes, rivers, streams, and other inland waters by depositing therein sewage, excreta, vegetable, animal or other matter or filth. No regulations have been made. S. 4 of the by-law in Schedule B to the Act prohibits any person within a municipality, *inter alia*, depositing upon, on, or into any lake, pond, bank, harbour, river, stream, or water any manure or other refuse or vegetable or animal matter or other filth. This by-law is in force in every municipality under the circumstances set out in ss 8 and 122 of the Act.

[53] Ss 6, 13, 14, 15 and 16 of the by-law in Schedule B to the Act; see also ss 8 and 122 of The Public Health Act,*supra*, footnote 51.

[54] S.O., 1967, c. 74, as am., ss 1(g) and 1(1).

[55] *Ibid.*, s. 9.

[56] *Supra*, footnote 14.

[57] O. Reg. 445/67, as am., ss 23 and 70.

[58] *Ibid.*, s. 24(1).

If the Act does not apply to extermination in waters the effect of these provisions is to prohibit any use of the specified pesticides on land or in a building or vehicle in such a manner that they come into contact with water and to prohibit their deposit in waters from equipment used in an extermination.

If the Act does apply to extermination in waters the effect of the first provision is to limit the extent of application of these pesticides to areas of waters which are intended to be treated, thereby prohibiting the pollution of surrounding waters.

It may be said that the effect of the second provision is to prohibit the deposit in waters of any such pesticide from equipment used in an extermination because waters are not sites used for such deposits. The provision that no equipment used to perform an extermination can be washed in any lake, river, or other surface water supports this view.[59]

Equipment for extermination that uses water from a lake, river or other surface water must have an effective, approved device to prevent backflow which might carry the pesticide from the equipment back into the water.[60]

Where pesticides have been deposited in any lake, river or other surface water notice must be given to the Department of Health and the local medical officer of health.[61] Such notice is essential for precautions to be taken to prevent any use of the water.

Cyanide compounds must not be used in a building or vehicle where they can come into contact with any waters.[62] An example of such prohibited use would be in a flour mill where water is used to generate power for the mill. The general use of certain pesticides has been prohibited which should prevent any future contamination of waters by these pesticides.[63]

An empty glass or metal container that has been used to hold a pesticide used in extermination and any material discarded after an extermination with an organic phosphorous compound shall, *inter alia*, be buried under earth so as not to pollute any watercourse or water table.[64]

These provisions of the Act[65] and Regulation prevent or minimize pollution of waters by the use of any toxic or noxious substances such as the pesticides specified in the Regulation, for the destruction, prevention or control of insects, vermin, birds,

[59] *Ibid.*, s. 26.
[60] *Ibid.*, s. 25.
[61] *Ibid.*, s. 24(2).
[62] *Ibid.*, s. 39.
[63] O. Reg. 197.69—aldrin, dieldrin and heptachlor; O. Reg. 386/69—DDT and TDE.
[64] *Supra*, footnote 57, ss 29(b) and 54.
[65] See also ss 2, 4, 6, 8, 9, 10, 13 and 14 of The Pesticides Act for provisions which can be used to prevent or minimize pollution of waters.

rodents, termites or other pests, fungi or vegetation on or over land and in or adjacent to buildings or vehicles.

(d) *The Conservation Authorities Act and The Energy, Gasoline Handling and Air Pollution Control Acts and Surface Disposal of Waste*

Under The Conservation Authorities Act, a conservation authority has power to control the flow of surface waters to prevent or reduce the adverse effects of pollution thereof for the conservation, restoration, development and management of natural resources.[66]

Under this power an authority may augment the flow in streams and rivers by releasing water to them from conservation reservoirs in which water is stored during periods of excess flow, and from certain lakes in the Basin which are dammed at their outlets by the authority. This augmented flow increases the capacity of waters of these rivers and streams to dilute and assimilate pollutants that have been discharged into them.

In addition an authority may, in the area subject to its jurisdiction, with the approval of the Lieutenant Governor in Council, make regulations prohibiting or regulating the placing or dumping of fill of any kind which may affect the control of pollution in the area. Such regulations have been made.[67]

The Energy Act provides for the control of the exploration and drilling for and the production of oil and gas.[68]

The drilling of oil or gas wells, the production of oil or gas from wells or the injection of fluids under pressure into wells to increase the yield of oil or gas might either directly pollute surface waters or first pollute ground waters and then surface waters.

Such pollution could be caused if oil, mineral water or other fluids flow uncontrolled from a well being drilled, due to improper drilling procedures or equipment, or otherwise escape. These substances can escape from a defective well head, openings in or around defective or improperly sealed casing, an abandoned well that was not plugged, a leak in a pipe line connecting a well with on-shore distribution facilities or through or around plugs in an improperly plugged well.

[66] S.O., 1968, c. 15, as am., ss 19(k) and 18.

[67] *Ibid.*, s. 26(1)(f); O. Reg. 342/69—The Metropolitan Toronto and Region Conservation Authority; O. Reg. 56/69—Hamilton Region Conservation Authority; O. Reg. 47/69, as am.—Lower Thames Valley Conservation Authority. See also the International River Improvements Act, S.C., 1955, c. 47.

[68] S.O., 1964, c. 27, as am.; see also R.R.O. 440 under The Mining Act regarding exploration and production of oil and gas in the lower Great Lakes, especially s. 24; *Ex Parte Underwater Gas Developers Ltd.*, [1960] O.R. 416 (establishing and serving gas well sites under navigable waters within jurisdiction of Province). See also R.R.O. 438, form 3; R.R.O. 440, form 2 and s. 29.

Inadequate control of fluids and cuttings from the drilling of wells may also cause pollution.

When fluids are injected into the subsurface by means of a well to increase oil production there is a possibility that the injected fluids could migrate upwards through an improperly plugged well (other than the oil and gas producing wells and the injection well) or through other fractures or faults in the rock above the formation into which the fluids are being injected and pollute waters, ground or surface.

Under the Act a permit is required to bore, drill or deepen a well, a licence is required to operate a machine for these purposes and to plug a well, and a licence is required to produce oil or gas.[69]

Where drilling and production operations take place in Lake Erie a term of the licence and permit requires the holder to control the spillage of oil into the lake and prevent contamination of surrounding waters by adequate remedial action. If he does not, the Department can do so and recover the cost, and the Minister of Energy and Resources Management can revoke the licence or permit.[70]

The holder of a permit or a licence must have at least $1,000,000.00 liability insurance to provide compensation for all damage caused by drilling and production operations in water-covered areas.[71]

The liability under such insurance is twofold:

(a) to pay, subject to the limit of $100,000.00 for any one incident, all sums which the holder becomes obligated to pay by reason of any requirements of the Act or regulations or any liability arising therefrom. The term in a licence or permit to pay the cost of measures taken by the Department to control spillage of oil into Lake Erie and prevent contamination of surrounding waters is an example of such a liability.[72]

(b) to pay, subject to the limit of the policy, all sums which the holder becomes obligated to pay by reason of liability imposed by law, other than arising from the Act and regulations, because of damage to or destruction of property caused by the operations.

The above limitations apply only to the liability of the insurer under the insurance policy and not to the insured permit or licence holder's legal liability for the costs of the Department for the damage to or destruction of property which is not subject to a pecuniary limit.

The Regulation contains specific provisions for the protection

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[69] Ss 5(3), 5(2), 5(1)(c).
[70] S. 10(1), s. 10(3).
[71] O. Reg. 420/68, as am., ss 26(2), (3), (4).
[72] *Supra*, footnote 68, s. 5(1)(c); s. 10.

of surface and ground waters. Thus the operator of a well must plan and effect a casing and cementing programme for it to protect all fresh water horizons (ground water) and to prevent the migration of oil, gas and water from one horizon to another.[73] In drilling and production operations he must ensure that salt water, oil, refuse and any flammable products from a well, tank or other production installations are not handled or disposed of so as to run into or contaminate any fresh water horizon or body of water or remain in a place from which they might contaminate any fresh water or body of water.[74] During the production stage, the operator of a well is required to immediately remove to a safe distance and burn or dispose of rubbish, debris, and oily refuse from a well or tank or resulting from any operation at a well so that fresh water is not polluted.[75]

In most cases, cash, security or a bond in the sum of $500.00 where the well is on land and $20,000.00 where the well is in a water-covered area must be deposited with the Treasurer of Ontario.[76]

Where a work, which includes a well,[77] does not comply with the Act or regulations (where, for example, it may cause pollution of waters) and is not corrected after notice, the Minister may take possession and do whatever is necessary to make the work comply, or may remove and sell any part or the whole of the work.[78] The cash, security or bond is thereupon forfeited.[79] Compliance with these and other provisions of the Act and Regulation[80] designed specifically to ensure the adoption of adequate procedures, reporting of information and the proper use and protection of equipment should virtually prevent pollution of waters from oil and gas wells.

The requirements for insurance coverage and bonding described above are intended to ensure financial responsibility and to permit prompt action by the Department in the event of pollution.[81]

The Act and Regulations contain provisions for control of the transmission of oil and fuel oil, the distribution of fuel oil by pipeline, appliances and utilization and storage of fuel oil.[82]

[73] *Supra*, footnote 71, s. 20(1).
[74] *Ibid.*, ss 21(2)(b) and 31(2)(b).
[75] *Ibid.*, s. 31(3)(b).
[76] *Ibid.*, s. 15(1).
[77] *Supra*, footnote 68, s. 1(27).
[78] *Supra*, footnote 71, s. 41.
[79] *Ibid.*, s. 15(4).
[80] *Supra*, footnote 68, ss 5, 6, 9(1)(a), 10, 2, 3, 4, 9(1)(c), (e), (f), 11(1), (3); *supra*, footnote 71, ss 14(a), (b), (d), (f); 16(1); 17, 18-24; 25; 26(7), (8), (9), (10), (11), (13), (15), (16); 30, 31, 32, 33; 37-42; 43-55; 57; and Schedule 2.
[81] *Supra*, footnote 71, ss 26(2) and 15(1).
[82] *Supra*, footnote 68, s. 1.8; s. 7(1)(a), (c); s. 11(2); 11(3); O. Reg.

Compliance with these provisions should eliminate any risk of leaks from these sources that might cause pollution.

The Gasoline Handling Act and the Regulation thereunder regulate the handling, storing, transporting and dispensing of gasoline and associated products by means of storage tanks, containers, tank truck loading facilities, tank trucks, service stations, garages, consumer outlets and marinas.[83]

These operations may cause pollution if the facilities are located on waters or in areas from which an overflow, escape or discharge of such products may be carried by runoff or may flow into surface waters or infiltrate into ground water or be carried into ground water by rainfall, melting snow or surface water.

The Act contains legal controls which can be used for the purpose, *inter alia*, of preventing pollution.[84]

The Regulation contains several provisions expressly designed for this purpose. Every above ground bulk-storage tank must be installed in a location where it can be diked to prevent any gasoline or associated product from flowing in any manner which would contaminate any fresh water source or waterway (a stream, river and lake) or allow entry of the product into an underground stream, or drainage system or sewer (from which it can flow into water, surface or ground).[85] Diking to prevent such contamination of or entry into waters, sewers, or drainage system is required in specified cases.[86] An amendment is being considered to require removal and disposal of contaminated fluid from the space within the dike so as not to cause pollution of waters.

An operator of a bulk storage plant, service station, tank truck and other road transportation facility is required to take every possible precaution to ensure that such products do not escape from storage, distribution or dispensing facilities in such a manner as to contaminate any fresh water source or waterway or to allow entry of the products into a sewer system or an underground stream or drainage system (from which they can reach waters) and the escape of these products in such manner or into any sewer or subsurface drainage system is prohibited.[87]

The installation, storage, distribution and dispensing of gasoline and associated products at marinas are specifically controlled to eliminate or minimize any risk of pollution of waters.[88]

325/64 as am., O. Reg. 335/64; see also s. 22(1)(b) of Bill 107 which makes it an offence to waste, permit the loss of or to dispose of any gas, oil, fuel oil or propane in any manner which may contribute to water pollution.

[83] The Gasoline Handling Act, S.O., 1966, c. 61, as am.; O. Reg. 276/66, as am.

[84] *Ibid.*, ss 2, 3, 4, 6.

[85] O. Reg. 276/66, as am., s. 6(23).

[86] *Ibid.*, s. 6(30); see also s. 6(37).

[87] *Supra*, footnote 85, ss 8(6); 8(14).

[88] *Ibid.*, s. 7 (31-35 incl.).

Other provisions require the use of procedures and equipment to detect leaks at an early stage and to prevent or contain discharges of petroleum products before any waters are contaminated.[89]

The subsurface disposal of liquid industrial waste or mineral water, primarily salt water encountered in oil and gas production, takes place by the injection through a well of these substances into suitable geological formations after, in the case of liquid industrial waste, they undergo surface treatment to ensure compatibility with existing formation fluids. This method has proven to be economical and safe where the operation is properly planned and carried out.[90]

The use of the subsurface can even be feasible in special circumstances for disposal of radioactive wastes. In the next ten years "Ontario will be a most significant user of radioactive materials for purposes of power and other industrial needs. . . . Where favourable subsurface conditions exist, disposal by this method may represent the most practical approach for radioactive storage over long periods . . . ".[91]

If improperly carried out, injection of liquid wastes or mineral water into a subsurface formation for disposal can cause pollution of waters, surface and ground, in the ways referred to earlier in connexion with oil and gas.

Mention has been made of pollution resulting from abandoned wells which were not plugged or were improperly plugged. Such pollution is of particular significance when one bears in mind that in certain counties and townships in Ontario "it is very probable that 10,000 wells (oil and gas) were never properly plugged and the exact locations of these wells are unknown. Although evidence suggests that many of these will have become plugged as a result of up-hole sloughing, any significant increase in pressure associated with subsurface disposal could create serious pollution problems".[92]

Liquid waste or mineral water transmitted by conduit through a well for disposal in a subsurface formation is "sewage" and surface installations for transmission and the well itself are "sewage works" within the definitions contained in The Ontario Water Resources Commission Act.[93] Therefore the drilling, testing, operation, monitoring and abandonment of such wells are subject to that Act, which requires the approval of the Commission to the estab-

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[89] *Ibid.*, ss 5(7); 5(8)(c); 5(53); 5(54); 6(31-34); 6(37); 6(51); 7(8); 7(20)(c); 8(1)(a), (d); 8(15); 8(16); 8(17); 9(4); 9(9).

[90] See Subsurface Disposal of Liquid Waste in Ontario (1968), p. 5 by D. D. McLean, Petroleum Resources Section, Department of Energy and Resources Management.

[91] See *op. cit., ibid.*, pp. 45, 47.

[92] See *op. cit., ibid.*, p. 12.

[93] *Supra*, footnote 2, s. 1(p), (q).

lishment of a well and to the location of the disposal of the sewage.[94]

The Regulation under The Energy Act requires the location of wells and the disposal of waste or mineral water in an underground formation to be approved by the Minister of Energy and Resources Management.[95] The location of a well and the nature of an underground formation are important factors in determining whether the waste or mineral water can reach, commingle with, and pollute fresh water, for example, a well for potable water supply.

Waste disposal wells must also be cased and cemented in such a manner as to prevent the waste or mineral water from entering any other formation than the one approved by the Minister.[96] Compliance with this provision would prevent pollution of fresh water in such other formation.

The provisions of The Energy Act and Regulation dealing with oil and gas which I have referred to earlier, apply *mutatis mutandis* to the disposal of wastes and mineral water in subsurface formations by means of wells (which are subject to the Act).[97] They provide safeguards against any risk of pollution from this method of disposal.

The surface disposal of waste on land or in a building may cause pollution if pollutants from the waste disposal site are carried by runoff or flow into surface waters or infiltrate into ground water, or are carried into ground water by rainfall, melting snow or surface water. Generally speaking, land covered with water, marshy land and low-lying land subject to flooding are not suitable for such sites because of the expense of constructing works to prevent the movement of ground or surface waters across or through the site which may cause pollution of the water.

The proximity of the site to surface waters, springs, wells, and to ground water acquifers, the characteristics of the overburden and bedrock of and adjacent to the site, the nature of the waste being deposited or processed and the capability of the works constructed at the site to prevent and intercept the movement of waters across and through the site are important factors in determining whether the location, construction and operation of the waste disposal site and system may cause pollution.

A section of The Public Health Act not yet proclaimed in force provides control of the location, construction, operation and aban-

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[94] *Ibid.*, s. 31(1); pre-Cambrian formations are not generally suitable for waste disposal wells. In the remote event of such a well being drilled in a pre-Cambrian formation it could be controlled under The Ontario Water Resources Commission Act rather than The Energy Act which does not deal with such wells. See *supra*, footnote 68, s. 1.26.

[95] *Supra*, footnote 71, ss 14(e), 36(1).

[96] *Ibid.*, s. 36(2).

[97] *Supra*, footnote 68, s. 1.26; 11(1)(k); *supra*, footnote 71.

donment of waste disposal sites and systems.[98]

Waste,[99] waste disposal site[100] and waste disposal system[101] are defined but it is not clear whether the definition of waste disposal site includes land covered with water.

No person or municipality (defined[102] to include a metropolitan municipality) shall establish, alter, enlarge, or extend a system or a site unless a certificate of approval has been obtained.[103]

Plans, specifications and an engineer's report together with any required information must be submitted to obtain a certificate of approval.[104] The deposit of waste upon any site not approved as such is prohibited.[105] Waste must be removed from a site not approved and the site restored to a satisfactory condition.[106] A waste disposal system or site must conform to the regulations.[107] Upon a report of the Minister, a municipality must provide for the collection of waste and establish, operate, extend, replace or repair a waste disposal system.[108] Regulations can be made prescribing standards for waste disposal systems and sites and regulating the treatment and disposal of waste and providing for the cancellation and suspension of certificates of approval.[109]

The section affords adequate legal controls of the surface disposal of waste and, in particular, of the location, construction and operation of a waste disposal site, to prevent any pollution of surface and ground waters from such disposal.

The control of surface disposal of waste has been transferred to the Department of Energy and Resources Management but it is

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[98] S.O., 1967, c. 79, s. 95a, as am.; see also s. 6.43 of The Public Health Act, *supra*, footnote 51; see The Municipal Act *supra*, footnote 41, s. 379(1)112 for the power of a local municipality to pass by-laws prohibiting, regulating and inspecting the use of land or structures within the municipality for dumping or disposing of garbage, refuse, or domestic or industrial waste. The by-law may define such waste and require the land to cease being used for such purposes. If provincial legislation similar to s. 95a is brought into force, a by-law under s. 379(1)112 would be invalid if it is in conflict with such legislation or any regulation thereunder. See *Re Neilson Engineering Ltd.* v. *Toronto*, *supra*, footnote 43; see also The Municipality of Metropolitan Toronto Act, *supra*, footnote 45, s. 73a.

[99] *Ibid.*, s. 95a(1)(c); s. 95a(18)(a).

[100] S. 95a(1)(d).

[101] S. 95a(1)(e).

[102] S. 95a(1)(a).

[103] S. 95a(5).

[104] S. 95a(9).

[105] S. 95a(11).

[106] S. 95a(12).

[107] S. 95a(13).

[108] S. 95a(17).

[109] S. 95a(18) (d)(c); see also subsec. (6)—security to assure satisfactory maintenance of the system or site or removal of waste therefrom; (14)—on default the Minister may cause the necessary work to be done at the expense of the operator to make the system or site conform to the regulations; (16)—contravention of the section or regulations or of an order of the Minister is an offence.

not expected that any basic changes will be made in the principles outlined above.

Waste as defined in the section and sewage as defined in The Ontario Water Resources Commission Act do not have the same meaning because, generally speaking, sewage under the Act means the wastes referred to in it[110] that are conveyed in a sewer. Therefore waste disposal systems or sites are not sewage works within the definition of that term in The Ontario Water Resources Commission Act[111] and are not subject to the regulatory powers contained in it except in so far as sewers are included in such systems or sites for the collection, transmission or disposal of waste. An example is a drainage collection system constructed as part of the waste disposal site to remove waste effluent for disposal in a watercourse or for discharge into a sewer connected to treatment works.

(e) *The Mining Act*

Under the Act the owner or lessee of a mine or a mill for treating ore or quarry may apply to the Mining Commissioner for the right to deposit on land or discharge into water any tailings or other waste products, if the effects of such deposit or discharge are not injurious to life or health.[112] The Commissioner may grant such right if it is reasonable to do so, subject to compensation for any injury caused. The Commissioner may also order the applicant to construct works, make grants to, and do any other thing for the benefit of any person whose rights or property are affected and must require such terms in an order granting the right as he deems proper for the protection of such person.[113]

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[110] *Supra*, footnote 5.

[111] *Supra*, footnote 6.

[112] R.S.O., 1960, c. 241, as am., s. 646 (1)(i).

[113] S. 646 (2)(3); see D. Horan, Mining Court & Mining Commissioners' Cases (1918-1960), Vol. 3, for *Hollinger Gold Mines & Olsen* (1930), p. 58, and *Kerr Addison Gold Mines Ltd.* (1938), p. 100, for consideration of applications under predecessor sections of s. 646 for the right to dispose of tailings in lakes. In the latter case, the court considered the reasonableness of the application from the standpoint of protection of the quality of waters for human consumption, domestic use and for mining purposes. The question of the possible effect of tailings on boating and on fish and other aquatic life was not raised. In *Re Faraday Uranium Mines & Arrowsmith*, [1962] O.R. 503, the Court of Appeal held that s. 646, if an order of the Commissioner is made, has the effect of depriving riparian owners of their normal remedies at common law and in equity and substitutes therefor compensation for all injury and damage suffered, including injurious affection to their lands caused by interference with their riparian rights—in this case pollution of a lake on which riparian owners had resorts, resulting from disposal of radioactive tailings on property of the mining company. It was also pointed out that by virtue of subsec. 13 an order under s. 646 gave no "blanket or irrevocable permit" for the future nor any right of a permanent nature if the situation changed. *Marmoraton Mining Co. Ltd.* v. *The Mineral Exploration Co. Ltd.*, [1954] O.W.N. 678; *Salvas* v. *Bell*, [1927] 4 D.L.R. 1099.

These broad powers permit the Commissioner to take all necessary measures to prevent any pollution from the discharge of tailings under a grant of a right to do so. In practice he requires the applicant to obtain the consent of the Commission to such a grant and requires the construction of such works and the taking of such measures for the prevention of pollution as may be requested by the Commission.

