Inter-jurisdictional Water Law – SSRB

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Abstract

Canada's water law evolves from many different sources and influences. It commenced with the riparian water laws of Britain, where laws developed on a case by case basis in a land of relative water abundance. This law was adopted in Canada but then modified by statute in respect of western Canada by firstly the Canadian government and later the provincial governments after the formation of the provinces of Alberta and Saskatchewan and the Natural Resource Transfer Agreements of 1930. In the aftermath, Alberta and Saskatchewan water law and policy has diverged, yet in some federal lands in the provinces federal water law and policy remains in tact.

Now a complex web of federal and provincial laws, institutions and policies apply to the South Saskatchewan River Basin running through Alberta and Saskatchewan along with inter-provincial agreements and co-management institutions. Although the South Saskatchewan River is one continuous body of water, laws differ between Alberta and Saskatchewan. This is further complicated when laws relating both to quantity and also quality of water are examined. Although quantity and quality of water issues are interrelated ecologically and scientifically, the laws in relation to quantity and quality have very few connections.

This paper will outline the constitutional framework of water law and provincial, federal and inter-provincial water institutions relating to both water quantity and quality. This review includes provincial statutes relating to water quantity and quality and principles of constitutional paramountcy and jurisdiction. Thereafter issues, discrepancies and conflicts will be identified and discussed as well as a plan for the future.

Outline

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INTRODUCTION

This paper will outline the constitutional framework of water law and principles of constitutional paramountcy and jurisdiction. As well, provincial, federal and inter-provincial water institutions relating to both water quantity and quality will be discussed. This review includes provincial statutes relating to water quantity and quality. Thereafter issues, discrepancies and conflicts will be identified and discussed in light of this fragmented, complicated water framework in the prairie provinces of Alberta and Saskatchewan as well as a vision of a framework for the future.

DEVELOPMENT OF PRAIRIE WATER LAW

Canada's water law evolves from many different sources and influences. It commenced with the riparian water laws of Britain, where laws developed on a case by case basis over several hundred years, in a land of relative water abundance. This law was adopted in Canada but then modified by statute in respect of western Canada by firstly the Canadian government and later the provincial governments after the formation of the provinces of Alberta and Saskatchewan and the Natural Resource Transfer Agreements of 1930. In the aftermath, Alberta and Saskatchewan water law and policy has diverged, yet in some federal lands in the provinces federal water law and policy remains in tact.

In British common law, water, in its natural state, was incapable of ownership at common law.[1] Traditionally water has been treated as a natural right not originating from the state but a natural right of dwellers supported by a water system, especially a river system, to use water.[2] As such, water was a "common property resource". Common property resources are either incapable of ownership, like the high seas or air, or are collectively owned (and then "public property" resources) like water, or oilfields extending under several properties

Canadian water rights are based on two common law theories, the English riparian doctrine (a set of usufructuary rights) and the American prior appropriation doctrine.[3] The riparian doctrine was inherited from England and made part of the law of the Prairie Provinces on July 15, 1870.[4]

Riparian rights are rights that a landowner has because their land is adjacent to water. The common law riparian doctrine held that water may be used for ordinary

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[1] Dale Gibson, "The Constitutional Context of Canadian Water Planning*"* (1968) 7 Alta. L. Rev. 81. (Although much of *Dale Gibson's* work is cited as "opinion"). See also Alistair R. Lucas*, Security of Title in Canadian Water Rights,* 1990 Canadian Institute of Resource Law, U of C at page 7.
[2] Vandana Shiva, *Water Wars, Privatization, Pollution, and Profit*, (London: Pluto Press, 2002) at p. 20
[3] Alastair R. Lucas, *Security of Title in Canadian Water Rights* (Canadian Institute of Resources Law, 1990, Calgary), at page 4.
[4] *Ibid.* at p. 4.

purposes connected with the riparian land owner's property including domestic and secondary or "extraordinary" uses, notwithstanding the effects on downstream riparians.[5] However, the water must be returned substantially undiminished in quantity and in quality.[6] The common law riparian doctrine assumes an abundant, if not an inexhaustible, water supply such as existed in eighteenth century England. The doctrine gives surface water riparian rights holders little security in regions of low rainfall or dramatic seasonal water flow fluctuations.[7]