During the drilling of brine wells, the production of brine from wells or the injection of water under pressure through wells to produce brine, oil, brine or other fluids might either directly cause pollution of surface waters or first cause pollution of ground waters and then surface waters in the ways referred to earlier in connexion with oil and gas. The abandonment of brine wells which have not been plugged or have not been plugged properly might also result in such pollution.

The Act contains legal controls expressly designed to prevent pollution related to brine wells.[114]

(f) *The Lakes and Rivers Improvement, Public Lands and The Provincial Parks Acts*

The Lakes and Rivers Improvement Act contains legal controls expressly relating to pollution caused by the operation of a saw mill, a pulp mill and pulp and paper mill.[115]

A person commits an offence if he deposits or discharges any refuse, sawdust, chemical or substance from a mill into a lake or river or on the shores or banks or permits anyone else to do so.[116] An officer of the Department of Lands and Forests may, if authorized by the Minister of the Department, order the owner or occupier of a mill to cause the cessation of such deposit or discharge and where the officer is of the opinion it is practicable to do so, he may order the removal of any such substance from the lake, river, shores or banks.[117] Failure to comply with an order is an offence.[118]

A court is given a discretion:[119]

> (a) to grant an injunction to take effect upon such terms and conditions or subject to such restrictions or limitations as are deemed proper;

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[114] S. 614 (8), (9), (11)(b); see also sub. ss (2), (5), (10), (11), (12) for powers which can be used, *inter alia,* to prevent pollution. See also s. 98 for compensation.

[115] R.S.O., 1960, c. 203, as am., s. 32; s. 33; s. 34; see also s. 30(1).

[116] S. 33 (1)(2).

[117] S. 33(3).

[118] *Ibid.*

[119] *Supra,* footnote 115, s. 34(1); clause (a) of subsec. (1) is intended to overrule part of the decision in *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398 that the economic importance of a mill to the community in which it operates, is irrelevant in an action for an injunction and damages that is based on pollution caused by the mill. See also The K.V.P. Com-

(b) to refuse to grant an injunction where the importance, advantage and benefit of the operation of a mill to the locality in which it operates and its residents outweighs any private damage or injury or any interference with private rights, riparian or otherwise, caused by the operation of the mill; or

(c) in lieu of granting an injunction to require the owner or occupant of a mill to take such measures to prevent or diminish any private damage or injury, or any interference with private rights, riparian or otherwise, caused by the operation of the mill as are deemed proper.

The Act confers power to order the removal of any tree, part of a tree, refuse or substance deposited into a lake or river or on the shores or banks in such a manner as impairs the natural beauty of the lake or river.[120]

Under The Public Lands Act it is an offence for a person, without written consent, to deposit or cause to be deposited any material or thing upon public lands whether or not covered with water.[121]

The Regulation under The Provincial Parks Act[122] prohibits throwing or dumping any material within a provincial park or along or over the shores of any lake or the bank of any river or stream within a provincial park and prohibits littering a park with refuse.[123] Contravention of this Regulation is an offence.[124]

(g) *Some Indirect Legal Controls*

There are numerous provisions in Acts and regulations which, although not expressly prohibiting pollution, can be applied to prevent or minimize it.[125]

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pany Limited Act, S.O., 1950, c. 33, s. 1(1) which dissolved the injunction granted in this case. While s. 3 of the Act provides for arbitration of claims against this company based on its pollution of the Spanish River, in lieu of bringing an action against it, s. 2 preserves the right to bring such an action. S. 4 imposes a duty on the Research Council of Ontario, at the expense of the company, to endeavour to develop methods that if applied by the company would abate its pollution of the river. Compare the power of the Commission to order such research, *supra*, footnote 32.

[120] S. 31.

[121] R.S.O., 1960, c. 324, as am., s. 27a.

[122] R.S.O., 1960, c. 314, as am., see s. 15(1)(a) for the authority to make such a regulation.

[123] R.R.O., 1960, Reg. 499, s. 3.

[124] *Supra*, footnote 122, s. 16.

[125] S. 28 of O. Reg. 331/66 under The Department of Tourism and Information Act, S.O., 1966, c. 44, as am. (connexion of sanitary conveniences in tourist establishments to an approved sewage disposal system); s. 11(i) of R.R.O. 434 under The Milk Act, S.O., 1965, c. 72, as am. (the construction or alteration of, *inter alia*, a milk or cheese plant or creamery to be made so that sewage is carried by pipes connected to a municipal sewer or septic tank).

B. *Constitutional Basis.*

The provisions of the Acts which I have outlined are valid under the British North America Act[126] as coming within the exclusive provincial legislative competence over the Management of the Public Lands belonging to the Province,[127] property and Civil Rights in the Province,[128] matters of a merely local or private Nature in the Province,[129] Local Works and Undertakings other than the Classes of Works and Undertakings assigned to the federal government under the Act,[130] Municipal Institutions in the Province[131] and the Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any provincial law.[132]

This legislative competence provides ample authority for the Province to deal effectively with pollution by enforcing standards of quality for waste effluents and for receiving waters so that the maximum number of uses can be made of such waters.

C. *Future Legislation.*

Legislation to authorize the imposition of additional legal controls may become necessary. For example, legislation may be needed to require modifications of industrial processes or to control the location of new or the expansion of existing industrial plants by a permit system; to prohibit certain types of industries in some areas; to require municipalities and industries to make radical

S. 6(2) of O. Reg. 449/67 under The Air Pollution Control Act, S.O., 1967, c. 2, as am. (The emission of any odour to such degree or extent as is described in this provision, is prohibited; such an emission may be caused by pollution of waters.)

S. 6a(3)(e) of The Emergency Measures Act, S.O., 1962-63, c. 41, as am. (control, in an emergency, of the administration, facilities and equipment of a municipality for the purpose, *inter alia*, of providing and maintaining sewage disposal); see also s. 4 of the Act. S. 24(2) of The Public Health Act, *supra*, footnote 51 (empowers a municipality, under the circumstances set out in the section, to install sanitary conveniences in a building and connect such conveniences with the common sewers of the municipality). S. 6.42 of this Act authorizes the Minister of Health, with the approval of the Lieutenant Governor in Council, to make regulations with respect to control of sources of ionizing radiation. S. 84.4 of The Game and Fish Act, S.O., 1961-62, c. 48, as am. (regulations with respect to fish huts on ice). See O. Reg. 13/65, as am. made under this authority. Ss 47(1)(c)(d)(e)(ea)(eb), 47a; 47b; 47c; 47d of The Ontario Water Resources Commission Act, *supra*, footnote 2; The only regulation made under these powers is Reg. 471 of R.R.O., 1960, as am. (Plumbing Code).

S. 379(1) paras 75, 76, 77 of The Municipal Act, *supra*, footnote 41 (municipal collection and disposal of garbage and refuse); see also s. 73a of The Municipality of Metropolitan Toronto Act, *supra*, footnote 45 and s. 6.43 of the Public Health Act, *supra*, footnote 51.

[126] (1867), 30 & 31 Vict., c. 3, as am.

[127] S. 92(5).

[128] S. 92(13).

[129] S. 92(16).

[130] S. 92(10).

[131] S. 92(8).

[132] S. 92(15).

modifications in existing techniques of waste treatment and disposal; to require treatment and re-use of process water by industries; to require industries and municipalities to install devices for measuring and sampling the discharge of waste effluents into receiving waters, to analyze the effluents and to make available the results to public regulatory agencies; to prohibit the manufacture, sale or use of products or to require changes in the nature of products, such as detergents and other cleansing agents, to eliminate pollutants which may not be treated adequately or economically by sewage treatment processes and are discharged as part of sewage effluents or otherwise contribute to pollution; to designate areas in which the use of land and practices relating to land will be controlled in order to prevent or reduce pollution caused by erosion and by contaminants carried into waters by runoff, tile drainage and water infiltrating into the ground; to require a municipality, industry or person to report forthwith to the Commission any discharge of industrial products or wastes that may cause pollution; and, to the extent to which the Province has constitutional power, to prevent pollution that may result from the escape of dangerous substances which are also highly polluting, such as acids and toxic chemicals, during handling or while in storage or being transported.

The Commission may require legislation to determine by order rather than by regulation, standards for the quality and quantity of waste effluent for each user of waters and standards for the quality of all or any part of waters. Compliance with standards for waste effluents should ensure the achievement and maintenance of standards for waters. These latter standards would be determined by reference to existing and future uses of waters after taking into account points of discharge and zones of influence of effluents, the factor of dilution under low flow conditions and other relevant matters. Discharge of waste effluents would be permitted or prohibited depending on compliance with the standards for effluents.

It may be necessary to extend the Commission's powers to require an industry to construct dykes, storage tanks or holding basins or to take other measures to prevent or to contain any discharge of industrial products and to require the Commission's approval for the construction or alteration of such works; to require that all necessary measures be taken by any municipality, industry or person causing pollution to eliminate or minimize the effects and in default, to authorize the Commission to take such measures at the expense of the municipality, industry or person; to require a municipality or an industrial or commercial enterprise to keep available at all times equipment, chemicals and other materials that may be necessary to alleviate the effects of pollution caused by it; and to determine fees to be paid to the Commission by any

municipality, industry or person, for the discharge of adequately treated waste effluent, including storm water, into waters.

Legislation may be required to provide some form of financial assistance or incentive for certain types of industries and small municipalities to enable them to establish sewage treatment works which will discharge effluents complying with standards of quality set by the Commission.

III. *Federal Controls and their Constitutional Basis.*

Under the British North America Act the federal government has competence to legislate for the enforcement of standards of water quality and control of pollution for certain purposes.

A. *Navigation and Shipping.*

The exclusive federal jurisdiction in relation to navigation and shipping[133] authorizes the prohibition and regulation of the deposit in waters of debris or rubbish which might obstruct navigation, thereby indirectly assisting to prevent or abate pollution.

For example, the Navigable Waters Protection Act prohibits the deposit of sawdust, slabs, bark or like rubbish that is liable to interfere with navigation, in any water, any part of which is navigable or that flows into any navigable water.[134] The Act also prohibits the deposit of stone, gravel, earth, ashes, cinders, or other rubbish that is liable to sink to the bottom in such water which is not at least twenty fathoms deep.[135] Any waters may be exempted by proclamation from the operation of these prohibitions.[136] The Minister of Transport may appoint places in any navigable waters, not within the jurisdiction of certain persons, where stone, gravel, earth, cinders, ashes or other material may be deposited even though the depth may be less than twenty fathoms, and may regulate such deposits.[137]

The purpose and effect of these provisions is to prevent obstruction of navigation and to maintain navigability. The purpose and effect of section 27 of The Ontario Water Resources Commission Act is to prevent pollution. The legislative field not being occupied, section 27, therefore, applies irrespective of whether the material being deposited is liable to interfere with navigation, the navigability or depth of the water in which it is deposited, or whether it is deposited in waters appointed for this purpose by the

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[133] S. 91(10).
[134] R.S.C., 1952, c. 193, as am., s. 18.
[135] *Ibid.*, s. 19.
[136] *Ibid.*, s. 22; see for an example a proclamation under this section permitting a mining company to dump dredged material in certain areas in the River St. Lawrence: S.O.R./69-488.
[137] *Ibid.*, s. 1A(a); s. 25.

Minister or exempted by proclamation from the operation of these prohibitions.[138]

In some cases acts in aid of navigation and shipping, done by private persons under the authority of federal legislation or by or on behalf of the federal government under such authority, may cause pollution, and because of the supremacy of valid federal legislation, section 27 of The Ontario Water Resources Commission Act is inapplicable to make such acts offences.

For example:

(a) the exercise of the right to throw overboard any dangerous goods without the master or owner of the ship incurring any liability, civil or criminal, in any court in respect of such throwing overboard;[139]

(b) the exercise of the authority of the Governor in Council or the Minister of Public Works to direct any work to be performed in any navigable water for the improvement of its navigation.[140]

Notwithstanding that the ownership of ungranted beds of navigable waters is in the Province,[141] on such direction it is lawful for federal employees or contractors on behalf of the federal government "to enter upon, dig up, dredge and remove any part of the bed of such navigable water".[142]

Although it is not expressly stated that it is lawful to deposit dredged sediments on beds of navigable waters, such a deposit is probably an integral part of dredging to improve navigation of these waters and authority for such a deposit would be necessarily ancillary to the authority to dredge.[143] On this view the deposit of dredged sediments on beds of navigable waters by or on behalf of the

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[138] It is highly unlikely that the statutory permission to deposit materials in navigable waters appointed for that purpose by the Minister or that the exemption of certain navigable waters from the operation of both prohibitions would be interpreted to confer a right on persons, on their own behalf, to deposit materials that would otherwise be contrary to law, for example, on beds of navigable waters owned by the Province without its consent or so that waters may be polluted contrary to s. 27 of The Ontario Water Resources Commission Act. See *Champion & White* v. *Vancouver* (1915), 23 B.C.R. 221, at pp. 231, 245. *London* v. *Vancouver* (1934), 49 B.C.R. 328, at p. 338. *Nicholson* v. *Moran*, [1949] 4 D.L.R. 571, at p. 579. *Irving Oil* v. *Rover Shipping* (1961), 45 M.P.R. 311.

[139] Canada Shipping Act, R.S.C., 1952, c. 29, as am., s. 461(6)(10).

[140] Public Works Act, R.S.C., 1952, c. 228, as am., ss 9 and 37.

[141] Beds of Navigable Waters Act, R.S.O., 1960, c. 32. *A.G. Can.* v. *A.G. Ont.*, [1898] A.C. 700; *R.* v. *Moss* (1897), 26 S.C.R. 322.

[142] *Supra*, footnote 140, s. 37; as to whether this interference with provincial property is valid see *Montreal* v. *Harbour Commissioners of Montreal*, [1926] A.C. 299; *Reference re Waters and Water Powers*, [1929] S.C.R. 200, at p. 214, *et seq.*

[143] *Paul* v. *R.* (1907), 38 S.C.R. 126, at p. 132.

federal government in accordance with the authority to dredge would be lawful even where the beds are owned by the Province and its consent is not obtained.

Where dredging of beds of navigable waters, dumping of dredged sediments and dumping of fill for reclamation of land in such waters are carried out by persons on their own behalf and not for the federal government, different considerations apply.

Any dredging and dumping of fill, as well as the site and plans of these operations, must be approved under the Navigable Waters Protection Act by the Minister of Transport upon such terms and conditions as he deems fit.[144] The dumping of dredged sediments in navigable waters would probably require the Minister's approval as an integral part of, and necessarily ancillary to, dredging.[145]

If in the Minister's opinion, the dredging or dumping of fill (or dredged sediments for disposal) does not interfere sustantially with navigation they do not require his approval.[146]

Under the Act approval of the Minister, where it is required and is given or is dispensed with, does not confer a right on persons on their own behalf to dredge or to dump fill or dredged sediments on beds of navigable waters owned by the Province, without its consent, or so that waters may be polluted contrary to section 27 of The Ontario Water Resources Commission whether the beds are owned by the federal government, the Province or a private person.[147]

The jurisdiction in relation to Navigation and Shipping has been exercised for the express purpose of preventing pollution of waters.

Thus:

(a) Where the Minister has cause to believe that cargo or fuel of a vessel that is in distress, wrecked, sunk or abandoned, is, *inter alia*, polluting or is likely to pollute Canadian waters, he may have the vessel, its cargo or fuel destroyed or removed and sold.[148]

It may be asked whether this provision is valid if its purpose and effect is prevention or abatement of pollution and not control or maintenance of navigation and shipping.

(b) Oil Pollution Prevention Regulations prohibit pollution by oil from ships.[149]

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[144] *Supra*, footnote 134, s. 2(c)(ii)(iv); 4(1)(a). It is not clear whether these sections apply to the deposit of material in appointed dumping places, *supra*, footnote 137.

[145] *Supra*, footnote 143.

[146] *Supra*, footnote 134, s. 4(2).

[147] *Supra*, footnote 138.

[148] *Supra*, footnote 139, s. 495c.

[149] S.O.R./68-434; P.C. 1968-1788.

The Canada Shipping Act has been amended to authorize the Governor in Council to regulate and prevent, by regulations, the pollution of Canadian waters by oil, chemicals, garbage, sewage or any other substances from ships.[150] Regulations of a broader scope than the prevention of pollution by oil have been proposed with respect to ships other than pleasure craft. Consideration is being given to the making of regulations for the prevention of pollution by sewage and garbage from pleasure craft. This amendment raises the question whether this federal jurisdiction can be validly exercised by legislation for the purpose of controlling all types of pollution arising from ships rather than only such pollution as might impede or impair navigation and shipping.

The purpose and effect of the authority under The Ontario Water Resources Commission Act to regulate the storage, treatment and disposal of sewage in boats and ships and of the Regulation[151] is to prevent pollution and not to affect or interfere with navigation and shipping and therefore they do not impinge on the exclusive federal jurisdiction in relation to navigation and shipping. The scope of this authority under The Ontario Water Resources Commission Act and of the amendment to the Canada Shipping Act (assuming the amendment is valid) are coextensive in the Basin and the Great Lakes Boundary Waters. The result is that there is duplication of authority to make regulations in this field but the provincial legislation and regulation in respect of pleasure craft are not rendered inoperative where "there is merely the potentiality of occupation of the field",[152] that is where federal regulations in the same field, for instance, respecting storage, treatment and disposal of sewage in pleasure craft, are authorized but not yet made.

If the federal regulation dealing with pleasure craft that is presently under consideration, is made and is valid, the inevitable question will be raised as to whether it will occupy the field in such a manner as to render inoperative the provincial Regulation for pleasure boats.[153]

Federal decisions with regard to the improvement of navigability or the construction of works for navigation and shipping may, by increasing or decreasing the volume of water in or the rate of

[150] *Supra*, footnote 139, s. 495A(2)(b).

[151] *Supra*, footnotes 27, 28, 30.

[152] Laskin, Canadian Constitutional Law (3rd ed. rev., 1969), p. 110; *A.G. Ont.* v. *A.G. Can.*, [1896] A.C. 348, at pp. 369-370, see *supra*, footnote 28.

[153] See Laskin, *op. cit., ibid.*, p. 104.

flow of receiving waters or by altering the patterns of currents in them, change the dilution of waste inputs and thus affect the quality of such waters.

On the other hand, the construction of sewage works that may be required of municipalities and industries by the Commission in order to achieve or maintain a desired standard of quality of receiving waters, may impede navigation and shipping and be beyond the power of the Commission to require under The Ontario Water Resources Commission Act unless approved under federal legislation.[154]

The federal jurisdiction in relation to navigation and shipping does not authorize legislation for control of waste inputs and enforcement of standards of quality for any use of water other than for navigation and shipping.

B. *Property in Waters.*

The question arises whether flowing waters in the Basin and in the Great Lakes Boundary Waters, other than in federal public harbours and canals, are the property of the Crown in right of Canada. If they are, the federal government in its exclusive jurisdiction over the Public Debt and Property[155] would have legislative authority to control all forms of pollution in order to maintain and improve the quality of these waters for all uses. The question of property in waters of federal public harbours and canals will be dealt with later.

Section 109 of the British North America Act[156] provides that "All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union . . . shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate . . .".

Does the phrase "all Lands . . . belonging to the . . . Provinces . . ." include waters flowing (or running) over lands?

Prior to 1929 all ungranted Crown Land and other natural resources of Manitoba, Saskatchewan and Alberta were vested in the Crown in right of Canada.[157] In 1929 and 1930 Manitoba, Saskatchewan and Alberta entered into agreements with the federal government subsequently approved by statute,[158] providing

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[154] *Re Brandon Bridge* (1884), 2 Man. R. 14; *A.G. Can.* v. *A.G. Ont.*, *supra*, footnote 141; *The Queddy River Driving Boom Co.* v. *Davidson* (1885), 10 S.C.R. 222.

[155] *Supra*, footnote 126, s. 91(A).

[156] *Ibid.*

[157] *In Re Transfer of Natural Resources to Sask.*, [1932] A.C. 28, at pp. 34, 37-38; Laskin, *op. cit.*, footnote 152, p. 552.

[158] The Manitoba Natural Resources Act, S.C., 1930, c. 29; The Alberta Natural Resources Acts, S.C., 1930, c. 3 and S.C., 1931, c. 15; The Saskatchewan Natural Resources Acts, S.C., 1930, c. 41 and S.C., 1931, c. 51 —the agreements referred to in the above three statutes were confirmed

for the transfer of such lands and other natural resources to these Provinces.

Paragraph 1 of the agreements is instructive. It reads:

> 1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province . . . shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province. . . .[159]

By these agreements the federal government recognized that natural resources (lands, mines, minerals) within the terms of section 109 are the property of the original Provinces of Confederation.

However the language used in paragraph 1 of the agreements did not clarify the meaning of "all Lands . . . belonging to the . . . Provinces . . ." in section 109. As a result doubts were "entertained on the part of the Province(s) whether the interest of the Crown in the waters and water-powers within the Province(s) under the Irrigation Act, (the North-west Irrigation Act, 1898) and the Dominion Water Power Act was transferred to and vested in the Province(s) under the terms of the Natural Resources Transfer Agreement, the same not having been specifically mentioned in the description of the natural resources transferred to the Province(s) . . .".[160]

To quiet these doubts The Natural Resources Transfer (Amendment) Act 1938[161] was enacted to amend the statutes approving the agreements by inclusion of the "interest of the Crown in the waters and water-powers within the Province(s) under the Irrigation Act[162] . . . (and the North-west Irrigation Act, 1898)[163] and under the Dominion Water Power Act . . .".[164]

What was the interest of the Crown (Canada) in these waters under these Acts?

The Irrigation Act[165] (and the North-west Irrigation Act, 1898)[166] had vested "the property in and the right to the use of

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by the Parliament of the United Kingdom in The British North America Act, 1930, Imperial Statutes, 20-21 Geo. V, c. 26 and schedules thereto.

[159] *Ibid.*

[160] The Natural Resources Transfer (Amendment) Act, S.C., 1938, c. 36, last recital in schedules relating to Manitoba and Saskatchewan and third last recital in schedule relating to Alberta.

[161] *Ibid.*

[162] Irrigation Act, R.S.C., 1927, c. 104, as am.

[163] The North-west Irrigation Act, 1898, 61 Vict., c. 35.

[164] The Dominion Water Power Act, R.S.C., 1927, c. 210.

[165] *Supra*, footnote 162, s. 6. Only the Irrigation Act deals with water of a spring.

[166] *Supra*, footnote 163, s. 4.

all the water . . . in any river, stream, watercourse, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh or other body of water", for the purposes of this Act(s),[167] in the Crown (Canada).

The Dominion Water Power Act[168] vested the property in and the right to the use of all Dominion water-powers in the Crown (Canada) and prohibited entry to waters on Crown (Canada) lands upon or within which there was water-power.

Assuming waters within the meaning of these Acts can be made the subject of property by statute, the effect of The Natural Resources Transfer (Amendment) Act 1938 was that the Crown (Canada) divested itself of whatever property it had in these waters in the three western Provinces and transferred that property to the Crown in right of Manitoba, Saskatchewan and Alberta for the express purpose of putting these Provinces in the same position as the original Provinces of Confederation were in under section 109 of the British North America Act. The Natural Resources Transfer (Amendment) Act is a clear recognition and an acceptance by the Government of Canada that the phrase "all lands . . . belonging to the . . . Provinces . . ." in section 109 includes, so far as the original Provinces of Confederation are concerned, such property in waters over these lands as was coextensive with the property in waters vested in the Crown in right of Canada under the Irrigation, the North-west Irrigation and the Dominion Water Power Acts.[168A] Otherwise the original Provinces of Confederation would not be in a position of equality with Manitoba, Saskatchewan and Alberta in relation to property in waters within the meaning of these Acts.

However this recognition by the federal government does not reflect the state of the law as to the ownership of flowing waters

[167] The phrase "for the purposes of this Act" cannot be considered a significant limitation on the extent of the property interest vested in the Crown (Canada) under these Acts because, subject to existing rights as described in the Acts, under ss 6, 7, 8, 10, 56 and 68 of the Irrigation Act, *supra*, footnote 162, and ss 4, 5, 6, 8, 31 and 47 of the North-west Irrigation Act, 1898, *supra*, footnote 163, the property in and the right to the use of waters was vested in the Crown (Canada); taking or diverting water without authority even for domestic use was an offence; a grant of Crown land conveyed no property, right or privilege to the water; the unauthorized diversion or use of water was prohibited except as provided by the Act; a right to the permanent diversion or exclusive use of water, even by riparian owners, could only be acquired under the Act; company public utilities operating under the Act were subject to federal control; the acquisition of water, the property in which was in the Crown, even for domestic use, was by application under the Act.

[168] Ss 4 and 5 of the Dominion Water Power Act, *supra*, footnote 164, vested the property in and the right to the use of all Dominion water powers in the Crown (Canada) subject to existing rights, and prohibited entry on waters and water powers on Crown (Canada) lands, upon or within which there was water-power or required for the protection of any water-power.

[168A] See *A.G. Can.* v. *Higbie*, [1945] S.C.R. 385.

by the original Provinces of Confederation.

Generally speaking at common law, flowing or running water is not the subject of property.[169]

However it was held in *Medway* v. *Romney*[170] that the words of an Act of Parliament vesting in a navigation company "the said river or streams . . . and all lands . . ." created "a new species of statutory property and interest in the water . . .".

I have been unable to find any statute of the Province of Upper Canada or the Province of Canada or any Imperial statute in force immediately prior to Confederation, in that part of the Province of Canada which was formerly the Province of Upper Canada which changed the common law principle and created and vested in the Province property in flowing waters within the Province. In fact, the language of the statutes of the Province of Upper Canada or of the Province of Canada appear to support the common law principle that, generally speaking, flowing waters are not the subject of property.[171]

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[169] In *Embrey* v. *Owen* (1851), 6 Ex. Rep. 353, at p. 368, quoted with approval in *Upper Ottawa Improvement Co.* v. *H.E.P.C. Ont.*, [1961] S.C.R. 486, at p. 492, Baron Parke stated: ". . . flowing water is *publici juris* . . . all may reasonably use it who have a right of access to it, . . . none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession. . . ." In *White* v. *White*, [1906] A.C. 72, at p. 83, Lord Robertson stated that the proposition that the grant of a dam (pool) includes not only the solum but the water therein is "opposed to elementary ideas about the water of a river; for the water would not be the property even of the exclusive owner of the solum and of both banks in question . . .". In *Lyon* v. *Fishmongers Co.*, [1876] 1 A.C. 662, at p. 683, Lord Selborne said: "The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream. . . ."

In *Wood* v. *Esson* (1884), 9 S.C.R. 239, at p. 253, Henry J. said: ". . . it is not now disputed that a grant of navigable waters . . . unless authorized by an Act of Parliament, is void and conveys no right or title. . . . The same doctrine and principles have . . . always been applicable to this country. . . ." In this case a grant from the Province of certain land in the harbour covered with water did not convey any property in the water; only the title to the bed subject to public rights, *e.g.* navigation. See *Upper Ottawa Improvement Co.* v. *H.E.P.C. Ont.*, *ibid.*, at pp. 491, 492, 507; *Hamilton Steamboat* v. *Mackay* (1907), 10 O.W.R. 295, at p. 298 (no proprietary rights in waters of Hamilton Bay); *Tanguay* v. *Price* (1906), 37 S.C.R. 657, at p. 667 (floatable waters of a river enclosed in log boom were *publici juris*); *Simpson Sand Co. Ltd.* v. *Black Douglas Contractors Ltd.*, [1964] S.C.R. 333, at pp. 337, 341.

[170] (1861), 9 C.B. (N.S.) 575, at p. 584. At p. 589 the court stated: "In our view of the true construction of the Act of Parliament, it is not necessary that there should be an actual damage to the navigation; because we think that the legislature intended to give the company such an interest in all the water of the river for the purposes of the navigation as is interfered with by the abstraction of any part thereof." In effect the court construed the Act as giving the company full property in the waters. If the right of property was limited to the purposes of navigation only, the abstraction of any part that would not interfere with navigation would not infringe the property created, a result contrary to the decision.

[171] Prov. of Can., 1859 (Consolidated), 22 Vict., c. 28, s. 12; see also

Bearing in mind that at common law there was no property in flowing waters and that this common law principle, not having been altered by statute, was applicable to that part of the Province of Canada formerly the Province of Upper Canada immedi-

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the judgment of Henry J. in *Wood* v. *Esson, supra,* footnote 169, at p. 253; also Prov. of Can., 1859, c. 3, s. 12, vests "all lands, streams or water courses and other real property acquired for the use of such Public Works" in the Crown. S.73 deals with the sale of surplus "land, stream or water course or other real property". "Streams and water courses" therefore mean the beds and shores but not the waters thereof. Ss 31 and 32 authorize taking possession of ". . . lands or real estate, streams, waters and watercourses . . ." but do not vest property in them. Ss 35 and 36 refer to a conveyance of the estate or interest of the owner or occupier of "land, real property, streams or watercourses", omitting any reference to "waters". S.37 vests in the Crown "all land, real property, streams or water courses . . ." acquired under the Act which ". . . become the property . . ." of the Crown; it does not vest and make "waters" such property. S. 98 of Prov. of Can., 1859, c. 3, repealed 1846, 9 Vict., c. 37. S. 8 of this repealed Act refers to "lands, real property, streams, *waters* and watercourses" three times in connexion with taking possession for the benefit of public works but refers to "land, real property, streams or watercourses" four times in connexion with ownership thereof and vesting of property therein. See also s. 13.

The omission of "waters" when dealing with vesting of property and the inclusion of "waters" when conferring a right to take possession, in such a deliberate manner, is significant in interpreting the 1859 statute of the Province of Canada.

S. 10 of the 1859 statute (Consolidated) vests in the Crown the "Public Works and Buildings" enumerated in Schedule A to the Act. Under "Navigations, Canals and Slides" in Schedule A, are enumerated the Welland and Rideau Canals, certain lakes, rivers and navigations, including Rice Lake, part of the Welland River and the river Trent, harbours in Lakes Erie and Ontario and roads and bridges and the Schedule ends with "and all other Canals, Locks, Dams, Slides, Bridges, Roads or other Public Works, of a like nature, constructed or to be constructed, repaired or improved at the expense of the Province". These latter words in the Schedule and the wording of ss 13, 14, 20, 27, 28, 33 and 81 are not apt to include the waters of canals, lakes, rivers and harbours, in the term "Public Works".

In *R.* v. *Kilbourn* (1915), 19 Ex. C.R. 7, at pp. 13, 14, the court stated in a dictum that the River Trent from Rice Lake to the Bay of Quinte became part of the Trent Canal system, vested in the Crown in right of the Province of Canada as a public work by virtue of the 1859 Act and passed to Canada under s. 108 and the Third Schedule.

In my opinion this language is applicable only to property in the bed and banks of the River Trent and to property in the beds and banks of the other lakes, rivers, harbours and canals enumerated in Schedule A to the 1859 Act and is not applicable to the waters thereof. The wording of Schedule A must be interpreted in accordance with all the relevant sections of the Act, and cannot alone be considered. The creation and vesting of property in waters of the canals, harbours, lakes and rivers referred to in Schedule A would be such a departure from established principles (which appear to have been recognized and incorporated in the relevant sections of this Act) that it would be reasonable to expect express language for this purpose. No such language can be found. See *Macdonald* v. *R.* (1906), 10 Ex. C.R. 394; *Hamburg-American Packet Co.* v. *R.* (1903), 33 S.C.R. 252 and *Paul* v. *R., supra,* footnote 143, at p. 131, which were not cited in the *Kilbourn* case. See also argument of counsel in *R.* v. *Grass* (1913), 18 Ex. C.R. 177.

ately prior to Confederation,[172] the phrase "all Lands . . . belonging to the . . . Provinces" in section 109 of the British North America Act does not include flowing waters over lands and therefore does not declare that property in such waters within the Province is vested in the Province of Ontario. Section 109 does not purport to "create" property.

Section 108 and the Third Schedule of the British North America Act do not have the effect of vesting in Canada any other or larger interest in the property of a Province than that which belonged to the Province at Confederation.[173] As indicated above, there was no property in flowing waters within that part of the Province of Canada formerly the Province of Upper Canada at Confederation. Therefore section 108 and the Third Schedule do not transfer, and indeed do not purport to transfer, property in such flowing waters to the Crown in right of Canada.[174]

No other sections of the British North America Act create or vest such property in Canada.

I have been unable to find any Act of the Province of Ontario after 1867 which created and vested in the Province property in its flowing waters.[175]

If this view is accepted, the consequence is that as Ontario, one of the original Provinces, has not created by statute property in flowing waters within its boundaries, it is not in the same position with respect to such waters as Manitoba, Saskatchewan and Alberta.[176]

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[172] The Consolidated Statutes for Upper Canada, 1859, c. 9, s. 1. The dictum of Meredith C.J.O. in *Carroll* v. *Empire Limestone Co.* (1919), 45 O.L.R. 121, at p. 128 to the contrary with respect to the Great Lakes is clearly limited to the issue before the court, namely whether a grant of land bordering Lake Erie includes part of the bed of the lake. In any event, as the court points out, the Beds of Navigable Waters Act, R.S.O., 1914, c. 31 settled the matter.

[173] *Western Counties Railway Co.* v. *Windsor & Annapolis Railway Co.* (1882), 7 App. Cas. 178, at p. 187; see also *Montreal* v. *Harbour Commissioners of Montreal, supra,* footnote 142, at p. 311 where the Judicial Committee stated that all property was vested in the Crown and that ss 108 and 109 determined whether it is so vested in right of the Province or the Dominion.

[174] See *A.G. Can.* v. *A.G. Ont., supra,* footnote 141, at pp. 709-711.

[175] The statutes respecting public works commencing with 1868, 32 Vict., c. 28, ss 10 and 23; R.S.O., 1877, c. 30, ss 14 and 29; R.S.O., 1887, c. 33, ss 14 and 29; R.S.O., 1897, c. 37, ss 14 and 29; R.S.O., 1914, c. 35, ss 8 and 13; R.S.O., 1927, c. 52, ss 7 and 12; R.S.O., 1937, c. 54, ss 7 and 12; R.S.O., 1950, c. 323, ss 7 and 12 and R.S.O., 1960, c. 338, ss 7 and 12 continue the distinction made in the 1859 Act, *supra,* footnote 171, between taking possession, *inter alia,* of "waters" on the one hand and vesting of property in lands, streams and watercourses on the other hand.

[176] Thus Ontario has no legislation similar to The Water Resources Act, R.S.A., 1955, c. 362, as am. (Alberta); The Water Rights Act, R.S.S., 1965, c. 51, as am. (Saskatchewan) or The Water Rights Act, R.S.M., 1954, c. 289, as am. (Manitoba). See also The Water Act, R.S.B.C., 1960, c. 405 (British Columbia).

However, although ownership of their lands by the original Provinces of Confederation does not involve ownership of waters flowing over such lands, it necessarily involves "ownership of the water rights incidental to those lands"[177] and includes "such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the solum".[178]

C. *Federal Harbours and Canals.*

The Public Works and Property of the Province of Canada (now Ontario and Quebec) enumerated in the Third Schedule of the British North America Act were transferred to Canada by section 108. The Public Harbours of the Province are designated

[177] *Burrard Power Co. Ltd.* v. *R.*, [1911] A.C. 87, at p. 94: The expression "proprietary rights of the Province . . . in the waters . . ." must be read as referring to those rights in or over waters as flow from the ownership of the solum and not to property in the waters themselves. See *A.G. B.C.* v. *A.G. Can.*, [1914] A.C. 153, at p. 166 where the Judicial Committee considered the *Burrard* case and distinguished between a transfer of the entire beneficial interest in the solum of the "railway belt" including beds of rivers and lakes, and a transfer of rights in or over waters springing from ownership of the solum. Such a distinction is unnecessary if waters flowing over the solum of the belt were themselves the subject of property and transferable as such in the same way that the solum was.

[178] *A.G. B.C.* v. *A.G. Can.*, *ibid.* The question arises whether the federal government is competent to create in the Crown (Canada) statutory property in flowing waters either for purposes within or for purposes falling outside its exclusive legislative authority. Would such competence include waters flowing over lands which are federal public property because they come within s. 108 of the British North America Act and are enumerated in the Third Schedule or have been acquired by Canada? Would it extend to waters flowing over provincial Crown lands? See Laskin, *op. cit.*, footnote 152, pp. 564-566; *Reference re Waters, and Water Powers, supra*, footnote 142; *A.G. Can.* v. *A.G. Ont., supra*, footnote 141, at p. 709; *A.G. Que.* v. *A.G. Can.*, [1921] 1 A.C. 401, at pp. 420, 428; *Fort George Lumber Co.* v. *Grand Trunk Pacific Rlwy. Co.* (1915), 24 D.L.R. 527, at p. 528. It might be said that creation of such property in waters flowing over provincial Crown lands would be inconsistent with the federal government's recognition and acceptance of provincial ownership of these natural resources. (See *supra*, footnotes 158, 160.) The competence of the Province to create, by legislation, property in flowing waters in the Crown (Ontario) can be based on its authority in relation to management of provincial public lands, property and civil rights in the Province and matters of a merely local nature (*supra*, footnote 126, ss 92(5)(13)(16) and footnote 176). See also *Esquimalt Waterworks Co.* v. *Victoria*, [1907] A.C. 499, at p. 508 where the Judicial Committee assumed that statutory property in waters had been created by a provincial statute; *Cook* v. *Vancouver*, [1914] A.C. 1077, at p. 1081, where even a riparian proprietor was held to be subject to a statute creating such property in the Crown in right of the Province. In view of the *Burrard* case it is doubtful if such provincial competence would extend to waters flowing over or through lands which are federal public property, such as in federal canals and public harbours coming within s. 108 and enumerated in the Third Schedule or as have been acquired by Canada after 1867. The creation of such property in the Crown in right of a Province would be inconsistent with the water rights incidental to federal ownership of the solum and infringe upon exclusive federal jurisdiction under s. 91(1A) in relation to public property.

under this Schedule and were transferred to Canada by this section. The nature of the interest transferred was the property in the harbours as they existed at Union, including the property in the beds and foreshores of these harbours.[179]

The question arises as to whether the interest transferred includes property in the waters of these harbours. The answer depends on whether such waters were the property of the Province of Canada at Union. As stated before, at common law flowing waters in lakes and rivers are not the subject of property but property can be created in them by statute.[180] I have not been able to find any Imperial statute or statute of the Province of Upper Canada or the Province of Canada creating property in the Province prior to 1867 in waters of the Public Harbours situate in the former Province of Upper Canada.[181] It follows that waters of these harbours were not the property of the Province at Union. Such waters therefore could not be transferred to the federal government by the terms "Public Works and Property" of each Province in section 108 and "Public Harbours" in the Third Schedule. Moreover, no section of the British North America Act 1867 purports to create property in waters of Public Harbours and vests such property in Canada.

This view is reinforced by The Ontario Harbours Agreement Act 1962-63 and a federal statute[182] sanctioning an agreement made in 1961 to finally ascertain and fix the property in Ontario that belongs to Canada under the designation Public Harbours in the Third Schedule. All ungranted lands, excluding mines and minerals, within the harbours described in Schedule A, are declared to belong to Canada.[183] "Lands" is defined to include "all interests in lands, lands covered by water and foreshore lands".[184] It is clear that the term "lands" does not include waters over lands in these harbours because if it did there would be no need for the inclusion of the words "lands covered by water".

The important federal canals in the Basin are the Welland, Rideau and Trent. At Confederation the Welland and Rideau Canals and certain rivers, lakes and works thereon forming part of the present Trent Canal System were vested as Public Works in the Province of Canada.[185] They therefore fall within the designation Canals with Lands and Water Power connected therewith

[179] *Montreal* v. *Harbour Commissioners of Montreal, supra,* footnote 142; G. V. LaForest, The Meaning of "Public Harbours" (1963), 41 Can. Bar Rev. 519.

[180] *Supra,* footnotes 169, 170.

[181] See *supra,* footnote 171.

[182] The Ontario Harbours Agreement Act, S.O., 1962-63, c. 95; Ontario Harbours Agreement Act, S.C., 1963, c. 39.

[183] *Ibid.,* s. 2(a) of Agreement in Schedule.

[184] *Ibid.,* s. 1 of Agreement in Schedule.

[185] *Supra,* footnote 171.

in the Third Schedule to the British North America Act and the property in them was transferred to Canada by section 108. The waters of these canals did not, however, become the property of Canada.

As indicated earlier, legislation is required to create property in flowing waters.[186] The language of the Act vesting the canals as Public Works in the Province of Canada is not apt to create and vest property in their waters in the Province.[187] Nor in my view is the inclusion of the canals in Schedule A of this Act under the heading "Public Works vested in the Crown . . ." sufficient for this purpose. No statute has been found creating and vesting such property in the Province prior to 1867.

If I am correct in my view that section 108 and the Third Schedule do not create property in waters of public harbours and transfer such property to Canada, the same conclusion would follow with respect to the creation and transfer of property in waters of the canals enumerated in the same Schedule.

The Sault Ste. Marie and Murray Canals in the Basin were constructed by the Government of Canada after 1867 and therefore did not become the property of Canada under section 108 of the British North America Act. The relevant statutes under which their construction appears to have been authorized[188] do not create and vest property in their waters in the federal government. As no property is created by statute the position is the same as at common law, that is, the federal government has no property in their waters.

In accordance with the *Burrard Power Co. Ltd.* and *A.G. B.C.*

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[186] *Supra*, footnotes 169, 170.

[187] *Supra*, footnote 171; Coulson and Forbes, on The Law of Water (6th ed., 1952), p. 315. It has been held that whether an Act incorporating a canal company vests property in the waters of a canal in the company depends on the language of the Act: *A.G.* v. *Great Northern Railway*, [1909] 1 Ch., 775, at pp. 782-783. See also *Rochdale Canal Co.* v. *Radcliffe* (1852), 18 Q.B. 287, at p. 314; L.J. 21 Q.B. 297, at p. 303.

The language of the statutes of the Province of Upper Canada authorizing construction of the Rideau and Welland Canals and improvement of the navigation of the River Trent supports the view that property was not created in the waters of the canals and rivers and was not vested in either the Province or in the Welland Canal Company and that "canal" was not used to mean the waters thereof but only lands and works. Rideau: 1827, 8 Geo. IV, c. 1, ss 1, 2, 3, 24; Trent: 1837, 7 Wm. IV, c. 66, s. 5; Welland: 1824, 4 Geo. IV, c. 17, ss 2, 3, 5, 6, 7; see also 1825, 6 Geo. IV, c. 2; 1826, 7 Geo. IV, c. 19; 1837, 7 Wm. IV, c. 92, s. 12.

[188] The authority for the construction is likely to be found under The Public Works of Canada Act, S.C., 1867, c. 12; An Act respecting the Receiver General and the Minister of Public Works Act, S.C., 1879, c. 7 as am. by S.C., 1883, c. 5; Department of Railway and Canals Act, R.S.C., 1886, c. 37; Department of Railways and Canals Act, R.S.C., 1906, c. 35; see the Annual Supply Acts from 1881 on for the Murray and Trent Canals and from 1887 on for the Murray, Trent and Sault Ste. Marie Canals.

v. *A.G. Can.* cases[189] the transfer of the property in lands of Public Harbours and Canals to Canada by section 108 and the Third Schedule also transferred the "rights in or over the waters" of Public Harbours and Canals incidental to or legally flowing from the ownership of those lands. However these rights in or over such waters are not the same as "property" in the waters.

Federal legislative jurisdiction in relation to harbours and canals may be based on The Public Property, Navigation and Shipping and on any other applicable enumerated classes of subjects in section 91 such as Inland Fisheries, and section 92 of the British North America Act.

In the case of harbours, federal jurisdiction has been exercised by placing the harbours in Toronto and Belleville and the harbour in Hamilton (not mentioned in the Third Schedule but subsequently largely acquired by the Hamilton Harbour Commissioners) under the jurisdiction of harbour commissioners under separate federal Harbour Commissioners Acts,[190] the Lakehead, Windsor and Oshawa harbours under the jurisdiction of harbour Commissions established under the Harbour Commissions Act[191] and by placing certain harbour facilities at Prescott under the National Harbours Board established under the National Harbours Board Act.[192] Areas covered with water within federal jurisdiction and not under the jurisdiction of federal harbour commissions may be proclaimed public harbours under Part X of the Canada Shipping Act without any necessity for federal ownership of the land within such areas that is adjacent to or covered by water.[193] Certain federal harbours come under the Government Harbours and Piers Act.[194]

In the case of canals, federal jurisdiction has been exercised by placing the Trent, Rideau and Murray Canals under the jurisdiction of the federal Department of Transport under the Department of Transport Act[195] and the management and operation (but not the property) of the Welland and Sault Ste. Marie Canals under the St. Lawrence Seaway Authority established under the St. Lawrence Seaway Authority Act.[196]

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[189] *Supra*, footnote 177.