Because the common law riparian doctrine couldn't meet the development needs of Canada, Canada and later the provinces, enacted statutes replicating portions of the United States' prior appropriation system.[8] The principles of "prior appropriation" developed in arid western regions of the United States in order to meet gold miners' water claims to small sporadic streams on arid public lands. [9] To meet this need American judges rejected the riparian doctrine and established a "first come, first right" doctrine.[10] The right to the beneficial use of the flow is a usufructuary right only (which means it is a temporary right to use, without damaging).[11] A version of this doctrine was codified in statute and formed the basis for Canada's statutory water law systems.[12]

Common law riparian doctrine remains relevant in Canada to the extent it has not been clearly modified or abolished by statute and to the extent the courts find it applicable in the Prairie Provinces.[13] Prior to the creation of the Prairie Provinces, the federal Government attempted to pass statutes that removed or at least restricted riparian rights by vesting the authority in the Crown to allocate water rights.[14]

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[5] *Ibid.* at p. 5.
[6] *Ibid*. at p. 5.
[7] *Ibid.* at p.8.
[8] Kenneth J. Tyler, *supra* page 4. The Canadian statutes differ from the law of the United States in that there, the first user automatically obtains an enforceable water right. Subsequent users take subject to this use; there is no license requirement as in Canada for these priorities. Riparian doctrine couldn't meet the development needs of the west as water use was restricted to riparian land which inhibited the development of other land, consumptive uses (like large scale irrigation) were denied to riparian owners, and no scheme of prioritization of interests existed. In dry years there would be no apportion of water to its most important uses. An upstream riparian would have an advantage. David R. Percy, "Water Rights in Alberta" [1977] XV Alta L.Rev. 142
[9] *Ibid.* at p. 11.
[10] *Ibid.* at p. 11.
[11] *Ibid.* at p. 12.
[12] *Ibid.* at p. 13. The societal objectives of Canada's water law system is: 1. the maximization of the value of the resource; 2. protection and promotion of public water uses; 3. clear ordering of private water rights; 4. fairness, flexibility, and efficiency in water rights allocation and management. Ibid at p.14.
[13] For example the English common law rule allotting the bed of the river *ad medium filum aquae* – to the centre thread of the stream to the riparian owners on either side for non-tidal water has been found inapplicable for navigable rivers in western Canada as the local circumstances in Canada were very different than Britain. *R*. v. *Nikal* [1996] 5 W.W.R. 305 (S.C.C.) and *R*. v. *Lewis* [1996] 5 W.W.R. 348 (S.C.C.). *King* v. *Fares* (1932) S.C.R. 78
[14] Alastair R. Lucas, *Security of Title in Canadian Water Rights* , *supra* at p.15 and Percy David R., "Water Rights in Alberta" (1977) XV Alta. L. Rev. 142. This intention appears in *The North-West Irrigation Act*, S.C. 1894, and c.30 and was repeated in early provincial legislation of the prairie provinces. The continued existence of riparian rights has been controversial and Legislatures have amended statutes attempting to clarify the intention to abolish riparian rights by vesting water rights in the Crown. Academic

The *North-west Irrigation Act* radically altered the common law by declaring that the property right to use all water was vested in the Crown which was expanded one year later to the "ownership of all water" as well as the right to its use.[15] The Act also introduced a statutory scheme of allocation of water resources. It is questionable if governments are able to legitimately appropriate something which cannot be owned in common law and something for which an arguable natural right of access to exists for persons. There have been no successful challenges to the current statutory regime which has been in existence for over 100 years on this basis. The *Irrigation Act* was a modified version of the United States' first use, first right scheme by allowing the Crown the exclusive domain of water allocation. This legislation responded to the need for large irrigation projects after years of drought on the Prairies.

When the provinces of Manitoba (1870), Alberta and Saskatchewan (1905) were created the natural resources were retained by the Dominion Government which included water rights.[16] In 1930 these natural resources were transferred to the provinces in the Natural Resources Transfer Agreements and water was confirmed as part of the transfer in Agreements of 1938.[17]

Many of the main features of the original federal water law still apply. These include Crown ownership, and allocation of interest by license. However, Alberta now allows the transfer of water licenses, but continues a grandfathered set of priorities of licensees. Saskatchewan does not yet have transfer provisions and provides no statutory assistance to priorities.

CONSTITUTIONAL FRAMEWORK OF WATER

Water management was not treated as a single topic in the Canadian Constitution. In 1867 when the *British North America Act* was negotiated and agreed to it is safe to say that water, and water scarcity in the Prairie Provinces, was not a known or planned for topic in the negotiations. In addition, pollution and environmental degradation was not an issue at the time either. As such, the *British North America Act* did not specifically deal with these issues.

The topic of water spans several heads of legislative power assigned to the federal and provincial governments in the Canadian Constitution. Specifically the provincial government has powers which relate to water such as all publicly owned "lands, mines, minerals and royalties, property and civil rights, local works and undertakings, and natural resources which included the right to make laws in relation to the development,

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commentary questions whether the vesting of the ownership in water was effective. See *Gibson, supra,* at page 73 and *Landis, Legal Controls of Pollution in the Great Lakes Space* (1970) 48 Cn. Bar. Rev. 93 at page 102. Gibson recognized that water could be owned once it was reduced to possession. The common law notion was the concept of owning water was meaningless because no particular rights or interests could possibly be grounded upon this "ownership".

[15] This was the initial language in 1895 which was supplemented by An Act to amend the North-west Irrigation Act, S.C. 1895, c.33, s.2. This would appear to change water from a common property resource incapable of ownership or collectively owned to a managed resource.

[16] Ibid., at p.9.

[17] ibid. at p. 11 referring to The Natural Resources Transfer (Amendment) Act, 1938, S.C. 1938, c.36.

conservation and management of non-renewable natural resources and forestry resources in the province.

It is through the first heading "lands" that the provincial jurisdiction to water primarily resides. In traditional Canadian common law, water rights transferred with the land with which it was associated. "Land" is defined as "every species of ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furs and heath."[18] In addition the provincial heading of "local works and undertakings" helps support water structures located within a province on a particular body of water.

The federal government has certain powers in relation to water, albeit historically somewhat more limited than the provinces. These include federal lands (national parks, Indian reserves) would be subject to federal legislation and not provincial land or water legislation (unless in the absence of provincial legislation), trade and commerce, navigation and shipping, seacoast and inland fisheries, Indians and lands reserved for Indians, works for the general advantage of Canada, entering into treaties, and matters not specifically assigned to the provinces.[19]

The federal government is responsible for ensuring the safety of drinking water within areas of federal jurisdiction, such as national parks and Indian reserves and water quality in respect of interjurisdictional waters[20]. The federal government also protects water quality by regulating toxic substances, conducting water quality research, and promoting pollution prevention. Further, the federal government has legislative supremacy in relation to navigation and shipping (s. 91(10), sea coast and inland fisheries (s. 91(12)). The first may grant powers in relation to quantity in order to facilitate navigation, and the latter quality and quantity to maintain and preserve fish and their habitat.

The federal government takes control of water once it crosses an inter-provincial or international boundary in accordance with the federal head of power relating to inter-provincial works and undertakings (s. 91(29) and 91(10)). Further the federal government could utilize its declaratory power (s.91 (29) and 91(10)), its "spending power" and lastly its "peace, order and good government" power in the introductory words of s.91 to assert jurisdiction to water.[21]

Municipalities are not given any powers by the Constitution. Their authority derives from delegated provincial legislation. Therefore, the municipalities can have no greater authority to manage environmental matters than the provinces, and only in respect of matters or issues specifically delegated or provided for in the municipalities acts.

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[18] Earl Jowitt, "*The Dictionary of English Law*", (London: Sweet &Maxwell Limited 1959) , p.1053.
[19] s.91 of the *Constitution Act*, 1982
[20] The *Canada Water Act*, R.S.C. 1985, c. C-11.
[21] Steven A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (1991, Canadian Institute of Resources Law, Calgary), p.23-28.