[190] The Toronto Harbour Commissioners' Act, S.C., 1911, c. 26, as am.; The Belleville Harbour Commissioners' Act, S.C., 1952, c. 34, as am.; The Hamilton Harbour Commissioners' Act, S.C., 1912, c. 98, as am. See as to Toronto Harbour: *Rickey* v. *Toronto* (1914), 30 O.L.R. 523; *T.T.C.* v. *Aqua Taxi Ltd.* (1957), 6 D.L.R. (2d) 721; See as to Belleville Harbour Commissioners' powers, *Indust. Molasses Corp.* v. *Carling*, [1952] O.R. 50.

[191] Harbour Commissions Act, S.C., 1964-65, c. 32, s. 30.

[192] R.S.C., 1952, c. 187, as am.; P.C. 1961-1449, S.O.R./61-442, s. 1.

[193] R.S.C., 1952, c. 29, as am., ss 600 and 601.

[194] R.S.C., 1952, c. 135, ss 3, 4.

[195] R.S.C., 1952, c. 79, as am.; see ss 25, 26; Canal Regulations P.C. 1960-664, S.O.R./60-212. Schedule A, as am.

[196] R.S.C., 1952, c. 242; Order in Council P.C. 1959-204 of February

No property in the waters of the Welland and Sault Ste. Marie Canals was created and vested in the Seaway Authority by the St. Lawrence Seaway Authority Act and therefore the waters in these Canals (including those over the areas of the beds of Lakes Ontario and Erie which are considered part of the Welland Canal System)[197] are not the property of the Authority or of the Crown (Canada).

These statutes confer power to control and manage federal harbours[198] and canals[199] by regulations or by-laws. By-laws and regulations have been passed under them to prohibit pollution of the property and waters of these harbours[200] and canals.[201]

Pollution can damage harbour property or vessels using a

19th, 1959, referred to in the Seaway Regulations P.C. 1959-375, S.O.R./59-94.

[197] At the approach to the Welland Canal, the federal government expropriated part of the bed of Lake Ontario at St. Catherines by instrument #8850 of June 26th, 1914, registered in the County of Lincoln, part of the bed of Lake Erie at Port Colborne by instrument #506 of February 19th, 1951 registered in the County of Welland, and acquired another part of the bed of this lake, by deed #4346 from International Nickel Co., dated April 23rd, 1918, and registered in the County of Welland. The instruments of expropriation and acquisition vest the property in lands covered by water and do not therefore vest property in the waters over these lands in the federal government.

[198] The Toronto Harbour Commissioners' Act, *supra*, footnote 190, s. 21(d); The Hamilton Harbour Commissioners' Act, *supra*, footnote 190, s. 20(d); The Belleville Harbour Commissioners' Act, *supra*, footnote 190, s. 19(1)(d); Harbour Commissions Act, *supra*, footnote 191, s. 13(1); National Harbours Board Act, *supra*, footnote 192, s. 13(1); Canada Shipping Act, *supra*, footnote 193, s. 604; see also ss 2(55), 645(4); Government Harbours and Piers Act, *supra*, footnote 194, s. 7.

[199] Department of Transport Act, *supra*, footnote 195, ss 25, 26; St. Lawrence Seaway Authority Act, *supra*, footnote 196, s. 19(1); see also ss 2(c), 10(a).

[200] Toronto—By-law 11, P.C. 1952-3306, S.O.R./52-260; Hamilton—By-law 84, P.C. 1969-993, S.O.R./69-249, ss 47, 50, 51, 55(2); Belleville—General By-law 1, P.C. 1953-1380, S.O.R./53-377, ss 51, 58(1)(c), 58(2), 79; Oshawa Harbour Commissioners By-laws P.C. 1961-514, S.O.R./61-146, s. 31(1); Lakehead Harbour Commissioners By-laws P.C. 1960-53, as am., S.O.R./60-37, s. 32(1); Windsor Harbour By-law P.C. 1959-1606, S.O.R./60-12, s. 8(1); Windsor Harbour Wharf By-law P.C. 1959-1606, S.O.R./60-12, s. 9; The National Harbours Board By-law A-1, Operating Regulations, P.C. 1954-1981, S.O.R. 1955 Cons., p. 2252, as am., s. 4, especially as am. by P.C. 1961-1449, S.O.R./61-442, s. 1; Public Harbours Regulations P.C. 1954-2073, 1 S.O.R. Cons. 1955, p. 555, s. 14; Government Wharves Regulations P.C. 1964-104, S.O.R./64-42, s. 11.

[201] The Canal Regulations P.C. 1960-664, S.O.R./60-212, as am., s. 48; St. Lawrence Seaway Regulations P.C. 1962-390, S.O.R./62-109, s. 21, as am. by P.C. 1968-620, S.O.R./68-125, s. 6(1) of the Seaway Regulations makes, *inter alia*, the Oil Pollution Prevention Regulations under the Canada Shipping Act, *supra*, footnote 149, applicable to the Seaway, subject to the Seaway Regulations; see s. 22 of the Regulations and the Seaway Handbook, Queen's Printer (1965) for Seaway Circulars, for oily water separators—Seaway Circular 2, item 20; for discharge of oil products—Seaway Circular 4, item 48; for ordure containers or approved sewage disposal systems—Seaway Circular 2, item 19, effective Apr. 1st, 1970; Shore Traffic Regulations, P.C. 1962-1314, S.O.R./62-367, ss 17 and 18.

harbour for example, by causing corrosion, fouling and deterioration of works and ships and encroachments on harbour beds. It can interfere with the use of a harbour as a harbour by causing odours, fog resulting from the input of heat into waters under certain climatic conditions and obstruction of navigation and water used for the operation of ships by nuisance aquatic vegetation and debris. Pollution can impair the appearance of waters of a harbour by promoting the growth of algae and other vegetation and impair the use of the waters for recreation or human consumption by causing bacterial contamination, toxicity or taste and odour problems.

I have referred earlier to federal harbour and canal legislation and regulations and by-laws for the control of pollution.[202] In addition, other federal Acts and Regulations providing for control of pollution, such as the Fisheries Act[203] and the Oil Pollution Prevention Regulations[204] may apply.

Provincial laws and applicable municipal by-laws for the control of pollution, already referred to, also apply to federal harbours and canals. The question arises as to whether The Ontario Water Resources Commission Act, especially section 27, and the Regulations[205] are valid if applied to these harbours and canals.

In *Burrard Power Co. Ltd.* v. *R.*[206] the Judicial Committee held that a grant under the Water Clauses Consolidation Act, 1897, of British Columbia of rights to divert waters situate within the Railway Belt which had been transferred by the Province to Canada, was invalid. The grounds of the decision were that the grant encroached on the exclusive federal jurisdiction in relation to federal property in the land, to which the right to divert water was incidental.[207] As pointed out earlier, this case did not decide that the transfer of the solum of the Railway Belt to Canada created and transferred property in waters located within the Belt.[208] It would follow that the waters themselves, not having been made the subject of property, are not under the exclusive legislative jurisdiction of Canada under section 91 (1A) in relation to its public property. The statement of the Committee in the *Burrard* case to the contrary,[209] was not necessary for the decision and in my view, cannot be supported in the light of the explanation of the *Burrard Power Co. Ltd.* case given in *A.G. B.C.* v. *A.G. Can.*[210]

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[202] *Supra*, footnotes 198, 199, 200, 201.
[203] R.S.C., 1952, c. 119, as am., ss 33(1), (2), (3), (4), 34(h).
[204] *Supra*, footnote 149, see also *supra*, footnote 201, for the application of the Regulations to the Seaway.
[205] *Supra*, footnotes 2, 14, 28, 30.
[206] *Supra*, footnote 177.
[207] *A.G. B.C.* v. *A.G. Can.*, *supra*, footnote 177.
[208] *Ibid.*
[209] *Ibid.*, at p. 95.
[210] *Ibid.*, at p. 166.

However assuming that waters of federal harbours and canals are under exclusive federal jurisdiction my view is that The Ontario Water Resources Commission Act, as applied to these waters, cannot be called public property or harbour or canal legislation and therefore does not encroach upon exclusive federal authority. There appears to be no essential difference between a valid provincial Act requiring all landowners, including a federal railway company, to prevent or abate a local nuisance, that is to clean out their drainage ditches,[211] and a provincial Act prohibiting the deposit of pollutants in any place where water might be impaired, including federal harbours and canals. The dominant feature and object[212] of The Ontario Water Resources Commission Act is the preservation and improvement of the quality of all waters for all uses, a matter wholly within provincial jurisdiction, and not to affect or control federal property in harbours and canals, whether in the land or in the water rights which legally flow from ownership of the land.[212A] In the *Burrard* case Lord Mersey said that the Belt being public lands,[213] "no Act of the provincial legislature could affect the waters upon the lands". These words must be read in the context of the reasoning of the Committee, namely[214] "if the Province could by legislation take away the water from the land it could also by legislation resume possession of the land itself and thereby so derogate from its own grant as to utterly destroy it. . . . The grant of the water record . . . is an attempt on the part of the Province to appropriate the revenues (of the Belt) to itself and would if carried into effect violate the terms of the contract".[215] No such reasoning is possible where provincial law such as section 27 of The Ontario Water Resources Commission Act is applied to federal harbours and canals.

Assuming the valid application of section 27 and other provincial law in the absence of valid federal law, the question arises as to whether the field is occupied by the federal Acts, by-laws and regulations to which I have referred, so as to render provincial law inoperative in these harbours and canals.

The legislative purposes of these federal Acts, regulations and by-laws are the management and protection of federal harbour and canal property, the protection of vessels using these harbours

[211] *C.P.R.* v. *Parish of Notre Dame de Bonsecours, supra*, footnote 43, at p. 441; *Madden* v. *Nelson and Fort Sheppard Rlwy. Co.*, [1899] A.C. 626, at pp. 628-629. In this case the Committee approved the *Bonsecours* case, and extended its principle to prevention in addition to abatement of a local nuisance.

[212] *Reg.* v. *O.L.R.B. Ex parte Underwater Gas Dev. Ltd.*, [1960] O.R. 416, at p. 428

[212A] *Reg.* v. *Smith*, [1942] O.W.N. 387; *T.T.C.* v. *Aqua Taxi Ltd., supra*, footnote 190; see also *infra*, footnote 221, cases on nuisance.

[213] *Supra*, footnote 177, at p. 95.

[214] *Ibid.*, at p. 94.

[215] *Ibid.*, at p. 96.

and canals, the control of navigation and shipping and the protection of fish. The purpose of The Ontario Water Resources Commission Act and Regulation is to maintain and improve the quality of waters in the Province including the waters of harbours and canals, for all uses which are and can be made of them.[216]

Because of the different purposes and scopes of application of the federal and provincial controls, in my view, the answer to this question as stated by Mr. Justice Judson in *O'Grady* v. *Sparling*[217] is that these ". . . provisions can live together and operate concurrently". Again in the words of Mr. Justice Martland in *Smith* v. *Regina*:[218]

> The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However even in such cases there is no conflict in the sense that compliance with one law involves breach of the other. It would appear therefore that they can operate concurrently.

It should be noted that there is no constitutional prohibition against the same act or conduct being held a violation of both federal and provincial legislation.[219]

The Ontario Water Resources Commission Act does not apply to the Crown in right of Canada or to activities of employees of the federal government or Crown agencies acting within their powers under valid federal legislation which cause pollution of waters of federal harbours and canals or any other waters in the Basin.[220] However certain of the provisions of this Act such as sections 27 and 28b, would apply to the activities of Crown employees or to Crown agencies which are outside their powers and which cause pollution.[221] These provisions would also apply to such

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[216] The waters of about nine of the twenty-seven federal harbours listed in The Ontario Harbours Agreement Act, *supra*, footnote 182, are used for domestic, municipal, industrial, aesthetic and recreational purposes in addition to navigation and shipping. The waters of the canals in the Basin under the jurisdiction of the federal Department of Transport and of the St. Lawrence Seaway Authority are, generally speaking, used for the same purposes as the waters of rivers, namely, domestic, municipal, industrial, recreational, agricultural and aesthetic purposes as well as for navigation and shipping.

[217] [1960] S.C.R. 804, at p. 811.

[218] [1960] S.C.R. 776, at p. 800. See also Laskin, *op. cit.*, footnote 152, pp. 104-111; *Regina* v. *Morin, supra*, footnote 43.

[219] *R.* v. *Kissick*, [1942] 3 D.L.R. 431; Laskin, *op. cit., ibid.*, p. 109.

[220] The Interpretation Act, R.S.O., 1960, c. 191, s. 11; *Gauthier* v. *The King, supra*, footnote 35; *R.* v. *Anderson*, [1930] 2 W.W.R. 595; *R.* v. *Rhodes*, [1934] O.R. 44; *Reg.* v. *Shore & Horwitz Const.*, [1960] O.W.N. 137; *Bowers* v. *Hollinger, supra*, footnote 35, at p. 536; *Re Sternschein, supra*, footnote 35; see also *C.B.C.* v. *A.G. Ont.*, [1959] S.C.R. 188.

[221] *National Harbour Brd.* v. *Langelier* (1969), 2 D.L.R. (3d) 81; *R.* v. *Smith, supra*, footnote 212A; see for the application of provincial laws for the control of nuisances to occupants, *i.e.* lessees or licensees, of federal property: *Re Wheatley, Re Kodak and Marsh, supra*, footnote 43; *Spooner Oils Ltd.* v. *Turner Valley Gas Cons. Brd.*, [1933] 4 D.L.R. 545, at p. 560;

activities of a corporation, not an agent of the Crown, which comes under the exclusive legislative authority of the federal government.[222] But those sections of this Act which deal with construction, alteration, enlargement, operation or inspection of sewage works would not apply to sewage works forming part of federal property or the property of a federal corporation because if they did, those sections would encroach upon federal legislative authority.[223]

The maintenance and improvement of the quality of waters in harbours and canals for the uses presently being made of them will necessarily result in a quality suitable for navigation and shipping and the protection of federal harbour and canal property. On the other hand, the preservation of the quality of these waters for the protection of federal harbour and canal property and navigation and shipping will not achieve the quality required for other uses.

D. *Inland Fisheries.*

The exclusive federal jurisdiction in relation to Inland Fisheries authorizes legislation for the conservation of fish, such as legislation providing for enforcement of standards of water quality that promote this end, and for control of discharges into waters of waste inputs harmful to fish. For example, the Fisheries Act[224] prohibits the throwing overboard of ballast, coal ashes, stones, or other prejudical or deleterious substances in any river or harbour or in any water where fishing is carried on.[225] It prohibits the deposit by people engaged in logging, land clearing, lumbering or other operations, of debris into any water frequented by fish or that flows into such water or on ice over either such water or at a place as set out in the Act.[226] In addition, the Act also prohibits any person causing the passing into or putting of chemical substances, poisons, sawdust, dead or decaying fish, or any deleterious substance in these waters or on ice over these waters[227] and it en-

R. v. *Karchaba, supra*, footnote 43; *Cote* v. *Quebec Liquor Com.*, [1931] 4 D.L.R. 137.

[222] *Carpenter* v. *C.N.R.*, [1955] 3 D.L.R. 492; *R.* v. *C.N.R.* (unreported) Magistrate's Court, District of Sudbury, July 4th, 1967, under s. 27 of The Ontario Water Resources Commission Act; *C.P.R.* v. *Parish of Notre Dame de Bonsecours, supra*, footnote 43; *Madden* v. *Nelson and Fort Sheppard Rlwy. Co., supra*, footnote 211.

[223] *Supra*, footnotes 221, 222; *Montreal* v. *G. T. Railway Co.* (1922), 65 D.L.R. 401; annotation in (1922), 65 D.L.R. 402.

[224] *Supra*, footnote 203. [225] *Ibid.*, s. 33(1). [226] *Ibid.*, s. 33(3).

[227] *Ibid.*, s. 33(2); S. 28b of The Ontario Water Resources Commission Act, *supra*, footnote 2, insofar as it authorizes the issuance of a permit for the purpose of killing fish by depositing piscicides into water, for example, for the purpose of killing undesirable fish such as suckers and minnows and restocking the water with desirable fish, would not be in conflict with or otherwise inoperative by reason of s. 33(2). A permit issued by the Commission is expressly made subject to all applicable laws which would permit the full operation of s. 33(2).

ables the Governor in Council by order to deem any substance to be a deleterious one for this purpose.[228]

If this latter provision is interpreted as authorizing the deeming of any substance to be deleterious although it is not in fact harmful to fish, it would be invalid as not being necessary for the conservation of fish. The provision could however be interpreted as merely shifting the onus of proof to the accused to establish that a substance deemed deleterious was not in fact harmful to fish.

The Act empowers the Governor in Council to make regulations "respecting the obstruction and pollution of any waters frequented by fish".[229] No regulations have yet been made.

This federal jurisdiction would not authorize legislation to achieve standards of water quality and waste inputs not related to conservation of fish. No significant relationship has been established between bacteriological quality of water and conservation of fish, and therefore this federal jurisdiction would not authorize legislation to control such quality. Yet legislation for the control of bacterial contamination is essential if waters are to be used for swimming and other water sports, human consumption and domestic, aesthetic, and many industrial and commercial purposes.

Again, these uses just mentioned may require the adoption of higher standards of quality and more stringent control of waste inputs than is required for conservation of fish. For example, in many lakes that do not have temperature stratification, the input of nutrients like nitrogen and phosphorus might cause such growth of algae and other nuisance aquatic vegetation as would interfere with the quality of water necessary for these uses long before there would be an adverse effect on desirable warm-water species of fish. The input of nutrients and growth of vegetation in many rivers and streams would also interfere with the quality required for these uses before there would be an adverse effect on both cold and warm-water species. The prohibition and regulation of waste inputs such as phenolic material, arsenic and chlorides would have to be more stringent and standards for turbidity and colour of receiving waters much higher for some or all of these uses than for conservation of fish.

Standards of quality for conservation of species of fish cannot easily be defined because of the differing responses of individual species to specific wastes and the many interactions between wastes and environmental factors such as pH and temperature. Oxygen and temperature requirements vary for different species. Some lakes support only warm-water species and others only cold-water species.

Therefore conservation of fish is too narrow a purpose of legis-

[228] *Ibid.*, s. 33(4).
[229] *Ibid.*, s. 34(h).

lative jurisdiction to achieve the quality of water required for the maximum number and variety of uses.

However as in the case of navigation and shipping, standards of quality necessary for conservation of fish and for many of the other purposes for which waters are used are interrelated, for example, water suitable for human consumption and domestic use is generally suitable for conservation of fish, and therefore water quality management to achieve these standards should be co-ordinated.

E. *Agriculture.*

There is concurrent federal and provincial jurisdiction to legislate in relation to Agriculture though federal legislation prevails in the case of conflict.[230] There is judicial authority for the view that the essence of this jurisdiction is the encouragement or support of agriculture or the agricultural operations of farmers.[231]

Much the same arguments can be made as in the case of Inland Fisheries. Thus this jurisdiction would not authorize legislation to achieve standards of water quality and control of waste inputs that would not promote agriculture.

Enforcement of standards for colour caused by non-toxic materials, for turbidity, and for the input of heat and control of waste inputs, such as nutrients in levels which foster algae, would be necessary for the use of waters for swimming and water sports, and human, domestic, aesthetic, and many industrial purposes, long before such enforcement and control would become necessary to attain the quality of water required for irrigation and domestic animals (except in the case of nutrients fostering certain algae which might produce toxins harmful to them).

In addition, the use of water for human consumption, food processing industries, breweries and distilleries would require much more stringent control of biochemical oxygen demand, phenolic substances, detergents and bacterial contamination than the use of water for irrigation and domestic animals. Similarly, the use of water for sugar refineries, pulp and paper plants and dairies would require more stringent control of chlorides than would be necessary for these agricultural uses.

It is apparent that federal jurisdiction in relation to agriculture does not authorize such legislation as is required for comprehensive management of water quality.

However, enforcement of standards of water quality and control of waste inputs for the purpose of providing suitable water for the non-agricultural uses previously referred to, will increase

[230] *Supra*, footnote 126, s. 95.

[231] *R.* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, at p. 457; *Lower Mainland Dairy Products Sales* v. *Crystal Dairies Ltd.*, [1933] A.C. 168, at p. 174; *Canadian Federation of Agriculture* v. *A.G. Que.*, [1951] A.C. 179, at p. 200.

the supply of water suitable for the agricultural uses. Conversely, waste water returned from agricultural uses and drainage water from farm land will be substantially below standards required for non-agricultural uses and will diminish the supply available for these uses. This interrelation of standards demonstrates the need for co-ordination of legislation for management of water quality.

F. *Indians and Lands Reserved for the Indians.*

The exclusive federal jurisdiction in relation to Indians and Lands Reserved for the Indians authorizes legislation for the regulation of their lives and affairs on a reservation.[232]

However, the Indian Act[233] provides that provincial laws of general application shall apply to Indians in the Provinces "except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act".[234] But for this provision provincial law would not apply to Indians on reserves.[235]

Under the Act the Governor in Council may make regulations,[236] and the council of a band of Indians may make by-laws[237] not inconsistent with the Act or regulations thereunder, in relation to, *inter alia*, fish, noxious weeds and contagious and infectious diseases on reserves.

The Act contains no express provisions dealing with these matters. No regulations have been passed dealing with fish and noxious weeds. The Indian Health Regulations[238] relate to disease. In view of the requirement[239] of these Regulations as to application of provincial laws and in the absence of by-laws under this Act dealing with these matters, section 27 of The Ontario Water Resources Commission Act in so far as it prohibits pollution that may harm fish and cause disease, and section 28b relating to control of aquatic nuisances, would apply to reserves.[240] In addi-

[232] British North America Act, *supra*, footnote 126, s. 91(24); Laskin, *op. cit.*, footnote 152, pp. 550-551.

[233] Indian Act, R.S.C., 1952, c. 149.

[234] *Ibid.*, s. 87.

[235] *R.* v. *Rogers*, [1923] 3 D.L.R. 414.

[236] *Supra*, footnote 233, s. 72(1)(a)(b)(f).

[237] *Ibid.*, s. 80(a), (j)(o).

[238] The Indian Health Regulations, P.C. 1953-1129, S.O.R./53-310.