Very complicated legal rules exist for determining if a matter is of federal or provincial jurisdiction and if it can be affected by both pieces of legislation. On some of the rules, legal scholars disagree.[22] Some of the more general rules are that if a matter does not fall within any of the heads of power of the provinces or the federal government, the federal government will have jurisdiction either through the opening words of s.91 which assign the federal government power over all matters not expressly assigned to the provinces, or through the broad heads of power of peace, order and good government ("POGG"), or matters of a national concern.[23] If provinces are unable to deal with an issue because it crosses boarders, such as marine or water pollution, the federal government will be found to have jurisdiction as it is a matter of national concern.[24]

The basic rule of constitutional law is that when a law is challenged constitutionally, a court will make a determination of the primary characteristic of the regulated subject matter. Once this is identified the court will determine if the matter falls clearly under provincial or federal authority. If a provincial government has legislated in respect of a matter the court finds to be primarily of a subject matter within federal jurisdiction, the court will make a determination that the provincial law is *ultra vires*, or not within the legislative competence of the province, and strike it down as unconstitutional or invalid.[25]

In many practical examples of water and environmental problems a clear determination of federal or provincial jurisdiction is unavailable unless referred to a court of law. In fact, the regulation of toxic substances and their release into the environment has been justified as a valid exercise of the criminal law power by the federal government granted pursuant to section 91(27) of the *Constitution Act, 1867*[26] but clearly a province has legislative jurisdiction in respect of toxic spills on provincial lands.

It is possible that a court will hold both the provincial government and federal government have jurisdiction in respect of a subject matter, like the toxic spill example. Both the federal and provincial laws will be allowed to operate concurrently as long as

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[22] The inter-jurisdictional immunity test is very troubling and contentious for both academic commentators and courts alike. Some such as Professor Hogg argue that a lesser test of "impairment" is possible in the even the legislation only indirectly affects the federal head of power. See Hogg, *Constitutional Law of Canada*, Student Edition (2002, Carswell, Toronto). This seems improbable in light of decision such as *Ordon Estate* v. *Grail* [1998] 3 S.C.R. 437.

[23] s. 91 provides, "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures for the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated…"

[24] *R.* v. *Crown Zellerbach* [1988] 1 S.C.R. 401 and *Canada (A.G.)* v. *Hydro-Quebec*, [1997] 3 S.C.R. 213.

[25] This occurred in *Alberta Bank Taxation Reference* where a provincial law imposing tax on banks was struck down as not within the jurisdiction of the province as it related to banking more so than direct taxation. *A.-G. Alta.* V. *A. –G. Can (Bank Taxation)* [1939] A.C. 117

[26] *R.* v. *Hydro-Quebec*[1997] 3 S.C.R. 213

the laws are not conflicting.[27] In the event of a conflict of the specifics in the laws the federal law will generally prevail. If for example the federal government passed water quality legislation to preserve fish habitat and these laws conflicted with provincial water quality laws, the federal laws would prevail.

The conclusion to be drawn from these examples is that there is no level of government which can derogate its duty in respect of water management claiming it is another level of government's jurisdiction. Neither can a government act in a manner conflicting or contradictory to another government. It is clear that inter-governmental cooperation is a necessity in managing water.

INSTITUTIONAL FRAMEWORK

Many institutions have interest in the area of water. One Manitoba study lists over 120 institutions just in Manitoba.[28] Albeit the federal departments and agencies listed would also be applicable to Alberta and Saskatchewan, many similar provincial institutions exist within these provinces as well.

The federal actors with mandates derived from federal heads of power significant to water are Environment Canada (monitoring inter-provincial and international water quality and the *Canadian Environmental Protection Act 1999*[29]), Health Canada (responsible for the Federal-Provincial-Territorial Committee on Drinking Water (CDW) which establishes the voluntary Guidelines for Canadian Drinking Water Quality), Natural Resources Canada (research), Fisheries and Oceans (protection of water quality and habitat for fish), Agri Food Canada (research of water development and use by the Agri-food sector).

Provinces also have departments and institutions established pursuant to their constitutional powers which relate to water and pollution. These too derive from specific provincial heads of power and include Environment departments, Natural resource departments, Watershed authorities, offices of drinking water, water services Boards or corporations, Health, Municipalities.