[239] *Ibid.*, ss 4, 20 specifically require compliance with provincial laws relating to health or sanitation so far as they are not inconsistent with the regulations. Indian Timber Regulations, P.C. 1954-2025, 1955 Consolidation, p. 1956, Indian Oil and Gas Regulations, P.C. 1966-1271, S.O.R./66-300 and Indian Mining Regulations, P.C. 1968-1865, S.O.R./68-454 have been made. S. 4 of the Oil and Gas, s. 25 of the Timber and s. 4 of the Mining Regulations require compliance with provincial laws not inconsistent with the regulations. Thus provincial laws for the control of pollution from these activities referred to earlier, would apply if consistent with the Regulations.

[240] *Supra*, footnote 233, s. 87.

tion The Ontario Water Resources Commission Act would apply to control other forms of pollution on reserves in the absence of regulations and by-laws under the Indian Act or where the regulations or by-laws require compliance with provincial laws not inconsistent with them.[241]

In the absence of applicable federal legislation or regulations, Indians off reserves are subject to provincial laws of general application.[242] Therefore The Ontario Water Resources Commission Act would apply to the activities of Indians off reserves that might cause pollution.

It might be noted in passing that the federal government has no property in waters on reserves.[243]

G. *Migratory Birds Convention Act.*

The Migratory Birds Convention Act[244] is valid as implementing under section 132 of the British North America Act the Migratory Birds Convention of 1916 between Great Britain (on behalf of Canada) and the United States of America.

The Migratory Birds Regulations[245] under this Act prohibit pollution of waters frequented by migratory birds or waters flowing into such waters or the ice over such waters, by oil, oil wastes or substances harmful to migratory birds.[246]

The legislative field in relation to such waters not being occupied by this Act, section 27 of The Ontario Water Resources Commission Act would also apply to such waters to prohibit all forms of pollution.

H. *National Parks.*

The National Parks in the Basin are the Georgian Bay Islands National Parks and the Point Pelee National Park.[247] Except for parts of the latter park, they are public lands and belong to the Crown in right of Canada.

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[241] *Ibid.*, s. 87.

[242] *R.* v. *Johnston* (1966), 56 D.L.R. (2d) 749; *Geoffries* v. *Williams* (1959), 16 D.L.R. (2d) 157; *R.* v. *Discon* (1968), 67 D.L.R. (2d) 619; *R.* v. *George* (1966), 55 D.L.R. (2d) 386; and see *R.* v. *Hill* (1908), 15 O.L.R. 406; see ss 3(b) and 19 of the Health Regulations, *supra*, footnote 238, as to Indians not on reserves.

[243] The interest of Indians in a reserve is a personal usufruct only with the ultimate title in the Crown in right of the Province in which the reserve is situate. The federal government does not acquire any proprietary rights in reserves by virtue of its exclusive legislative authority in relation to Indians and Lands reserved for the Indians. *R.* v. *Commanda*, [1939] O.W.N. 466; *Ont. Mining Co.* v. *Seybold*, [1903] A.C. 73, at p. 82.

[244] R.S.C., 1952, c. 179, see the Schedule for the Convention and s. 2 of the Act; *Sikyea* v. *The Queen*, [1964] 2 C.C.C. 325, (1964), 43 D.L.R. (2d) 150, aff'd, [1965] 2 C.C.C. 129, (1964), 50 D.L.R. (2d) 80.

[245] P.C. 1966-1475, S.O.R./66-361.

[246] *Ibid.*, s. 51.

[247] National Parks Act, R.S.C., 1952, c. 189, as am.; see Schedule Part V.

Public lands in the National Parks Act means "lands belonging to Her Majesty in right of Canada . . . including any waters on, upon or flowing through the said lands . . .".[248]

According to this definition these waters are the subject of property and belong to the Crown (Canada). Federal legislative competence in relation to Public Property might, by reason of federal ownership of public lands within parks, authorize such creation and vesting of property in the Crown.

Under the Act the Governor in Council may make regulations for the "control and management of the Parks",[249] the "protection of fish, including the prevention and remedying of any . . . pollution of waterways",[250] "the establishment . . . of utility services including water supply, sewage and garbage removal",[251] and "the abatement and prevention of nuisances".[252]

The National Parks General Regulations prohibit pollution of any stream or body of waters.[253]

The National Parks Garbage Regulations[254] prohibit the deposit of garbage and miscellaneous or trade waste, as defined, in any creek or watercourse in a Park or on any Park land except in a designated area.

The National Parks Water and Sewer Regulations[255] prohibit the deposit of refuse or other matter, fishing, bathing or washing in any Park area designated and marked as a source of water supply.

The National Parks Fishing Regulations[256] prohibit placing or permitting to pass into Park waters "sawdust, oil, chemicals, mill tailings, mine wastes or other refuse or deleterious substances of any kind". This prohibition would not extend to control of pollution of Park waters for purposes other than the protection of fish.

Federal legislation to control pollution of waters either surrounding or bordering the Parks, namely, Georgian Bay and Lake Erie, must be based on the classes of subjects within federal competence including management and protection of federal property in the Parks. In the absence of valid federal legislation occupying the field, provincial legislation for the control of pollution, such as The Ontario Water Resources Commission Act, would apply to these waters.

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[248] *Ibid.*, s. 2(d).
[249] *Supra*, footnote 247, s. 7(1)(a).
[250] *Ibid.*, s. 7(1)(d).
[251] *Ibid.*, s. 7(1)(j).
[252] *Ibid.*, s. 7(1)(t).
[253] P.C. 1954-1918, S.O.R. 1955, vol. 3, ss 14, s. 19(2)(a); see also ss 17, 18, 20.
[254] P.C. 1968-2114, S.O.R./68-540, s. 6(1).
[255] P.C. 1968-1822, S.O.R./68-440, s. 6.
[256] P.C. 1967-672, S.O.R./67-175, s. 23, see also s. 24.

I. *Criminal Law.*

The exclusive federal jurisdiction in relation to Criminal Law[257] might authorize penal legislation prohibiting, in the public interest, discharges of wastes into waters under defined conditions, and for the purpose of prevention, prohibiting conditions which may lead to such discharges.

In *A.G. B.C.* v. *A.G. Can.*[258] Lord Atkin described the only limitation on the plenary power of the Government of Canada to determine what shall or shall not be criminal as "the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in section 92. It is no objection that it does in fact affect them".[259]

In *A. G. Ont.* v. *Reciprocal Insurers*[260] the argument on behalf of the Dominion was that ". . . the jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense, that in execution of its powers over that subject matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done . . . the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under section 92 by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion . . .".[261] This argument was rejected in the Judicial Committee's decision that: ". . . it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under section 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid . . . ."[262]

In *Canadian Federation of Agriculture* v. *A.G. Quebec*[263] the Judicial Committee held that ". . . the prohibition in section 5(a) is in pith and substance a law for the protection and encouragement of the dairy industry in Canada. Incidentally, penalties are provided for any breach of the prohibition, but their Lordships are

[257] The British North America Act, *supra*, footnote 126, s. 91(27); *A.G. B.C.* v. *Smith*, [1967] S.C.R. 702.
[258] [1937] A.C. 368, followed in *A.G. B.C.* v. *Smith*, *ibid.*
[259] *Ibid.*, at p. 375.
[260] [1924] A.C. 328.
[261] *Ibid.*, at pp. 339, 340.
[262] *Ibid.*, at p. 342.
[263] *Supra*, footnote 231.

quite unable to regard this fact as sufficient per se to make the prohibition a law . . . in relation to the criminal law".[264] The Committee suggested that the argument based on criminal law ". . . would have more weight if it had been possible to contend that the object of the prohibition was to exclude . . . substances injurious to health".[265]

Prima facie control of pollution deals directly with the civil rights of individuals in relation to collection and treatment of their wastes and discharge of wastes into waters that are wholly or partly located in any area of a Province—matters of a local or private nature in the Province and within its legislative competence.

As pointed out at the beginning of this article, control of pollution at the present time is not chiefly directed to protection of health; rather it is intended to secure the quality of water most suitable for the greatest number of uses, of which protection of health is but one aspect.

If federal leglislation to prevent or control pollution takes the form of penal prohibitions designed, not merely to remove "some evil or injurious or undesirable effect upon the public",[266] but as part of a larger legislative scheme, to achieve conservation, development or use of waters, then the aspect of criminal law would be a pretence for an encroachment on provincial jurisdiction.

The common nuisance section of the Criminal Code[267] prohibits unlawful acts or omissions which endanger the "lives, safety, health, property or comfort of the public". Although some forms of pollution would fall within these provisions their primary purpose is not protection of the public interest in the quality of waters, as is the case with section 27 of The Ontario Water Resources Commission Act. The field is not occupied and section 27 can operate concurrently with them. Having regard to the limited scope of these provisions, and the procedural difficulties of enforcement by a member of the public,[268] they are not of real assistance.

Questions may arise as to whether criminal legislation can be justified where no direct injury is caused by any specific discharge of waste, or where any discharge of waste has a serious cumulative effect but only a minor individual effect or where the criminal quality or lack of criminal quality of any discharge of waste may vary as often as uses or qualities of different waters may vary. If

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[264] *Ibid.*, at p. 195.
[265] *Ibid.*, at p. 196.
[266] *Canadian Federation of Agriculture* v. *A.G. Que.*, [1949] S.C.R. 1, at p. 50, aff'd, *supra*, footnote 231.
[267] Crim. Code, S.C., 1953-54, c. 51, as am., s. 165.
[268] Tremeear, Criminal Code (6th ed., 1964), pp. 241, 242. *Grant* v. *St. Lawrence Seaway Authority*, [1960] O.W.N. 249; *R.* v. *Schula* (1956), 18 W.W.R. 453.

mens rea is required in any prohibition of pollution, for example if pollution is made a crime only when wanton, the extent of control would be seriously limited. There is the further question whether criminal legislation in this field can be effectively enforced in view of the recognized safeguards of the rights of individuals.

The essence of criminal law is prohibition of a general nature, not control and regulation of an individual case[269] and this is the main disadvantage in the exercise of this jurisdiction. A number of general and relatively inflexible criminal prohibitions of discharges of wastes under defined conditions would be an inadequate substitute for administrative discretion. Such discretion can be exercised in the case of pollution by a particular industry or by a specific discharge of waste and it can be adapted to meet changing conditions or modified after its initial exercise in a particular case.

J. *Peace, Order and Good Government.*

Whether Parliament has jurisdiction to legislate generally for control of pollution and enforcement of standards of water quality would depend, apart from criminal law, on whether it is authorized to do so for the peace, order and good government of Canada under the general power contained in the introductory words of section 91 of the British North America Act.

In the *Local Prohibition* case[270] Lord Watson said:[271]

> If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each Province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate to the exclusion of the provincial legislatures.

In describing the area in which Parliament may legislate in the exercise of the power under consideration Lord Watson stated:[272]

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures and that which has ceased to be merely local or provincial and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

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[269] See *P.A.T.A.* v. *A.G. Can.*, [1931] A.C. 310, at p. 325.

[270] [1896] A.C. 348; see also *A.G. Ont.* v. *Can. Temp. Fed.*, [1946] A.C. 193, at p. 206; The Supreme Court of Canada in *Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292, and *Munro* v. *National Capital Com.*, [1966] S.C.R. 663, at p. 670, preferred the statement of the principle in the *Can. Temp. Fed.* case.

[271] *Ibid.*, at p. 361. [272] *Ibid.*

War, pestilence, drink or drug traffic, carrying of arms or the prohibition or restriction of the sale or exposure of cattle having a contagious disease, have been mentioned in judicial decisions as illustrations of the type of matter which would permit legislation by Parliament under the peace, order and good government clause.[273]

In later cases the Judicial Committee restricted the exercise of the general power in relation to matters otherwise within exclusive provincial competence, to a sufficiently great emergency such as war.[274]

In the *Margarine* case[275] Mr. Justice Kellock refers to the judgment of Chief Justice Duff in the *Natural Products Marketing* case[276] and then continues:[277]

> In speaking of the *Board of Commerce* case the Chief Justice pointed out that the statute there in question was supported among other grounds on the ground that in the year 1919 when it was enacted, the evils of hoarding and high prices in respect of the necessaries of life had attained such dimensions as to affect the body politic of Canada. Nobody denied the existence of the evil; nobody denied that it was general throughout Canada; nobody denied the importance of suppressing it; nobody denied that it prejudiced and seriously prejudiced the well being of the people of Canada as a whole, or that in a loose, popular sense of the words it affected the body politic of Canada; nevertheless it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament under the introductory clause in the manner attempted. The Chief Justice went on to refer to the *Snider* case [1925] 2 D.L.R. 5, A.C. 396, the legislation there in question having been framed for the purpose of dealing with industrial disputes. . . . Duff C.J. said that the importance of the matters dealt with by the statute, the fact that the statute made provision for meeting a condition which prevailed throughout the whole of Canada and for dealing with industrial disputes which, in many, and indeed, most cases, would affect people in more than one Province, the fact that the machinery provided had proved to be a valuable instrument in the interests of industrial peace, were not disputed but nevertheless, the Privy Council negatived the existence of

[273] *A.G. Ont.* v. *Can. Temp. Fed., supra*, footnote 270, at p. 206.

[274] *Co-op Committee on Japanese Canadians* v. *A.G. Can.*, [1947] A.C. 87, at pp. 101-102; *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, at p. 416; *A.G. Can.* v. *A.G. Ont.*, [1937] A.C. 326, at p. 353; *Canadian Federation of Agriculture* v. *A.G. Que., supra*, footnote 231, at pp. 197, 198.

[275] *Canadian Federation of Agriculture* v. *A.G. Que.*, [1949] 1 D.L.R. 433 aff'd, *supra*, footnote 231. At p. 193 the Judicial Committee describes the judgment of Duff C.J. in the *Natural Products Marketing* case, [1936] S.C.R. 398 as "masterly".

[276] *Ibid.* In *A.G. Can.* v. *A.G. Ont., supra*, footnote 274, at p. 353, the Judicial Committee in referring to the judgment of Chief Justice Duff in the *Natural Products Marketing* case, stated that "they consider the law (as to the general power) is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. . . . The few pages of the Chief Justice's judgment will, it is to be hoped, form the locus classicus of the law on this point and preclude further disputes".

[277] *Supra*, footnote 275, at p. 487.

> the general principle that the mere fact that Dominion legislation is for the general advantage of Canada or is such that it will meet a mere want which is felt throughout the Dominion renders it competent, if it cannot be brought within the heads enumerated specifically in s. 91.

In *A.G. Can.* v. *A.G. Ont.*[278] the Judicial Committee said[279] of the general power: "It is only necessary to call attention to the phrases in the various cases, 'abnormal circumstances', 'exceptional conditions', 'standard of necessity' (*Board of Commerce* case) 'some extraordinary peril to the national life of Canada', 'highly exceptional', 'epidemic of pestilence' (*Snider's* case) to show how far the present case is from the conditions which may override the normal distribution of powers in sections 91 and 92."

Even if the dictum that the general power could authorize federal legislation for the protection of public health[280] was accepted, as pointed out earlier, impairment of public health by water-borne disease has not attained, and if provision of sewage and water works and treatment of water supplies continue, cannot attain such dimensions as to go beyond local or provincial concern or interest and become the concern of Canada as a whole. *A fortiori*, impairment of public health from this source has not become and is most unlikely to become an emergency of the nature referred to by the Judicial Committee.

Federal health legislation for the prevention or control of pollution causing water-borne disease cannot therefore be justified under the general power.

Certain features of the control of pollution of waters in the Basin which make it essentially a matter of local or provincial interest should be noted.

The surface waters of the Basin are physically self-contained and independent of all other surface waters in Canada, apart from the Ogoki River and Long Lac diversions from the Albany River System in Ontario into the Basin, and apart from the discharge of waters of the Basin into the St. Lawrence River. The uses of these surface waters cannot affect the uses of any other surface waters in Canada except the St. Lawrence River. Conversely, the uses of all surface waters in Canada other than in Ontario, cannot affect the uses of any surface waters of the Basin. Pollution of the surface waters of the Basin cannot impair the quality of any other surface waters in Canada except those of the St. Lawrence River. Conversely, pollution of all surface waters in Canada other than in Ontario, cannot impair the quality of any surface waters in the Basin. These features of a substantially self-contained and independent system are probably true of ground waters inside the Basin and outside the Basin in the rest of Canada.

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[278] *Supra*, footnote 274.
[279] *Ibid.*, at p. 353.
[280] *Supra*, footnote 266, at p. 78.

Management of the quality of waters in the Basin through control of pollution determines the uses that can be made of them. These uses can largely dictate the development of land in the immediate vicinity of the waters and, in decreasing degrees of importance, directly influence development of land progressively further from the vicinity but still within both the drainage area of these waters and the Basin. With the possible exception of lands bordering the St. Lawrence River in Quebec, the uses of the waters in the Basin do not directly influence development of land in the rest of Canada. Persons and industrial and commercial enterprises in Canada that use, pollute and are affected by pollution of the waters of the Basin are chiefly located in the Province of Ontario.

The control of pollution could substantially alter the pattern of economic development and population distribution within the Province. The following are some of the possible effects that may result from the cost of this control.

Where a municipality has to extend or improve its existing sewage treatment works so that its sewage effluent will conform to standards of quality required by a regulatory body such as the Commission, substantial expenditures may be necessary which can curtail the provision of other municipal services. A municipality might have to increase its tax rate on real property, which is its chief source of revenue, in order to meet liabilities incurred for this purpose. This increase in the tax rate by one municipality can impair its attraction for industries and its competitive position with other municipalities, which do not have to increase their tax rate to meet such liabilities.

Similarly, industries and commercial enterprises which are required to spend large sums for treatment so that their waste inputs will conform to required standards of quality may be forced to curtail expenditures for expansion and modernization. The competitive position of some enterprises in relation to others may be impaired to an extent where they may wish to relocate in areas of the Province where the cost of treatment is lower or to move entirely out of the Province.

If required standards of quality for waters can only be met by larger and wealthier municipalities, then the availability of land suitable for housing or industrial or commercial development decreases. Assuming the demand for land for such purposes remains the same or increases, the cost of development will increase.

Generally speaking, it is cheaper to treat municipal sewage or industrial wastes to meet required standards if the municipality or industry borders waters with a high capacity for dilution or assimilation of wastes than if it borders waters with a low capacity. This consideration might influence the movement of industrial and

commercial development and thus population growth, towards those municipalities adjoining the Great Lakes Boundary Waters and their connecting rivers.

The enforcement of standards of quality for waste inputs and waters could hinder development of land where the wastes expected to result from the developed land could not be adequately treated because of high cost. The consequence could be a stagnation of industrial and commercial development in many parts of the Basin and an intensified rate of movement of population away from rural communities into large urban centres where the cost of adequate treatment would be less.

If the Province through the Commission were to pay all or a substantial part of the cost of sewage treatment required of municipalities to maintain or improve standards of quality for waters, a greater tax burden is put on it with many consequential effects on its economy. The allocation of large sums for this purpose means less is available for other purposes.

Similar social and economic consequences could affect another Province in which an important drainage basin is wholly or partly located.

These possible effects are of primary concern to the people of the Basin and the Province. Taken together with the physical nature of the Basin as substantially self-contained and independent of all other waters in Canada, the localized influence which the uses of its waters have on the development of land and the location in the Province of the great majority of the persons, industries and enterprises which use its waters, the conclusion is inescapable that control of pollution in the Basin does not have an aspect in Canada any different in kind from its aspect in the Province. This aspect is essentially regional or provincial: federal legislation is not justified.

It has been said[281] that "the United States has developed to such an extent that water problems and specific water programs proposed to solve these problems have social, political, economic and ecological ramifications that affect the entire Nation and not just the immediate area or region in which a problem or project is located . . . the problem of water is national in character . . .".

In my view political, legal, geographical, social and economic differences between Canada and the United States are such that this statement does not apply to management of waters, and in particular, to control of pollution in Canada. This management and control have the ramifications just referred to but these primarily affect

[281] Report of the Senate Committee on Interior and Insular Affairs on S. 20 (1967), 90th Cong., 1st Sess., Report No. 25, Calendar No. 28, p. 2, quoted in C. B. Bourne, The Development of International Water Resources: The "Drainage Basin Approach" (1969), 47 Can. Bar Rev. 62, footnote 73, at p. 83.

the region and Province in which the drainage basin is wholly or partly located, and to a lesser degree, affect the rest of the country in the same way that any regional problems affect it. Pollution of the Great Lakes Boundary Waters may raise questions with the United States but these arise in the federal context because only the federal government can make binding legal arrangements with another country with respect to pollution.[282] These questions do not rise because control of the quality of these Boundary Waters "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole".[283]

K. *Works and Undertakings.*

The federal government has jurisdiction to legislate in relation to "Works and Undertakings connecting the Province with any other or others of the Provinces or extending beyond the Limits of the Province".[284] "Works and Undertakings" do not include a river or lake in its natural state even though the river or lake extends beyond the limits of a Province or is international water.[285] "There is no general federal jurisdiction over an interprovincial or international river or lake as such, because they would not be works or undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province. . . ."[286]

Where Parliament has validly declared certain works to be for the general advantage of Canada, Parliament derives exclusive legislative jurisdiction in relation to such works although they may be wholly situate within the Province,[287] and applicable provincial legislation, otherwise valid, will be rendered inoperative. In my opinion an example would be the federal declaration in regard to all works for the production, refining and treatment of radioactive materials and the suspension of the operation of The Ontario Water Resources Commission Act with respect to such works in so far as they involve the construction or operation of sewage works for the collection, transmission, treatment or disposal of radioactive wastes.[288]

[282] *A.G. Ont.* v. *Scott*, [1956] S.C.R. 137; Laskin, *op. cit.*, footnote 152, p. 289.

[283] *Can. Temp. Fed.* case, *supra*, footnote 270, at p. 205.

[284] British North America Act, *supra*, footnote 126, ss 91(29), 92(10)(a).

[285] *Montreal* v. *Montreal Street Railway*, [1912] A.C. 333, at p. 342; *Re Radio Communication*, [1932] A.C. 304, at p. 315; *A.G. Ont.* v. *Winner*, [1954] A.C. 541, at pp. 568, 572-574.

[286] Laskin, Jurisdictional Framework for Water Management, in Resources for Tomorrow Conference: Background Papers (1961), Vol. 1, pp. 211, 219.

[287] British North America Act, *supra*, footnote 126, s. 91(29), s. 92(10)(c); cases cited *supra*, footnote 285; Laskin, *op. cit.*, footnote 152, p. 504.

[288] Atomic Energy Control Act, R.S.C., 1952, c. 11, s. 18; Regulations,

Except for examples of this kind, these powers do not provide any significant basis for federal legislation for the control of pollution.

If the ancillary doctrine is still valid,[289] federal competence to legislate for the control of pollution may be extended by its operation.

L. *Great Lakes Boundary Waters.*

While there are no interprovincial waters located in the Basin, there are international waters in the sense of waters through which the international boundary between Canada and the United States passes.

Under section 132 of the British North America Act, Parliament alone has jurisdiction to pass all legislation "necessary or proper" for performing the obligations of Canada or of any Province thereof towards foreign countries arising under a treaty between the British Empire and such countries. This power has been interpreted to apply only when Canada has been bound as part of the British Empire by a treaty.[290]

If the Boundary Waters Treaty of 1909[291] which created the International Joint Commission is such a Treaty, as I think it is, then Parliament under section 132 has power to pass legislation implementing the obligations under it.

The only express obligation in the Treaty regarding pollution is contained in article 4, namely, "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other". Briefly, the Treaty defines boundary waters as the lakes and rivers along which the international boundary passes, including all bays and inlets, but not including tributaries flowing into such lakes and rivers or waters flowing from such lakes and rivers or rivers flowing across the boundary.[292]

The scope of the obligation under article 4 regarding pollution of the Boundary Waters determines the scope of federal legislative power under section 132 to implement the obligation. In my

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P.C. 1960-348 as am., S.O.R./60-119; *Regina* v. *Algoma*, [1958] O.W.N. 330; *Winner* v. *S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887; *A.G. Ont.* v. *Winner, supra*, footnote 285; *Luscar Collieries Ltd.* v. *McDonald*, [1925] S.C.R. 460, aff'd, [1927] A.C. 925; see also *Pronto Uranium Mines Ltd.* v. *O.L.R. Bd.*, [1956] O.R. 862.

[289] *A.G. Can.* v. *Nykorak* (1962), 33 D.L.R. (2d) 373; Laskin, *op. cit.*, footnote 152, pp. 103-104.

[290] J.-G. Castel, International Law (1965), p. 860; *In Re Regulation of Aeronautics*, [1932] A.C. 54; *A.G. Can.* v. *A.G. Ont., supra*, footnote 274, at p. 349.

[291] S.C., 1911, c. 28, see schedule and "Preliminary Article" to the Treaty.

[292] *Ibid.*, preliminary article.

opinion the clear meaning of article 4 as regards the obligation of Canada or the Province of Ontario is to prohibit such pollution on the Ontario side of the line as crosses the international boundary and causes injury to health or property on the American side. The obligation is not to prohibit pollution of rivers and lakes in the Basin flowing into the Boundary Waters, nor is it to prohibit pollution that remains on the Ontario side of the boundary or to prohibit pollution on the Ontario side that moves across the boundary but does not cause injury on the American side.

The requirement in article 4 of a causal connexion between a waste input directly into the Boundary Waters on the Ontario side and injury to health or property on the American side does not appear to have been accepted in the report to the International Joint Commission on the pollution of Lakes Erie and Ontario and the international section of the St. Lawrence River by the Advisory Boards of the International Joint Commission where it is stated:[293]

> The Advisory Boards conclude, on the basis of data and other information developed by the United States and Canada over the last six years, that Lake Erie, Lake Ontario and the international section of the St. Lawrence River are being polluted on both sides of the boundary (United States-Canada) to an extent that is causing and is likely to cause injury to health and property on the other side of the boundary.
>
> The Advisory Boards have concluded from flow studies conducted by United States and Canadian agencies, that there is substantial mixing of waters in the lakes to the extent that concentration levels of polluting materials are remarkably uniform throughout extensive areas of each lake. Thus, there appears to be no doubt that all major sources of pollution to the lakes have contributed directly, or indirectly, to their generally degraded condition.

These findings that any major source of pollution on the Ontario side contributes directly or indirectly to the "generally degraded condition" of the lakes, and that this degraded condition causes injury to health and property on both sides of the line do not require any causal connexion between a waste input on the Ontario side and a specific injury on the American side. Even if in a particular case, a major waste input on the Ontario side remained entirely on the Ontario side or moved across the boundary but did not cause any injury on the American side, or even if any injury on the American side was caused, not by the waste input on the Ontario side, but by a major waste input on the American side, the waste input on the Ontario side would apparently, in the view of the Advisory Boards, be prohibited by article 4. In other words article 4 prohibits any "major source of pollution" on either side of the line, whether or not it can be demonstrated that the source of pollution on one side causes injury on the other side because

[293] Report to the International Joint Commission on the Pollution of Lake Erie, Lake Ontario, and the International Section of the St. Lawrence River (1969), p. 7.

the degraded condition of the lakes causes such injury and will continue to do so in the future. On this view federal legislative competence under section 132 to implement the obligation under article 4 would extend to the prohibition of any "major source of pollution" of the Great Lakes Boundary Waters which enters such waters directly and not from a tributary.

If my view of the obligation in article 4 is accepted, effective legislation to implement it would have to prohibit waste inputs originating on the Ontario side with penalties for breach or possibly to create civil rights of action and remedies for injury caused to health or property on the American side.[294] For the enforcement of this legislation, either criminal or civil, a causal connexion would have to be established between a waste input originating on the Ontario side and injury to health or property on the American side. Proof would be required not only of the movement of a waste across the international boundary so as to cause injury, but also that the injury was not caused by the input from the American side of the same waste or wastes having similar injurious effects.

It may be possible over a given period of time, to measure the total amount of any specific waste entering, leaving and remaining in any of these Boundary Waters, and then to apportion the amount of the remaining waste among the various sources of wastes on both sides of the boundary. However, for the purpose of criminal and civil proceedings such measurement and apportionment would not be proof of any causal connexion between a waste input on the Ontario side and injury on the American side. It would also not establish that the injury was not caused by the same or a similar waste originating on the American side.

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[294] The present law is unsatisfactory. Where pollution of waters on one side of a provincial boundary in interprovincial waters or on one side of the international boundary in the Great Lakes Boundary Waters causes damage to land under or adjoining the waters on the other side of either boundary (for cases of pollution involving damage to land see *Weber* v. *Berlin* (1904), 8 O.L.R. 302; *Butt* v. *Oshawa* (1926), 59 O.L.R. 520; *Hunter* v. *Richards* (1913), 28 O.L.R. 267); if *British S.A. Co.* v. *Companhia de Moçambique*, [1893] A.C. 602, *Albert* v. *Fraser Companies*, [1937] 1 D.L.R. 39 and *Boslund* v. *Abbotsford*, [1925] 1 D.L.R. 978, are followed, the courts would not have jurisdiction to try civil actions for damages or an injunction based on such pollution or even for damage to personal property or health indirectly caused by such pollution.

Redress might be sought under the Boundary Waters Treaty through a reference to the International Joint Commission either under article IX for a non-binding report or under article X for a final decision. Such redress might follow a tortuous path. In the Trail Smelter Dispute, which involved claims for damage in the State of Washington based on nuisance by smoke caused by operations of a smelter in British Columbia, following the path took thirteen years. See The Trail Smelter Dispute by John E. Read (1963), 1 Can. Year Book of Int'l L. 213; see also J. P. Erichsen-Brown, Legal Implications of Boundary Water Pollution (1967), 17 Buffalo L. Rev. 65.

It is not possible to conclude reasonably that specific wastes originating on the Ontario side are transmitted to any given location on the American side in any concentration sufficient to cause an injury which would not be caused by the same or similar wastes originating on the American side, for the following reasons:

(1) the large volume of water involved;
(2) the distance between any alleged source of waste on the Ontario side and a given location of injury on the American side;
(3) the many variable factors affecting the movement of wastes in these waters or in their sediments;
(4) the numerous sources of the same or similar wastes originating on both sides of the boundary;
(5) the varying rates of biochemical breakdown of different wastes; and
(6) the varying rates of re-aeration of these waters.

A causal connexion could be established reasonably only by visual observation of the movement of wastes (such as oil or other material causing discoloration) from one side of the boundary to a point on the other side, or in certain of the connecting rivers by linking the injury on the American side of the boundary to a specific waste originating only on the Ontario side.

Apart from the difficulty of establishing a causal connexion, federal legislative competence to implement the obligation under article 4 does not extend to waste inputs into the numerous tributaries in Ontario of the Great Lakes Boundary Waters because the definition[295] of Boundary Waters in the Treaty does not include these tributaries. Even if article 4 is held applicable to these tributaries, the difficulty of establishing a causal connexion between a waste input into tributary and injury on the American side may be greatly increased.

Even assuming a causal connexion can be established, because of the six reasons enumerated above, the degree of legislative control of pollution that would be required to produce a quality of water on the Ontario side of the line suitable for human, domestic, recreational, aesthetic and industrial purposes in Ontario would need to be far higher than if the objective was merely the prevention of injury to health or property on the American side. This objective does not solve the real problem for Ontario which is the maintenance and improvement of the quality of waters for existing and potential uses in Ontario. On the other hand, the maintenance or improvement of standards of quality for these waters in Ontario to permit the greatest number of uses would necessarily prevent any significant pollution on the Ontario side

[295] *Supra*, footnote 292.

to the injury of health or property on the American side.

Since Great Britain no longer negotiates treaties on behalf of Canada and obligations entered into by Canada are not obligations of Canada as part of the British Empire but of Canada by virtue of her new status as an international juristic person, section 132 is no longer a source of federal legislative competence to implement treaties.[296] The question then arises whether Parliament has legislative power, apart from section 132, to implement a treaty with respect to pollution of waters in the Basin that may be negotiated with the United States of America in the future.

In the *Labour Conventions*[297] case it was held that under the British North America Act Parliament had no independent legislative power to implement a treaty apart from section 132. Therefore certain federal labour legislation to implement conventions under the Treaty of Versailles was beyond the power of Parliament as being in relation to Property and Civil Rights in the Province, a matter within the exclusive legislative competence of the Provinces. It was decided that the power to legislate in order to implement the obligations of a treaty which is not an "Empire Treaty" under section 132, does not belong exclusively to Parliament and may belong to the Provinces. The Judicial Committee stated: "The distribution (of legislative powers in sections 91 and 92) is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained."[298]

If this decision remains law,[299] the legislative authority of Parliament to implement a treaty made in the future by the federal government with the United States of America for the control of pollution of the Boundary Waters must depend for its valid exercise on the authority possessed by Parliament under sections 91 and 92 and not on section 132 of the British North America Act.

Federal legislative competence under sections 91 and 92 does not extend to enforcement of standards of quality for all uses of waters and to control of all forms of pollution. Parliament can legislate to implement a treaty dealing with control of pollution to the extent that such control falls within its legislative competence as has been discussed in this article. To the extent that it does not, Parliament has no legislative competence to implement a treaty without the concurrence of the Provinces.[300]

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[296] *A.G. Can.* v. *A.G. Ont., supra*, footnote 274; *Re Radio Communication, supra*, footnote 285.

[297] *A.G. Can.* v. *A.G. Ont., ibid.*

[298] *Ibid.*, at p. 351.

[299] *Francis* v. *The Queen*, [1956] S.C.R. 618.

[300] G. J. Szablowski, Creation and Implementation of Treaties in Canada (1956), 34 Can. Bar Rev. 28, at pp. 53, 54; *A.G. Can.* v. *A.G. Ont., supra*, footnote 274.

The importance of legislative power to implement a treaty lies in the fact that, with certain exceptions not relevant here, a treaty is not part of the domestic law of Canada and is not binding upon persons in Canada or upon the Provinces or their agencies, and no legal rights or duties under the domestic law of Canada are created or imposed by the terms of the treaty, except in so far as the treaty is implemented by valid legislation, either provincial or federal.[301] Thus in *Arrow River and Trib., Slide and Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.*[302] Mr. Justice Lamont (Mr. Justice Cannon concurring) stated:[303]

> The Treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects. . . . these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subjects. . . .

Therefore no legal rights or duties respecting pollution of the Great Lakes Boundary Waters are created or imposed under the domestic law of Canada by article 4 of the Boundary Waters Treaty, except in so far as the Treaty is implemented by valid federal legislation, since the implementation of an "Empire Treaty" is exclusively within federal legislative competence under section 132.[304] Decisions or reports of the International Joint Commission under the Treaty respecting pollution are not binding under the domestic law of Canada and can only be made binding by federal legislation under section 132 implementing the Treaty. The contravention by any person in Canada of the terms of the Treaty or of any decision or report of the Commission under it respecting pollution is not an offence under the domestic law of Canada except in so far as the contravention is made an offence by valid federal legislation.

Article 4 does not affect in any way the competence of the Provinces or of the federal government to control pollution by legislation within their respective constitutional jurisdictions, nor does it affect the validity of existing legislation such as The On-

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[301] *Arrow River and Trib. Slide and Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495; *Swait* v. *Bd. of Trustees of Maritime Trans. Unions* (1967), 61 D.L.R. (2d) 317; *Francis* v. *The Queen, supra*, footnote 299; *Sikyea* v. *The Queen, supra*, footnote 244; *Albany Packing Co.* v. *Reg. of Trade Marks*, [1940] Ex. R. 256, at p. 266; *A.G. Can.* v. *A.G. Ont., supra*, footnote 274, at pp. 347-348; *R.* v. *Canadian Labour Relations Board* (1964), 44 D.L.R. (2d) 440, at p. 454; *Re Nakane* (1908), 13 B.C.R. 370; Castel, *op. cit.*, footnote 290, pp. 851-906.

[302] *Ibid.*

[303] *Ibid.*, at p. 510.

[304] *Supra*, footnote 290.

tario Water Resources Commission Act, except in so far as article 4 has been implemented by valid federal legislation.[305]

Valid federal legislation under section 132 implementing article 4 would render inoperative any provisions of a provincial statute, otherwise valid, that were in conflict with the federal Act.[306]

The Act of 1-2 George V., c. 28, which can conveniently be called the "Boundary Waters Act", was passed by Parliament in 1911 for the purpose of "carrying into effect" the provisions of the Boundary Waters Treaty. Section 1 of the Act states that the Treaty is confirmed and sanctioned;[307] provides for the establishment of the Canadian section of the International Joint Commission;[308] confers jurisdiction on the Exchequer Court of Canada in cases arising under the statute;[309] creates, in implementation of article 2 of the Treaty, legal rights and duties in Canada arising out of the diversion of water which causes injury on the American side;[310] and in section 2, provides that the laws of Canada and of the Provinces are amended and altered so as to permit and authorize the performance of the obligations under the Treaty and so as to sanction, confer and impose the rights, duties and disabilities intended by the Treaty to be conferred or imposed or to exist within Canada.

It should be noted that the Boundary Waters Act does not make it an offence to contravene any of the terms of the Treaty, and in particular the terms of article 4 respecting pollution of Boundary Waters or waters flowing across the boundary or decisions or reports of the International Joint Commission thereon; it does not prohibit the pollution that is prohibited by article 4; it does not confer on the federal government or any federal agency any jurisdiction relating to control of such pollution; it does not refer to any specific provincial laws regarding pollution that are intended to be amended or altered; and it does not require or authorize any action to be taken by the federal government or any

[305] In *Re Regulation of Aeronautics, supra,* footnote 290, at p. 74 (as to implementation under s. 132); *Swait* v. *Board of Trustees of Maritime Unions, supra,* footnote 301; *B.C. Power* v. *A.G. B.C.* (1963), 44 W.W.R. 65, 180.

[306] *R.* v. *Stuart,* [1925] 1 D.L.R. 12 held that although the Migratory Birds Convention did not expressly forbid or deal with possession of migratory birds during the closed season, the provisions of the Migratory Birds Convention Act (Can.) prohibiting such possession were valid under s. 132 as necessary to implement the Convention. The provision of a Provincial statute permitting such possession was held invalid; *A.G. B.C.* v. *A.G. Can.,* [1924] A.C. 203; *Re Nakane, supra,* footnote 301; see also *Daniels* v. *The Queen,* [1968] S.C.R. 517.

[307] *Re Nakane, ibid.,* held that "sanction" was sufficient to implement a treaty under s. 132.

[308] *Ibid.,* s. 6; see also s. 5.

[309] *Ibid.,* s. 4.

[310] *Ibid.,* s. 3.

federal agency respecting pollution of Boundary Waters.

Moreover it is significant to observe in this Act that:

(a) While section 1 is worded almost like section 2 of the Migratory Birds Convention Act[311] the latter Act provides that the Governor in Council may make regulations to protect migratory birds,[312] provides administrative machinery for enforcement of the Act and regulations[313] and creates offences relating to them.[314] No such provisions for effective implementation of article 4 are to be found in the Boundary Waters Act.

(b) The terms of article 2 of the Treaty creating legal rights and remedies for any injury arising from diversion of waters have been substantially incorporated in section 3 but the terms of article 4 prohibiting pollution on one side of the line that causes injury on the other side have not been incorporated anywhere.

(c) Section 3 purports to create legal rights and remedies in the case of injury on the American side by diversion in Canada of waters flowing across the boundary or into boundary waters but there is no similar provision purporting to create legal rights and remedies in the case of injury on the American side caused by pollution in Canada.

It is therefore very difficult to understand how section 2 of the Act implements the prohibition against pollution that is contained in article 4 or what the meaning or effect of section 2 is in regard to this prohibition. The only effective implementation that I can suggest is that if a statute of Ontario expressly permits pollution on the Ontario side which causes injury to health or property on the American side, the statute would be held invalid as contrary to the Boundary Waters Act.[315]

Assuming the Act implements the Treaty, the Act does not occupy the field of control of pollution of the Great Lakes Boundary Waters so as to render section 27 of the Ontario Water Resources Act inapplicable.[316] Not only is there no express conflict between section 27 and the prohibition in article 4 but section 27, unlike article 4, prohibits all pollution and has penalties for breach.

Even if the Boundary Waters Act can be amended, having regard to the decision in *Sikyea* v. *The Queen*[317] the arguments made earlier in regard to causation, and the need for standards of quality of the Boundary Waters for all uses in Ontario rather than for prevention of injury on the American side, would still be valid.

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[311] R.S.C., 1952, c. 179.
[312] *Ibid.*, s. 4.
[313] *Ibid.*, ss 5, 7, 11.
[314] *Ibid.*, ss 6, 8, 9, 10, 12.
[315] *Supra*, footnote 306.
[316] *Supra*, footnotes 217, 218.
[317] *Supra*, footnote 244.

The Boundary Waters Treaty was entered into more than sixty years ago. Since that time there have been great changes in our environment, in our knowledge about pollution and the Boundary Waters of the Great Lakes System and in our uses of these waters. In my view the concept of control of pollution that is contained in article 4 should be replaced by principles formulated in the light of present conditions and future needs. These principles should deal with all significant pollution of these waters, whether reaching them directly or from tributary waters, including Lake Michigan and should provide for allocation to Canada and the United States of all uses of these waters including the use for waste disposal. There should be no need to demonstrate that pollution from any source causes injury to health or property or otherwise, or that pollution from a source on one side of the line causes an effect on the other side. However, where it is established that an injury to health or real or personal property or to an other interest on one side of the line is caused by pollution from any source on the other side, the injured person should be given effective rights and remedies in the locality where the source of pollution is located.[318]

In the paper referred to earlier,[318A] *Jurisdictional Framework for Water Management*, Mr. Justice Laskin raises the question whether a Province loses its constitutional authority where it is faced with interprovincial or international waters in the sense of boundary waters. He states:

> One possible argument would be to urge that where rights in respect of interprovincial or international waters are concerned they are no longer matters in relation to "property and civil rights in the Province" under section 92(13)—they involve rather rights outside the Province —and, similarly, they are no longer in relation to "matters of a merely local or private nature in the Province" under section 92(16)—they are of a non-local nature outside the Province. It is proper to say that this argument has not been adopted by the Courts as a basis of federal legislative power, even when urged in association with the federal trade and commerce power. Although provincial legislation has from time to time been invalidated for purporting to curtail or defeat rights outside the Province, it is improbable that this view would be taken of Provincial legislation dealing with water flowing through or in the province merely because the water had an extra-provincial destination or contact. The only limitations on provincial power would be such as arose from federal power (and federal legislation enacted thereunder) as already discussed.

There is judicial authority[319] for Mr. Justice Laskin's view. In

[318] *Supra*, footnote 294.

[318A] *Supra*, footnote 286, at p. 221.

[319] *R.* v. *Meikleham* (1906), 11 O.L.R. 366. In *Arrow River and Trib. Slide and Boom Co.* v. *Pigeon Timber Co. Ltd., supra*, footnote 301, the Supreme Court held that the legislative competence of a Province extended to that portion of international boundary waters that is located within its

Rex v. *Meikleham*,[320] the court stated:[321]

> It is not open to question that the Province of Ontario extends to the line in Lake Huron which forms the western boundary of the British possessions and the easterly boundary at that point of the United States of America, nor that within the territorial limits of the Province, as to the subjects of legislation assigned by the British North America Act, 1867, to the Provinces, the legislative authority of the Province is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow, *Hodge* v. *The Queen* (1883), 9 App. Case, 117, 132. . . . As I have already pointed out, in the case of the great lakes—Lake Huron is the lake in question here—to the east of the international boundary line the whole area forms part of the Province of Ontario and is under its legislative authority and control. . . .

It follows that provincial legislative competence would extend, and legislation such as The Ontario Water Resources Commission Act would apply, to international waters in the Basin, such as the

territory, and in particular held that ss 32 and 52 of The Lakes and Rivers Improvement Act, R.S.O., 1927, c. 43, providing for construction and maintenance of works upon any river or lake in Ontario were *intra vires* and applied to the Ontario side of international boundary waters namely the Pigeon River, notwithstanding that such waters have an extra-provincial contact. At p. 509, Lamont and Cannon JJ. stated: "That Pigeon River is only in part in the Province of Ontario does not, in my opinion, render the Act inapplicable to that part for provincial legislative enactments, unless restricted as to the area to which they shall apply, effectively operate throughout the whole Province." At p. 502, Smith J. stated: ". . . the provincial jurisdiction to improve the flotability of the non-navigable part of an international stream within the Province, except as modified by treaty, does not seem to be different from the jurisdiction to make such improvements in a non-navigable stream wholly within the Province."

In *Cote* v. *Quebec Liquor Comm.*, *supra*, footnote 221, at p. 140, the court held that the legislative jurisdiction of the Province of Quebec extends to that part of the St. Lawrence River which is situate within the Province.