Once again, rules of constitutional paramountcy would have to be applied in the event of a conflict in the mandate of these institutions such that a stakeholder could not comply with the mandate of one without compromising the mandate of another. These conflicts can either be settled through negotiation of the parties involved or through a lengthy and perhaps costly court process.

WATER QUALITY AND QUANTITY LEGISLATION

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[27] This is referred to as the "double aspect" which acknowledges some matters have both a federal and a provincial matter and are therefore competent to both the federal government and the provinces. Highway offences and securities regulation has been found to qualify for this doctrine. *Multiple Access* v. *McCutcheon* [1982] 2 S.C.R. 161 and *Smith* v. *The Queen* [1960] S.C.R. 804

[28] http://www.gov.mb.ca/waterstewardship/directory/

[29] S.C. 1999, c. 33.

Saskatchewan's water allocation law consists predominantly of *The Saskatchewan Watershed Authority Act*[30] and *The Water Appeal Board Act*[31]. The Act establishes the corporation, the Saskatchewan Watershed Authority, and outlines its mandate and powers for managing Saskatchewan's water resource including the issuance (as well as cancellation or refusal) of water licenses for use and the building of water works, and monitoring of water quality. There are provisions for giving notice of the Corporation's decision and appeals. Local advisory committees may be appointed, however they appear to have only advisory powers.

In Saskatchewan water quality is for the most part the responsibility of the Department of Environment and Resource Management through *The Environmental Management and Protection Act, 2002*[32] ("EMPA") and the *Water Regulations.*[33] This legislation prohibits discharges of pollutants without authorization or permit, provides for environmental assessment of developments, and sets detailed water quality requirements respecting the provision of municipalities of drinking water.

In Alberta both water quality and quantity rest with Alberta Environment and are legislated in *The Water Act*[34] of 2000 and *The Environment Protection and Enhancement Act*. The former legislation provides for the issuance (as well as suspension, amendment, and non-renewal) of water licenses, detailed information on water priorities based on date of license issue, and transfer of water licenses in accordance with Cabinet order or an approved water management plan such as exists in respect of the SSRB.

Both jurisdictions allow significant industrial development and its resultant pollution through the environmental assessment process and the exemption of discharges authorized by such things as intensive agriculture permits in Saskatchewan or oil and gas wells in Alberta. This dispersal of decisions regarding industrial development and the quantity of pollution entering the environment amongst government departments makes achievement of good water quality difficult.

WATER FRAGMENTATION

A complex web of federal and provincial laws, institutions and policies apply to the South Saskatchewan River Basin running through Alberta and Saskatchewan along with inter-provincial agreements such as the Prairie Provinces Water Board Agreement and Canada/U.S. International Boundary Waters Treaty[35] and co-management institutions including the International Joint Commission. Although the South Saskatchewan River is one continuous body of water, laws differ between Alberta and Saskatchewan. This is further complicated when laws relating both to quantity and also quality of water are

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[30] *2005*, S.S. 2005, S-35.03
[31] S.S. 2002, c.S-35.02
[32] S.S. 2002, c. – E 10.21.
[33] *The Water Regulations*, 2002 E-10.21 Reg 1.
[34] R.S.A. 2000, W-3
[35] *International Boundary Waters Treaty Act*, R.S. 1985, c. S-17.

examined. Although quantity and quality of water issues are interrelated ecologically and scientifically, the laws in relation to quantity and quality have very few connections.

Often, it is helpful in evaluating our laws and institutions in respect of a natural resource to access the wisdom of other countries and jurisdictions in respect of their laws and institutions governing that same natural resource, water. Many other countries and jurisdictions have amassed significant knowledge and information respecting this topic due to a greater focus on water because of its shortage in their area. Many of these players have shared their knowledge through the World Water Forums organized by the World Water Council. A report prepared as a follow up to a World Water Forum outlined the following principles for reforming water institutions:

- Accountability – in water management, conservation and service delivery.
- Participation by all stakeholders – whether public or private, communities or non-governmental organizations (NGOs), with special attention to the problems of women and poor people.
- Predictability – all laws and regulations should be applied fairly and consistently.
- Financial sustainability – through recovery of both operational and capital costs.
- Transparency – clear policies, rules, regulations, and decisions, with information available to the public.
- Decentralization and subsidiarity – delegation of responsibility and authority of water management to the lowest feasible level. This involves managing surface waters at the catchment's level with involvement of all stakeholders; Land and water resources should be managed at the basin level to maximize and share water benefits which integrates groundwater.[36]

How well do the water laws applicable in Alberta and Saskatchewan achieve these principles? Although admittedly only conjecture based on a review of constitutional rules and the language of provincial statutes, a report card might be illustrated as in Table I.

Table I – SSRB Water Law Report Card

Principle	Gold Star	Some Evidence of Principle	Cause for Concern
Accountability		X*	
Participation		X*	
Predictability			X
Financial Sustainability	Unable to assess	Unable to assess	Unable to assess
Transparency		X*	
Decentralization			X

* Signifies some cause for concern still exists. Further research required.

Accountability

[36] World Water Council Water Action Unit, *World Water Actions, Making Water Flow for All*, (Earthscan Publications Ltd, London, 2003) at p. 22.

Overall, significant water institutions are managed by government departments or crown corporations under the oversight of democratically elected officials. Legislation clearly outlines complaint procedures and procedures for the resolution of these complaints and disagreements through procedures of due process. However, some cause for concern still exists as Alberta legislation does not impose any obligation on the government officials to ensure a healthy environment and although Saskatchewan's statutory language assigns responsibility for enhancing and protecting the quality of the environment on the Minister responsible for the Environment, immunity from liability provisions appear later in the legislation.

Clear obligations exist for municipalities providing potable water to attain quality standards. This "end of the pipe" responsibility is a costly method of water management when the provincial and federal governments have the jurisdiction to manage both source and non-source activities affecting water quality. This issue will be discussed further in relation to the principle of Decentralization.

Participation

Both Saskatchewan and Alberta have provisions for the participation of non government organizations in the management of their water resource. Saskatchewan has provision for local advisory committees and Alberta allows for water management plans developed at the community level. These provisions are laudable and the only cause for concern is it is unclear that the advice of local advisory committees must be given weight in decisions and who will determine water management plans. Without proper funding and capacity building by government of these groups and plans, their utility may be compromised.

Predictability

Certain aspects of water allocation management appear very clear. Alberta legislation specifies priority of licenses and how decisions in respect of transferring water license will occur. However, it is unclear exactly how grandfathered licenses will be transferred and how it will affect this scheme of priority of licenses. Although Saskatchewan legislation is very clear on who is making decisions, the Saskatchewan Watershed Authority, factors taken into account in decision making aren't as clear in the legislation.

How water allocation decisions and water quality are co managed is not clear. In Saskatchewan allocation decisions are made by the Saskatchewan Watershed Authority but water quality and the environment is managed by the Minister of Environment. Although Alberta has the same Minister responsible for both areas it still is unclear that a holistic approach to quantity decisions and quality implications occurs.

In the event of a conflict between the provincial and federal government institutions, a complicated constitutional legal analysis would be required to determine

which jurisdiction would be paramount. Because nothing is certain in a court of law a "best guess" legal opinion would be provided but full resolution and determinacy could only be provided after the court determination and all avenues of appeal were exhausted. This process can take years if not decades. As with most legal disputes the inevitable conclusion is that institutional cooperation is a necessity.

Financial Sustainability

An accurate determination of financial sustainability or whether there is recovery of both operational and capital costs in water management and governance is beyond the scope of this paper. However, it is important to point out that generally it is thought that Canada under prices its water resource and fails to recognize the full external costs of water.

Transparency

Both Alberta and Saskatchewan legislation contains clear obligations on government officials to communicate decisions to applicants in respect of water allocation decisions. However, as these are for the most part discretionary decisions of officials, notoriously hard to appeal in a court of law, the transparency of reasons for decisions may or may not always exist.

In respect of water quality decisions and the environmental impact assessment the provisions for public notification and consultation is less clear. As a result, some cause for concern exists.