In *Owen Sound Transp. Co.* v. *Tackaberry*, [1936] 3 D.L.R. 272, the Court of Appeal held that the Ferries Act, R.S.O., 1927, c. 159 applied to Georgian Bay, a boundary water, so that an exclusive franchise under the Act to operate a ferry service on that Bay was valid. This case was followed in *T.T.C.* v. *Aqua Taxi Ltd.*, *supra*, footnote 190, where it was held that Ontario statutes under which a franchise to operate a ferry was obtained, were valid and applicable to a federal public harbour in international boundary waters, namely Toronto Bay in Lake Ontario. The dictum of Mr. Justice Gale, as he then was, at p. 729, that ". . . the water . . . of Toronto Bay" was the property of the Dominion, should be read in the light of the discussion in this article on property in waters of federal public harbours.

In *Upper Ottawa Improvement Co.* v. *H.E.P.C. of Ont.*, *supra*, footnote 169, the court assumed and did not question the validity and application of The Lakes and Rivers Improvement Act, R.S.O., 1937, c. 45, and The Ottawa River Water Powers Act, S.O., 1943, c. 21, to an interprovincial river, namely the Ottawa River. See *Re Sturner and Town of Beaverton* (1911), 24 O.L.R. 65.

See also *Beauharnois* v. *H.E.P.C. Ont.*, [1937] O.R. 796, aff'd at p. 818; *The Grace* (1894), 4 Ex. C.R. 283; Castel, *op. cit.*, footnote 290, pp. 376-415.

[320] *Supra*, footnote 319.

[321] *Ibid.*, at pp. 370-372.

Great Lakes Boundary Waters, or to interprovincial waters outside the Basin, such as the Ottawa River, to the extent that these waters form part of the territory of the Province of Ontario.[322] Subject to the paramountcy of valid federal legislation within federal legislative powers as discussed earlier in this article, the fact that waters are international or interprovincial does not lessen or override the authority of a Province to control pollution in any part of these waters that lies within the Province.[323] It also follows that federal legislative competence does not extend to these waters merely because they are international or interprovincial waters. Such competence would have to be based on the legislative powers contained in sections 91, 92 and 132.

M. *Canada Water Act.*

Bill C-144 known as the Canada Water Act, was given first reading in the House of Commons November 5th, 1969. The Minister of Energy, Mines and Resources introduced the Bill and is the Minister referred to in it.[324]

The purpose of the Act is to provide for federal water resource management which is defined[325] as the "conservation, development and utilization of water resources". This includes research, collection of data, formulation of comprehensive water resource management plans, design of projects for efficient management, implementation of plans or projects and control and regulation of water quantity and quality.

Joint water resource management under a federal-provincial agreement, is authorized for any waters "where there is a significant national interest" in their management.[326] Where this national interest exists, unilateral federal water resource management by the Minister with the approval of the Governor in Council, is authorized with respect to inter-jurisdictional waters,[327] (any waters whether international, boundary or otherwise, that though wholly or partly situate in a Province, significantly affect waters outside the Province),[328] with respect to international waters,[329] (rivers flowing across the international boundary)[330] and with respect to boundary waters,[331] (defined as in the Boundary Waters Treaty).[332] In addition, unilateral federal management is authorized with respect to federal waters,[333] that is waters subject to the exclusive legislative jurisdiction of Canada.[334]

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[322] See The Territorial Division Act, R.S.O., 1960, c. 395, ss 6-10 as to the boundaries of townships lying on international, interprovincial or other waters in Ontario.

[323] *Supra*, footnote 319.

[324] Bill C-144, introduced in the Second Session, Twenty-eighth Parliament, 18 Eliz. II, 1969; s. 2(1)(i).

[325] S. 2(1)(L). [326] S. 4. [327] S. 5(1)(b). [328] S. 2(1)(g).
[329] S. 5(1)(c). [330] S. 2(1)(h). [331] S. 5(1)(c).
[332] S. 2(1)(c); *supra*, footnote 292. [333] S. 5(1)(a). [334] S. 2(1)(e).

Unilateral federal management for all waters other than federal waters, requires that the Governor in Council be satisfied that all reasonable efforts to reach a federal-provincial agreement have been made and have failed.[335] Only in the case of federal, international and boundary waters can unilateral federal management include, *inter alia*, implementation of either plans or projects.[336]

The Act deals specifically with pollution, that is, "water quality management"[337] which is defined as "any aspect of water resource management that relates to restoring, maintaining or improving the quality of water".[338]

Joint water quality management under a federal-provincial agreement is authorized[339] for any federal waters or for any other waters whose management "has become a matter of urgent national concern". Unilateral federal water quality management is authorized with respect to federal waters[340] and with respect to any inter-jurisdictional waters,[341] whose quality management "has become a matter of urgent national concern". Except for federal waters, this unilateral federal management requires[342] that the Governor in Council be satisfied that all reasonable efforts to reach a federal-provincial agreement have been made and have failed.

All water quality management relates only to waters designated either in a federal-provincial agreement[343] or by a unilateral federal decision,[344] as a water quality management area.

The Act provides for the incorporation or designation, either under a federal-provincial agreement[345] or by a unilateral federal decision,[346] of a water quality management agency to plan and carry out programmes to "restore, preserve and enhance the water quality level"[347] in the area for which the agency is established. These programmes include the development and recommendation to the Minister of a quality management plan for an area.[348]

In order to implement a plan that has been approved by the Minister, an agency may, *inter alia*, design, construct and operate waste treatment works, treat waste delivered to the works, analyze samples of waste, inspect public or private waste treatment works within its area and collect fees prescribed by regulations of the Governor in Council to be payable for treatment of waste, analysis of waste samples and for the deposit of waste in waters of the area.[349]

Section 8 of the Act prohibits the deposit of any waste in any waters of an area or in any place under any conditions where the waste may enter any such waters, except where the deposit of waste is permitted and is in accordance with conditions prescribed

[335] S. 5(2). [336] Ss 5(1)(a), 5(1)(c). [337] S. 8 *et seq.*
[338] S. 2(1)(m). [339] S. 9. [340] S. 11(2).
[341] S. 11(1). [342] Ss 11(b), 11(2). [343] S. 9.
[344] S. 11(1)(2). [345] S. 9. [346] S. 11(1)(2).
[347] S. 13(1). [348] S. 13(1)(c). [349] S. 13(2).

by regulations, including payment of any effluent discharge fees. This section does not come into force with the rest of the Act. It comes into force by a special proclamation.[350]

Regulations may be made by the Governor in Council prescribing, *inter alia*, substances to be wastes for the purposes of the Act,[351] and with respect to any water quality management area, prescribing[352] the quantities, if any, of waste that may be deposited in waters of the area and the conditions for such deposit, standards for the quality of these waters, and effluent discharge fees to be paid for the deposit of waste in them. The regulations may require books and records to be kept of a deposit,[353] submission of test portions for analysis,[354] and a report to an agency of any deposit of waste contrary to section 8.[355]

The Act provides for analysts, inspectors,[356] powers of inspection, requirements for assistance of inspectors and disclosure of information to them[357] and prosecutions.[358] It is an offence to contravene[359] section 8. The only other offences are contraventions of the regulations[360] requiring books and records, requiring a report of a deposit contrary to section 8 and requiring submission of test portions for analysis, and contravention of the section prohibiting obstruction of an inspector and the making of false statements.[361] A court is given broad power to grant an injunction.[362] Civil remedies are preserved for any act or omission which is an offence under the Act.[363]

It should be noted that water resource management, other than water quality management, does not involve any control, by law, of the conservation, development and utilization of waters, and in particular, does not authorize any control, by law, of the quantity or quality of waters. Apart from water quality management, no offences are created with respect to water resource management and no charges can be prescribed for water or sewage services performed in the implementation of any water resource management plans or projects. No regulations can be made respecting the control of water quantity and apart from quality management, no regulations can be made regarding any aspect of water resource management. The reference to "control and regulation" of water quantity and quality in the definition[364] of "water resource management" must therefore be taken to mean control and regulation by physical means and not by law.

Implementation of plans or projects for water resource management of boundary waters or federal or international waters might

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[350] S. 34(2). [351] S. 16(1)(a). [352] S. 16(2).
[353] S. 16(1)(e). [354] S. 16(1)(g). [355] S. 16(1)(f).
[356] S. 17. [357] S. 18. [358] Ss 25, 26, 27, 29. [359] S. 22.
[360] Supra, footnote 267, s. 107; see Tremeear, *op. cit.*, footnote 268, p. 162.
[361] S. 23. [362] S. 24. [363] S. 28(2). [364] S. 2(1)(L).

include construction and operation of the following works:

(i) works such as dams, reservoirs, dykes, weirs and works for the transmission of water into, or the diversion of water out of, any body of water. The operation of these works can significantly affect the movement or the level of waters and necessarily affects, directly or indirectly, their quality, through dilution or other means.

(ii) works such as water intakes, reservoirs, water treatment plants and water works generally. Water from the operation of these works is used for many purposes. Except for water used for the hydraulic generation of power, it is returned, eventually, to a body of water in an altered form (for example, municipal sewage) which may require sewage treatment before return to avoid pollution. If treatment is inadequate the utilization of these water works is the beginning of a series of events leading to pollution.

(iii) works for the conservation of the quality of waters, such as sewage treatment plants and sewage works generally. The effluent from these plants is usually discharged into waters and, depending on the degree of treatment, may impair their quality and result in pollution. The discharge of effluent even from treatment works that are designed and operated in accordance with modern standards can, under certain conditions, cause pollution.

Unilateral federal implementation of plans or projects by these methods could mean that the federal government would acquire, by expropriation, purchase or otherwise, lands bordering waters, with riparian rights in or over the waters, and would construct and operate the necessary works. The Minister, *inter alia*, would, for charges to be fixed by him, enter into contracts to collect, treat and supply water to municipalities, industries or other persons or to accept and treat sewage produced by them and dispose of the effluent. The revenues realized might be used to acquire additional property and expand these water and sewage services.

Unilateral federal implementation of water management can significantly affect the conservation, development and utilization of federal and international waters and, subject to the Boundary Waters Treaty as implemented, [365] boundary waters.

Implementation by the Minister is not subject to control under the applicable provisions of The Ontario Water Resources Commission Act[366] or other provincial leglislation.[367] In fact his im-

[365] S.C., 1911, c. 28; see also, *supra*, footnote 307.

[366] *Supra*, footnote 2, see for example s. 18(1) (inspection of works); s. 27 (prohibition of pollution); s. 28a (a permit for taking water); s. 28b (a permit to control aquatic nuisances); ss 30, 31 (approval of sewage and

[367] *See next page.*

plementation may be contrary to such legislation, or to the policies of provincial agencies administering the legislation. This is the normal consequence of the rules that a provincial statute, such as the Ontario Act, does not bind the Crown unless expressly stated otherwise and that a province cannot legislate to bind the Crown in right of Canada either in respect of its prerogatives or its property.[368]

I will now consider the constitutional validity of the important provisions of the Act.

At the outset the question arises as to whether any waters in the Basin are federal waters, that is, waters under the exclusive legislative jurisdiction of Parliament. If the dictum in the *Burrard Power Co. Ltd.* case[369] is accepted, waters on federal property, such as federal harbours and canals, are federal waters. The opinion has been previously expressed that the dictum cannot be supported in the light of the explanation of this case given in *A.G. B.C.* v. *A.G. Can.*[370] If this view is correct the only waters in the Basin that can be considered federal are those which have been made the subject of federal property, by statute, such as those on or flowing through public lands in a National Park[371] or those which are wholly located on federal land and, in effect, are considered part of it.[372] If federal waters are intended to be limited to these waters and to other waters not within the Provinces, such as waters along the coast and in the Yukon and North West Territories, the definition of federal waters should be amended.

No further reference will be made to federal waters because once it is established that waters are federal the constitutional validity of the provisions of the Act with respect to these waters cannot be denied.

A question of validity is raised by the authorization in the Act for the Minister to spend funds to be appropriated by Par-

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water works); s. 30(4) (returns from owner of water works); s. 30(5) (control of the repair and operation of water works); s. 36 (returns from owner of sewage works); s. 37 (control of operation and repair of sewage works); s. 46a (exercising, in an area of public water or sewage service, the broad powers set out in the section); s. 47(1) (power to make regulations); s. 50 (an order requiring measures respecting the collection, transmission, treatment or disposal of sewage); s. 50a (power to regulate the discharge of sewage into works).

[367] For example, The Lakes and Rivers Improvement Act, *supra*, footnote 115, see s. 9 which requires the approval of the Minister of Lands and Forests to the construction of a dam on any lake or river: see also ss 9a and 16 authorizing appointment of an officer to control the use of a lake or river in certain cases.

[368] *Supra*, footnote 35.

[369] *Supra*, footnote 177.

[370] *Ibid.*

[371] *Supra*, footnote 247.

[372] *Re Vancouver & E. Rlwy. Co.* v. *Milsted* (1907), 7 W.L.R. 384 (ownership of a spring); Coulson and Forbes, *op. cit.*, footnote 187, p. 98.

liament[373] and to enter into contracts for the implementation of water resource management plans or projects.

In *A.G. Can.* v. *A.G. Ont.*[374] Lord Atkin said:[375]

> . . . But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.
>
> It may still be legislation affecting the classes of subjects enumerated in s. 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 invade civil rights within the Province, or 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 invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the Provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain. . . .

Or, as stated by the Judicial Committee in *A.G. Man* v. *A.G. Ont.*,[376] "It is not permissible to do indirectly what cannot be done directly".

This principle was followed in *Angers* v. *M.N.R.*[377] where the exercise of the federal spending power in relation to family allowances was held valid against the argument that the Family Allowances Act encroached upon exclusive provincial jurisdiction in relation to education. The court made it clear that even in the absence of legal control the result would have been different if the Act had been "an educational measure".[378] The reasoning is instructive.

The court found in the Family Allowances Act, "the almost redundant repetition, always emphatic, that the regulation of family allowances are to be conditional on the absolute recognition of provincial provisions as to the necessary degree of scholastic assiduity . . .".[379]

It held that ". . . there is no taking over from one power by the other . . . the cutting off of the federal treasury's monthly payments . . . does not exert influence over the provincial scholastic laws nor over the rights of parents.

. . . Does the federal government wish to insert its own system as a third force, between the official programme of the province and the choice, mediocre or bad, of the parents? The Act implies no such thing . . .".

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[373] *Supra*, footnote 324, s. 31.
[374] [1937] A.C. 355.
[375] *Ibid.*, at p. 366.
[376] [1929] A.C. 260, at p. 268.
[377] (1957), 57 D.T.C. 1103.
[378] *Ibid.*, at p. 1105.
[379] *Ibid.*, at p. 1106.

The conclusion was that the Act ". . . does not tend to establish compulsory school attendance, does not arrogate to itself either the supervision or the training of the student child . . .".[380]

In *Porter* v. *The Queen*[381] the court found that the essence of the Government Annuities Act[382] is that the federal executive is authorized to enter into contracts with persons who desire to enter into such contracts, of a kind designed to promote thrift so that provision may be made for old age. The Act does not compel any person to enter into a contract with the government. The court applied the principle laid down in *A.G. Can.* v. *A.G. Ont.*[383] and held that, while the Annuities Act does not fall under section 91(1A) or any other enumerated head of section 91, it does not affect the civil rights of any person or otherwise encroach upon any of the classes of subjects reserved to the Provinces in section 92 and is therefore a valid exercise of the general power in section 91.

The stated object of the provisions of the Act authorizing unilateral implementation by the Minister of plans or projects with respect to international or boundary waters is federal management of these waters, that is, their physical conservation, development and utilization according to policies of the federal government. The object is not to deal with federal property although the expenditure of federal funds to be appropriated by Parliament, is authorized. The authority conferred by the Act is broad enough to achieve this object to the full extent that the physical environment permits. Its exercise by the Minister is not subject to control by provincial law and would result in a significant degree of federal management of these waters.

Water resource management does not come within any specific head of federal legislative power. It normally falls within the exclusive legislative competence of a Province in relation to property and civil rights, matters of a local or private nature, management of the provincial lands, municipal institutions and local works.[384] A Province does not lose this jurisdiction and the federal government does not gain it, merely because waters partly in a Province are international or boundary waters with an international extra-provincial contact or destination.[385] The only additional jurisdiction acquired by the federal government in relation to these waters is the power to enter into treaties and the jurisdiction under section 132 to implement an Empire Treaty.[386] The Canada Water Act

[380] *Ibid.*
[381] [1965] Ex. C.R. 200.
[382] R.S.C., 1952, c. 132.
[383] *Supra*, footnote 274, at p. 366.
[384] *Supra*, footnotes 127, 128, 129, 130, 131, 132.
[385] *Supra*, footnotes 286, p. 221; 319.
[386] *A.G. Can.* v. *A.G. Ont.*, *supra*, footnote 274.

does not implement the Boundary Waters Treaty (an Empire Treaty) which has already been implemented by the Boundary Waters Act.[387]

The vague phrase "significant national interest", is used in the Act to justify unilateral federal water resource management of international or boundary waters. Whatever this phrase means, it is not sufficient to remove the management of these waters from provincial jurisdiction and transfer it to federal jurisdiction, either under the general power as it has been interpreted by the courts[388] or under any enumerated power in section 91 or section 92. Some of the economic and social consequences of the control of pollution, referred to earlier, could equally result from federal water management. While of importance to Canada, they are of primary concern to the Province or Provinces in which these waters are located. Significant national interest in the sense of importance to the economy and culture of Canada exists in any large municipality but the Province in which it is located has exclusive legislative jurisdiction.[389] As put by Mr. Justice Crockett:[390]

> The mere fact that . . . the subject of the legislation (Dominion) has become as much a matter of national as of provincial concern to the several provinces, is not sufficient to remove that subject from the sphere of s. 92 to which in its normal and domestic aspect it primarily belongs, and transfer it to the jurisdiction of the Parliament of Canada under s. 91.

Any "significant national interest" in the management of these waters exists only because the federal government has the power to enter into an internationally binding treaty for their management.[391] *A.G. Can.* v. *A.G. Ont.*[392] established the principle that, apart from section 132, this power does not confer any legislative competence on Parliament.

In the *Burrard Power Co. Ltd.* case[393] it was decided that a grant under a provincial statute of the right to divert water from a lake situate on federal land was a "dealing with" the land and that the statute was invalid as an encroachment on the exclusive federal jurisdiction in relation to public property. Where the Act authorizes unilateral federal water management which will divert water from or otherwise interfere with waters on or flowing through provincial lands, it could well be an encroachment on the exclusive jurisdiction of a Province in relation to its public lands and a

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[387] S.C., 1911, c. 28.
[388] Supra, footnotes 270, 271, 272, 273, 274, 275, 276.
[389] *Supra*, footnote 131.
[390] *A.G. Can.* v. *A.G. Ont.*, [1936] S.C.R. 461, at p. 526, aff'd, *supra*, footnote 274.
[391] *Supra*, footnote 282.
[392] *Supra*, footnote 274.
[393] *Supra*, footnote 177; see also *A.G.B.C.* v. *A.G. Can.*, *supra*, footnote 177.

derogation from the transfer to it of the public lands under section 109 of the British North America Act.

Much the same arguments as in the case of unilateral federal implementation, can be made with respect to the authority given to the Minister to enter into an agreement with one or more provincial governments providing for water resource management and the expenditure of federal as well as provincial funds. As these joint agreements are not limited to international or boundary waters, but can extend to "any waters where there is a significant national interest"[394] in their management, including waters wholly within a Province, it can be even more readily concluded that the authority encroaches on exclusive provincial legislative competence. The fact that a provincial government consents to enter into an agreement does not make the object or essence of the authority any less an encroachment. The court in *Porter* v. *The Queen*[395] accepted and applied this principle but found that the Government Annuities Act was not such an encroachment.

Whether or not a Province chooses to enter into a management agreement with the Minister the application of the principle in the cases leads to the conclusion that the authority conferred by the Act for federal-provincial or for unilateral federal water resource management is an encroachment on exclusive provincial competence and invalid. It is an attempt to do indirectly through agreements and the spending power what cannot be done directly through control by legal sanctions.

The definition of waste[396] and the power, by regulation, to add to the category of waste,[397] make it clear that water quality management under the Act is designed to control all forms of pollution that may impair the quality of waters for any use "by man, or by any animal, fish or plant that is useful to man".[398]

This general control can only be considered as a valid exercise of federal legislative power if it falls within the general power or is in relation to criminal law.

I have earlier expressed the basis for the opinion that control of pollution in the Basin does not go beyond "local or provincial concern or interests" and cannot "from its inherent nature be the concern of the Dominion as a whole".[399] Water quality management under the Act expresses and is based on this area or local nature of the problem. The jurisdiction of a management agency and the power of the Governor in Council to make regulations

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[394] *Supra*, footnote 326.

[395] *Supra*, footnote 381; see also *Beauharnois* v. *H.E.P.C. Ont.*, *supra*, footnote 319, at p. 815; La Forest, *op. cit.*, footnote 1, p. 136.

[396] *Supra*, footnote 324, s. 2(1)(K).

[397] *Ibid.*, s. 16(1)(K).

[398] *Ibid.*, s. 2(1)(K).

[399] *Munro* v. *National Capital Com.*, *supra*, footnote 270.

both of which have been described earlier, are confined to an area of waters. Apart from offences of obstruction and giving false statements, any offence under the Act is based on the waters of an area.

Unilateral federal water quality management is limited to inter-jurisdictional waters. A Province does not lose its normal jurisdiction over waters in the Province and the federal government does not gain this jurisdiction, apart from implementation of a treaty under section 132, merely because the waters are inter-provincial, international or boundary waters with an extra-provincial contact.[400] The fact that waters are partly situate within a Province and partly within another Province or a foreign country does not make the part or parts situate within one or more Provinces a matter of national concern or any less a matter of local or provincial concern than if the waters were wholly situate within a Province. Whatever the phrase "significantly affect waters outside" a Province means in the definition of inter-jurisdictional waters, the phrase is not sufficient to remove the quality management of these waters from the jurisdiction of the Province or Provinces in which the waters are situate and transfer their management to the jurisdiction of the federal government.

"Urgent national concern" is also a condition precedent for unilateral federal management. The preamble to the Act states "pollution of the water resources of Canada is a significant and rapidly increasing threat to the health, well-being and prosperity of the people of Canada and to the quality of the Canadian environment at large . . .". Assuming such a threat as is described would be a national emergency serious enough to justify the use of the general power, it cannot be effectively argued that pollution threatens the country to the extent that such an emergency exists or is imminent, particularly when broad programmes to control pollution are being brought into force in varying degrees by all the Provinces.

In any event if pollution of inter-jurisdictional waters became an emergency, the emergency would primarily affect the Provinces in which the waters are located rather than Canada as a whole. Moreover if "urgent national concern" meets the requisite standard of emergency so that the provisions for unilateral federal water quality management are valid under the general power, it can be seriously questioned whether in view of existing comprehensive provincial legislation[401] the quality management of any inter-jurisdictional waters in the Basin, including the Great Lakes Boundary Waters, can become a matter of "urgent national concern".

[400] *Supra*, footnotes 286, 319.
[401] *Supra*, footnote 2.

The phrase "urgent national concern" may reasonably be construed to mean situations falling short of the emergency conditions necessary for the exercise of the general power. Chief Justice Duff pointed out in the *Natural Products Marketing* case[402] that "not every matter which attains such dimensions as to affect the body politic of the Dominion" or that is of "national concern" falls within the general power. As put by Mr. Justice Cannon in *A.G. Can.* v. *A.G. Ont.*:[403] "Nor can it help to declare that local conditions throughout the nation have created a situation of national concern, for this is but to say that whenever there is a widespread similarity of local conditions Parliament may ignore constitutional limitations upon its own powers and usurp those reserved to the Provinces . . . ."

To illustrate, matters that have been dealt with by federal legislation, such as minimum wages, limitation of hours of work,[404] unemployment insurance,[405] profiteering in necessaries of life,[406] and industrial disputes,[407] were undoubtedly of "urgent national concern" when the Acts were passed, but did not justify the use of the general power because their inherent nature was not the concern of the country as a whole.

If the inherent nature of the control of pollution is local or provincial, as I believe it is, water quality management of any inter-jurisdictional waters may be a matter of "urgent national concern" in addition to a matter of urgent provincial concern and still not justify the exercise of the general power.

The authorization for a federal-provincial agreement for water quality management extends to any waters "the quality management of which has become of urgent national concern".[408] It could include waters wholly within a Province. This authorization contemplates the spending of federal funds for the operations of an agency established under the agreement, at least until it becomes self-sustaining.[409] If the view is accepted that "urgent national concern" does not justify the exercise of the general power, similar arguments can be made as in the case of water resource management, to support the opinion that the authorization to spend federal funds for the operations of an agency encroaches on exclusive provincial competence and is invalid.

Section 8 prohibiting the deposit of waste in water quality management areas except in compliance with relevant regulations may by itself, be valid federal legislation under the criminal law

[402] *Supra*, footnote 275, p. 419.
[403] *Supra*, footnote 390, at p. 513.
[404] *A.G. Can.* v. *A.G. Ont.*, *supra*, footnote 274.
[405] *Supra*, footnote 374.
[406] *Re Board of Commerce Act*, [1922] 1 A.C. 191.
[407] *Toronto Electric Com.* v. *Snider*, *supra*, footnote 274.
[408] *Supra*, footnote 324, s. 9.
[409] *Ibid.*, ss 10(1), 13(1)(c) (vii).

power. Although it does not come into force with the rest of the Act, it is inextricably linked with the sections under which an area is designated. Section 8 must also be read together with other water quality management provisions. These confer the power to make regulations permitting the deposit of waste on payment of fees and under prescribed conditions and the power to establish an agency with the function of recommending a plan to the Minister. Taken together with these sections it is clear that section 8 is not designed to remove "some evil or injurious or undesirable effect upon the public".[410] "There is nothing of a general or injurious nature to be abolished or removed."[411] Section 8 is designed to permit implementation of a water quality management plan of an agency in accordance with the policies of the federal government by regulating the treatment and deposit of waste in waters, by achieving a pre-determined standard of quality for water and by establishing the cost of control of pollution and the responsibility for payment.

Viewed as an essential part of the legislative scheme to provide for management of waters, section 8 is, in form, valid criminal law, but in substance,[412] an invalid encroachment on the exclusive competence of a Province in relation to the civil rights of persons who treat and dispose of waste in a Province and in relation to the other bases for provincial jurisdiction over the control of pollution.

There is nothing in the Canada Water Act that could not be enacted by one or more Provinces in which any waters are located.[412A] In essence, it is a declaration by the federal government that if these Provinces are unable or unwilling to control pollution to its satisfaction, the federal government could intervene in a field of provincial jurisdiction to exercise such control.

The cases referred to earlier do not support this assertion of legislative authority as stated by Mr. Justice Kerwin:[412B] "Even if the object aimed at by . . . the present Act may be praiseworthy and if the desired result might better be obtained by the Dominion than all or some of the Provinces acting within their constitutional limitations might accomplish, the matter is not translated from the jurisdiction of the provincial legislature to that of Parliament."

Assuming the Act is valid its effect on The Ontario Water Resources Commission Act should be considered.

Certain non-regulatory functions and powers of the Minister

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[410] *Supra*, footnote 266.

[411] *Ibid.*

[412] *Canadian Federation of Agriculture* v. *A.G. Que.*, *supra*, footnote 231; *A.G. B.C.* v. *Smith*, *supra*, footnote 257.

[412A] *Toronto Electric Commissioners* v. *Snider*, *supra*, footnote 274.

[412B] *Reference re The Employment and Social Insurance Act*, [1936] S.C.R., at p. 460, aff'd, [1937] A.C. 355.

or of an agency would duplicate similar functions and powers of the Commission.[413]

Actions of the Minister or of a federal water quality management agency are not subject to control under The Ontario Water Resources Commission Act and can be contrary to requirements and policies of the Commission.[414] Thus the construction and operation of water works, including those for diversion, storage or release of water with consequential effects on its quality, and of waste treatment works and the treatment of waste at such works, would not be subject to the relevant powers of the Commission.[415]

If federal permission to deposit waste in waters for a fee is interpreted to confer a legal right to do so, there might be conflict with the Ontario Act. Thus the deposit that is permitted by the regulations might violate section 27 of this Act. Such a deposit might be removed from the power of the Commission to enjoin it under section 26(3) or section 54. The deposit might be contrary to section 28(2)(b) if it takes place in an area defined by the Commission under section 28 to include a source of public water supply to which section 28(1) applies. If the deposit was for the purpose of controlling aquatic nuisances and no permit was obtained from the Commission the deposit would violate section 28b. A deposit might contravene terms and conditions of an approval of sewage works given by the Commission under section 31. The Commission might require, by a mandatory report under section 38, construction and operation of sewage works, that is, spray irrigation and lagooning, for the purpose of stopping a deposit from municipal sewage works into a watercourse, although it is permitted under the regulations. Works may be required of a municipality by the Commission under section 38 to improve the quality of waste effluent from municipal sewage works even though the poorer quality is permitted under the regulations. An order of the Commission under section 46a defining an area of public sewage service may prohibit the discharge of municipal sewage or industrial waste which might be permitted by the federal regulations. Regulations of the Commission under section 47(1)(g) may prescribe standards of quality for sewage and industrial waste effluents and receiving streams and watercourses which are more restrictive than, and conflict with the standards for water quality and waste quality prescribed by the federal regulations. Federal regulations may permit the deposit of certain wastes from pleasure boats in waters of a water quality management area and the Commission's Regulation under section 47(1)(ha) might prohibit such a discharge. The

[413] *Supra*, footnote 2; ss 16(1)(b), (c), (d), (e), (ea), 17, 18(1), 26(2), 39.

[414] *Supra*, footnote 35.

[415] *Supra*, footnote 2, ss 16(1)(a), 18(1), 28a, 28c, 30, 31, 36, 37, 46a, 47(1), 50, 50a.

discharge of marina wastes might be permitted under the federal regulations and prohibited by Commission regulations under section 47(1)(hb). An order of the Commission to an industry under section 50 could result, in effect, in prohibition of a quality of effluent which might be permitted, on the payment of a fee, under the federal regulations.

The Commission as an agent of the Crown in right of Ontario would not be bound by the Act or regulations.[416] Discharges from sewage treatment works operated by the Commission would not be subject to the federal regulations or the prohibition of section 8 and the Commission would not be required to pay effluent discharge fees.

However, discharges of wastes by municipalities, industries or other persons that might be permitted under The Ontario Water Resources Commission Act could violate section 8 of the Act and the regulations. Thus discharges into waters of a water quality management area might be permitted, either expressly or by necessary implication, from sewage works that are approved by the Commission or are required by it to be constructed, under sections 31, 38, 46a, 47(1)(ha), 47(1)(hb), and 50, even though such discharges might violate section 8 of the Act and the regulations. Sewage works constructed and operated with Commission approval or with the other approvals referred to under section 35 are deemed to be operated by statutory authority. This would necessarily imply statutory authority for the discharge of sewage effluents from them even though such discharge might be prohibited under section 8 of the Act and the federal regulations.

The federal permission to deposit waste may be interpreted to remove only the prohibition of section 8 and not to confer a legal right to deposit waste, notwithstanding the payment of effluent discharge fees. On this interpretation, if provincial standards for the deposit of waste are not as stringent as the federal ones, conflict might arise. If provincial standards are more stringent no conflict would arise but compliance with both standards would be confusing and burdensome and involve substantial interference with provincial control of pollution.

It is clear that complex and difficult questions of occupation of the field will arise. Conditional legislation which involves merely the potentiality of occupation of a field does not displace valid provincial legislation in that field.[417]

If the Act, except section 8, is brought into force and an area of water quality management is not designated either under section 9 or section 11 the field would not be occupied by reason of

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[416] Interpretation Act, R.S.C., 1952, c. 158, s. 16; *Nickel Rim Mines* v. *A.G. Ont.*, [1967] S.C.R. 672.

[417] *A.G. Ont.* v. *A.G. Can.*, *supra*, footnote 270, at pp. 369-370.

duplication of non-regulatory powers and functions under the Act and under The Ontario Water Resources Commission Act. There is no conflict merely because under the Act a federal-provincial agreement in regard to water quality management could be made or the Minister could, unilaterally, implement programmes related thereto. The potentiality of bringing section 8 into force and of making regulations respecting the discharge of waste and water quality standards would not mean that the field is occupied by the Act so as to render inoperative the regulatory provisions under The Ontario Water Resources Commission Act with respect to control of pollution. However, if a water quality management area is designated, if regulations are made for the area and if section 8 is brought into force, a serious question would arise whether the regulatory powers and functions of The Ontario Water Resources Commission respecting the control of pollution would apply to the area. The purpose of federal and provincial control being the same, my view is that, for the reasons given earlier, the field would be occupied and provincial law rendered inoperative.

The conditions precedent in the Act for federal water resource management or federal water quality management are expressed in vague phrases of uncertain meaning. For example, when do waters in a Province "significantly affect" waters outside the Province and become inter-jurisdictional? When is there a "significant national interest" in the water resource management of any waters? What does the "efficient conservation, development and utilization of waters" mean? When has the water quality management of any waters "become a matter of urgent national concern"? Whether these conditions exist with respect to any waters can be a matter of dispute and can invite lawsuits. Initially, determinations will be made by the federal government but the decision in a particular case can be reversed or upheld by the courts until a final judicial decision is made. Federal determinations will necessarily vary with different waters throughout Canada and similarly, decisions of the court will vary. The existence of provincial laws and programmes for water resource management and water quality management will increase the uncertainty of these determinations and decisions.

In effect, these vague conditions precedent transfer to the courts the function of determining whether the control of pollution shall be by federal law and programmes or by provincial law and programmes. This function is a matter of policy for governments, and not the courts, to decide.

The application of some of the provisions of the Act will override any conflicting provincial laws and common law rights and may even conflict with other federal laws. For example a deposit of waste permitted under the regulations may interfere with riparian rights to damages and an injunction or even be contrary to the pro-

hibition of pollution in the Fisheries Act.[418] Where in any area of a Province the courts decide that the field of pollution control is occupied by the Act, it alone will apply while in the rest of the Province, provincial law will apply. Action by a provincial government and its agencies in the field of water quality management is not subject to the Act and regulations and similar action by the federal government and its agencies under the Act is not subject to provincial law.

The result of these considerations will be not only uncertainty and confusion in the administration of the Act but even greater uncertainty and confusion in the administration of provincial law.

The Act will create many complex legal and administrative problems. Difficult questions will arise concerning the constitutional validity, interpretation and legal effect of its provisions in the context of existing provincial laws and the technical data with respect to any waters. It will be possible to have for a Province or region of Canada, an advisory committee to the Minister, an intergovernmental consultative committee, a joint commission to direct water resource management programmes under a federal-provincial agreement, a federal water quality management agency, a water quality management agency under a federal-provincial agreement and unilateral implementation by the Minister of water resource management programmes and unilateral action of the Governor in Council in making regulations respecting water quality management. In any Province it would be in keeping with the concept of inter-jurisdictional waters to have a water quality management agency for each area of waters that affect waters outside the Province. Each agency would be composed of representatives from the area containing these waters and from the area affected by them. As some waters in Ontario affect only waters in Manitoba, some affect only waters in Quebec, some affect only waters of Hudson Bay and James Bay and some only the Great Lakes Boundary Waters, at least four regulatory agencies could be established for the control of pollution in the Province. These agencies could be in addition to the advisory committee, intergovernmental committee, joint commission, and unilateral implementation by the Minister and unilateral action of the Governor in Council just referred to. The difficulty of achieving either agreement or a majority view in one agency composed of representatives of the federal government and of one or more Provinces containing an area of inter-jurisdictional waters could impair the effectiveness of the agency. None of the governments concerned could act independently because of the existence of a federal-provincial agreement.

This proliferation of legal control and administrative action in Ontario could be duplicated in other Provinces. It is superimposed

[418] *Supra*, footnote 203.

on existing federal, provincial and municipal legal controls and administrative action, and on common law rights. With one exception, the Act makes no provision for the result.[419] I have indicated some of the complex problems that may arise.

It would not seem feasible to cover in a federal-provincial agreement the complexities and contingencies of water resource management or water quality management, unless the agreement delegates to an agency discretionary power that, in effect, is power to legislate. The Act does not delegate any such power. The implementation of policies for the control of pollution by means of regulations based on investigations and recommendations of a water quality management agency may be unable to meet individual circumstances in a fair manner or changing conditions quickly enough to be effective. Power to make orders for specific conditions and to amend these orders from time to time would be required for effective implementation.

There is a real danger that in order to raise money for the operations of an agency through effluent discharge fees, the federal government may permit a degree of pollution. Fees for the use of waters for the disposal of wastes, which have been adequately treated to permit all uses to be made of the waters, may well be justified but fees for the disposal of wastes in waters without such treatment are not justified.

The provisions of the Act for joint federal-provincial agreements do not reflect the primary responsibility of the Provinces for the management of their waters. Recognition of this responsibility would require that action by the Minister or a joint board under a water management agreement or action by an agency under a water quality management agreement should comply with provincial law, that regulations under the Act with respect to an area or agency under a water quality management agreement be made with the approval of the Lieutenant Governor in Council of any Province in which the area is wholly or partly located and do not invalidate any provincial law, that a water quality management plan for an area be recommended to and approved by the appropriate provincial Minister as well as by the federal Minister and, that section 8 be made applicable to an area under a water quality management agreement with the approval of the appropriate provincial authorities.

Under the Act, water quality management plans, water quality standards, effluent discharge fees, permissible and prohibited deposits of waste in waters and the degree to which the regulations are enforced can vary from one management area to another

[419] *Supra*, footnote 324, s. 28(2). *Cf.* s. 87 of the Indian Act, *supra*, footnote 233; International River Improvements Act, *supra*, footnote 67, s. 10.

management area in a Province or throughout Canada. An industry with plants in different localities that use the same treatment and deposit waste under similar conditions could be in violation of section 8 in one area and in compliance in another area. This potential for variation with no standards set out in the Act to ensure that all Provinces will be treated equally could influence industrial location, economic development and population distribution and be made to serve federal economic and political purposes other than control of pollution alone.

N. *Indirect Legal Controls.*

Legal controls exist to prevent the escape of dangerous substances, most of which can be highly polluting in water, during packaging, storage, transportation and unloading.

In addition there are other federal Acts which are useful aids in the control of pollution.[420]

[420] *By Rail*

General Orders 0-29 and 0-30 of the Board of Transport Commissioners dated Feb. 1st, 1965 making Regulations, under the Railway Act, R.S.C., 1952, as am., c. 234, s. 34, s. 355, for the Transportation of Dangerous Commodities by Rail; see also ss 354, 439, 440 of this Act. See General Orders 0-32, s. 55 and 0-33, s. 12(2) which prohibit pollution of waters under the circumstances described.

By Water

Dangerous Goods Shipping Regulations P.C. 1954-1811, as am., (shipment in portable containers). Draft Regulations for Dangerous Bulk Chemicals (shipment not in portable containers) are being prepared; see the Canada Shipping Act, R.S.C., 1952, c. 29, as am., ss 461, 462; The International Dangerous Goods Code to be issued by the Intergovernmental Maritime Consultative Organization of the United Nations may be adopted in place of the Dangerous Goods Shipping Regulations.

By Air

The Aeronautics Act, R.S.C., 1952, c. 2, as am., s. 4; Air Regulations P.C. 1960-1775, as am., S.O.R./61-10, ss 507, 800; Although not having legal effect, the information circular, Carriage of Explosives and other Dangerous Articles on board Aircraft 0-22-64 of July 22/64 issued by the Director of Civil Aviation, Department of Transport (Federal) indicates the circumstances under which dangerous goods may be carried on board aircraft. The circular refers to the Official Air Transport Restricted Articles Tariff and the International Aviation Transport Association Restricted Articles Regulations (12th ed., 1969).

For control of radioactive materials see Shipping Containers Order of the Atomic Energy Control Board S.O.R./63-65 requiring packaging and shipping of such materials in accordance with applicable model regulations. Where such regulations do not exist, *i.e.* road transport, either the Transportation of Dangerous Commodities by Rail Regulations apply or special authorization of the Board may be granted.

In the case of water an order of the Board of Steamship Inspection of December 31st, 1968 applies. It makes applicable the International Atomic Energy Regulations for the Safe Transport of Radioactive Materials (1967 ed.). In the case of rail and air transport the regulations and information circular noted above apply. For intra-provincial road transport in Ontario see O.R. 123/61 under The Highway Traffic Act, R.S.O., 1960, c. 172, as am. See the Atomic Energy Control Act, R.S.C., 1952, c. 11, as am., s. 9(c); Atomic Energy Control Regulations, P.C. 1960-348, ss 101(1)(d); 602(2); 603(2), (3); see s. 303(b) for authority to appoint employees of provincial governments or agencies concerned with control of pollution,

Conclusion

As I have indicated, there is some factual interrelation between those aspects of the control of pollution and enforcement of standards of water quality that lie within federal legislative competence and those that lie within provincial competence. Valid federal legislation which occupies the field renders inoperative otherwise valid provincial legislation in the same field. Therefore the enactment of any federal legislation for the control of pollution in the Basin, where comprehensive provincial legislation already exists, requires close co-operation between the federal and provincial authorities to establish the most effective co-ordinated system of legal control.

Federal legislative competence under the peace, order and good government power and in relation to criminal law probably does not authorize comprehensive water management as proposed under the Canada Water Act. If this view is accepted, federal legislative competence in its totality, is too narrow, fragmentary and uncertain to authorize the comprehensive and flexible attack on pollu-

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as inspectors under the Atomic Energy Control Act and Regulations.

The form of mining permit issued by the Atomic Energy Control Board, condition 4, requires "effective measures be taken to prevent pollution of waters or the spreading of other contamination by radioactive materials in excess of permissible limits during or after your operations". The radio isotope licence of the Board prescribes appropriate methods of disposal of the radio isotopes that have been used under the licence. The Board's permit for prescribed substances (see s. 101(j) of the Regulations) provides an appropriate method of disposal for the particular prescribed substance covered by the permit. The Boards Special Fissionable Substances Licence (s. 101(e) of the Regulations) prescribes an appropriate method of disposal for fissionable substances covered by the licence.

In federal harbours and canals and the St. Lawrence Seaway there are special provisions applicable to dangerous goods. See *supra*, footnote 200 for the Oshawa By-law Part III; Lakehead By-law Part IV; Windsor By-law, ss 27-29; Hamilton By-law 84, ss 89-128; Belleville General By-law, ss 43, 48; Public Harbour Regulations, ss 30-64; National Harbours Board By-law, Part III; See *supra*, footnote 201 for the Canal Regulations, ss 44, 45; St. Lawrence Seaway Regulations, s. 9, as am. by S.O.R./66-125; Shore Traffic Regulations, s. 16.

See the War Measures Act, R.S.C., 1952, c. 288, as am., ss 3, 6, for control, *inter alia*, of waters under the circumstances set out in the Act; Income Tax Act, R.S.C., 1952, c. 148, as am., s. 11(1)(a); The Income Tax Regulations, P.C. 1954-1917 passed Dec. 8th, 1954; S.O.R./55-682; as am., particularly by S.O.R./66-54; 69-559. Schedule B, class 24, s. 1100 (1)(t), for an accelerated rate of capital cost allowance for property acquired after April 26th, 1965 and before Jan. 1st, 1971, primarily for the purpose of preventing, reducing or eliminating pollution of waters by industrial waste, refuse or sewage. The National Housing Act, R.S.C., 1952, c. 188, as am., Part VI B. Central Mortgage and Housing Corporation may make a loan for the purpose of assisting in the construction or expansion of certain sewage works. The Municipal Development and Loan Act, S.C., 1963, c. 13, s. 7 for sewers eligible for a loan under the Act (not in use now). The Government Organization Act, S.C., 1966, c. 25, s. 29. The Resources and Technical Surveys Act, R.S.C., 1952, c. 73, as am., ss 8A, 8B. The Fisheries Research Board Act, R.S.C., 1952, c. 121, s. 6.

tion that is now required. If the Act is within federal competence and section 8 is made applicable by a proclamation, the result could well be conflict, complexity, confusion and invalidation of existing provincial law.

Because laws for the control of pollution of waters have far-reaching economic and social consequences primarily for the people of the Province or Provinces in which the waters are located, the most suitable basis for comprehensive legal control is provincial.

A new treaty with the United States for the control of pollution of Boundary Waters, which gives full recognition to the primary responsibility of the Provinces, is urgently needed. This treaty should take into account modern knowledge, existing conditions and future requirements, and, in an equitable manner, balance all needs for all uses of these waters including the use for waste disposal.