Decentralization

One benefit of the fragmented approach to water management in Alberta and Saskatchewan is its decentralization. However, if the various water institutions are not managing the water resource on a catchments level basis with the involvement of all stakeholders in water quantity and quality decisions, this fragmentation is a liability. Recent reports have outlined a significant void in information in respect of groundwater so it is probable that its integration into water decisions is absent.[37] Further, from a review of legislative provisions, it would appear upstream industrial decisions with implications for the environment would be handled within the province in which they are situated, without regard to downstream effects in another province.

In Saskatchewan it is clear that quantity and quality of water are managed in a decentralized manner through separate government bodies. In Alberta one government department, Environment is responsible for both quantity and quality decisions but it isn't

[37] Canadian Institute of International Affairs, National Capital Branch Study Group on Water Resources, *The Transboundary Water Resources of Canada and the United States*,(CIIA Toronto, 2005) and The Honourable Tommy Banks, Chair, *Water in the West: Under Pressure*, Fourth Interim Report of the Standing Committee on Energy, The Environment and Natural Resources, http://www.senate-senat.ca/EENR-EERN.asp

evident that decisions in respect of either issue are coordinated as each is outlined in separate legislative instruments (statutes and regulations). As a result, integrated water management doesn't appear to be occurring at the highest level of Ministerial responsibility. There may be some coordination of water decisions in Alberta in water management plans. However these plans don't appear to be determinative in the environmental impact assessment and decisions permitting industrial development which affect water quality, let alone even used in a consultative manner in these decisions. In Saskatchewan it is possible that local advisory committees are coordinating both quantity and quality issues, but again their influence is not yet evident in water management in Saskatchewan, and definitely not in environmental impact assessments.

CONCLUSION

It is evident from this review of Alberta and Saskatchewan water law and constitutional rules that a complex web of laws exists with implications for water management. Although the South Saskatchewan River, as one example, is one continuous body of water, the laws differ between Alberta and Saskatchewan, as well as various institutions. An added level of complexity occurs when federal institutions and laws are added to the mix. However, the value of conducting this review is in assessing how the legal water framework can be improved.

Although this writer chose the principles adopted by the World Water Council for assessing the water law framework, it is possible if not probably that stakeholders of various water catchments may adopt different or modified principles. It is evident from this review that there is cause for optimism in this legal framework for managing water. There is some accountability, participation and transparency of decision making in relation to water. There is always room for improvement, and specific attention should be given to predictability, and decentralization or the delegation of responsibility and authority of water management to the lowest feasible level, managing water on a catchments level with the involvement of all stakeholders.

The significant number of institutions with interest in and mandates respecting management of water is both an asset and perhaps a liability. If coordinated and allowed to manage water in a comprehensive manner, these institutions can be instrumental in ensuring sound water quantity and quality decisions. It will not be necessary to develop an entirely new water management system with new rules and new institutions. The existing institutions and framework holds promise. The necessity is to clarify the importance of water quality and preservation of quantity to communities and allow all decisions affecting water quality and quantity, including environmental permitting of industrial development, to be determined on a careful consideration of the communities' views of effects of an industrial development on these factors. With some fine tuning, the legal framework to allow for this is in place. If significant investment by government, institutions, and community is made in Saskatchewan's Local Advisory Committees, and the development of Water Conservations Plans in Saskatchewan and

water management plans in Alberta this transformed water management framework could be a reality.

Just as water is omnipresent in our cities, provinces and country, all levels of government and institution have a role to play in relation to water. Perhaps because of this physical characteristic, we are unable to assign water to a specific level of government or institution unlike other natural resources like uranium (under the jurisdiction of the federal government) or industries like railways (again the federal government's jurisdiction). Further, it is important to remember that the importance of community management of water has been recognized throughout the world. The application of constitutional rules of federal paramountcy in relation to water would take power and jurisdiction away from provinces, and thus municipalities and communities. Given Canada's constitutional framework, and the importance of the federal government in mandating criminal activities (like toxic polluting) and managing interjurisdictional waters, there can be no other solution in water management than an approach of cooperative federalism. The cooperation of all levels of government with jurisdiction in relation to a matter affecting water will be a necessity; no government, institution or community will have the option to defer involvement and responsibility.