WATER RIGHTS IN ALBERTA*

DAVID R. PERCY**

The author studies the law in Alberta regarding the use of water resources. The right to divert surface water from its course or to detain its natural flow for consumptive or other purposes is discussed. The author contends that the present Alberta Water Resources Act does not develop maximum beneficial use of Alberta's water resources.

I. INTRODUCTION

In many ways water is the most fundamental of the natural resources upon which the economy of Alberta depends so heavily but, in contrast to oil and gas, very little legal attennention has been paid to the regulation of its use. In recent years a few commentators have begun to deal with various aspects of water quality management in Alberta, but there has been almost no consideration of the allocation of rights to appropriate and consume water. The notable exception is Per Gisvold's useful but necessarily skeletal "Survey of the Law of Water in Alberta, Saskatchewan and Manitoba"[1], which is now more than twenty years old and deals with water rights in Alberta only in outline form.

At the outset it is conceded that questions of water quality management and of the regulation of water abstraction are closely interrelated, for they are both aspects of the larger problem of maximizing the benefit derived from all water.[2] In many situations the two different types of use may well conflict, as where the right to take water from a stream is diminished in value because the stream is polluted or where appropriations from a stream reduce its flow and hence its capacity to absorb pollutants without harmful effects. Without denying the importance of this interrelationship, the sole purpose of this article is to discuss the present law in Alberta dealing with the right to divert surface water from its course or to detain its natural flow for consumptive and other purposes. Similarly, there will be no attempt to deal with the topic of groundwater for, despite its inextricable connection with surface water, it has enjoyed a separate history of regulation until recent years and requires independent analysis at this stage. It is hoped nevertheless that the present article will complement subsequent studies in these related fields and thus lay the foundation for work on the economics of water rights legislation and on the wider issues of water resource allocation in Alberta.

II. HISTORICAL DEVELOPMENT

Early settlers in Canada brought with them the doctrine of riparian rights as the means of settling disputes in the allocation of water. This doctrine was developed in England and the Eastern United States, where water was plentiful, at a time before major conflicts of use had

* The author wishes to thank Dean Charles J. Meyers of Stanford Law School, Professor Thomas F. Bergin of the University of Virginia Law School and Mr. Bert Boyson, Alberta's Controller of Water Resources, for their helpful comments on an earlier draft of this article.
The research of this article was made possible by a research grant from Imperial Oil Limited.

** Associate Professor of Law, University of Alberta.

[1] Gisvold, *A Survey of the Law of Water in Alberta, Saskatchewan and Manitoba* (1959) 28-32, 57-61. The title page of this work indicates that it was completed in 1956.

[2] Lucas, *Water Pollution Control Law in British Columbia* (1969) 4 U.BC. L. Rev. 56, 57-58.

appeared. Accordingly, it was found quite appropriate in Eastern Canada where similar conditions prevailed and its reception into Canadian law was soon confirmed.[3]

The cardinal features of riparian rights to the use of water are very familiar and will be outlined only briefly here. Basically, water rights are restricted to those who own property abutting upon bodies of water. Each riparian owner is entitled to receive the flow of water to his property undiminished in quantity and unimpaired in quality, subject to the right of upstream riparians to abstract sufficient water for their domestic purposes. In addition, upstream riparians are entitled to use water for other than domestic purposes, provided that they do not diminish perceptibly the flow of the stream and thereby interfere with the rights of other riparians. In this way limited upstream development of water for uses such as mills or irrigation can be permitted, but only so long as the consumption involved does not cause a noticeable reduction in the downstream flow. Although on the face of it this rule sets a very strict standard which would permit only minor upstream abstractions, in practice it has been mitigated by the application of the principle *de minimis non curat lex*. All uses of water, whether for domestic or other purposes, are restricted to the riparian tenement and cannot readily be transferred to other land even with the consent of the riparian owner.[4]

It was in this form that the doctrine of riparian rights was transplanted into Canada in the mid-nineteenth century and extended to the western part of the country as settlement progressed. When major settlement of the prairies followed in the wake of the Canadian Pacific Railway in 1882 and 1883, few immediate problems with the riparian system emerged, largely because unusually heavy precipitation in the normally arid areas of the southern prairies known as Palliser's Triangle ensured abundant water supplies until 1887.[5] However, in that year a lengthy drought began which soon emphasized, as settlers in the Western United States and in Australia had earlier discovered, that the doctrine of riparian rights could be fatal to the development of a water-short region.

The general inability of the riparian system to maximize the economic potential of water in conditions of scarcity has been documented thoroughly elsewhere.[6] For the early settlers, three major defects appeared and required urgent change. Most importantly, the limitation of water use to riparian land in the dry climate of the southern prairies obviously inhibited the development of land distant from good sources of water. This problem was exacerbated by the tendency of early farmers to settle close to watercourses and to fence them off, thus depriving range cattle of access.[7] Although some effort

[3] *Miner* v. *Gilmour* (1859), 12 Moo. P.C. 131, 156; 14 E.R. 861; discussed in Burchill, *The Origins of Canadian Irrigation Law* (1948) 29 Can. Historical Review 353.

[4] These principles were established by a series of nineteenth century cases culminating in *Chasemore* v. *Richards* (1859), 7 H.L.C. 349. See Hobday (ed.) *Coulson and Forbes on the Law of Waters* (6th ed. 1952), 130-138. Theoretically, it might be possible for a riparian to transfer his water right down to a non-riparian use by obtaining a covenant not to sue from all downstream riparians. However, this would normally be a costly exercise and would involve considerable legal complexity in order to bind the successors in title of the downstream riparians.

[5] *General Report on Irrigation in the Northwest Territories* (1894), contained in the Annual Report of the Department of the Interior (1895), at 6. The area was first thoroughly described by the Palliser expedition in 1858-59, when it was considered too arid to be valuable for agriculture. See MacGregor, *A History of Alberta* (1972) 76.

[6] Gaffney, *Economic Aspects of Water Resource Policy* (1969) 28 Am. J. Econ. and Sociology 131, 137-9; Davis, *Riparian Water Law—A Functional Analysis*, U.S. National Water Commission, Legal Study No. 2 (1971).

[7] Mitchner, *William Pearce and Federal Government Activity in the West*, 1874-1904 (1967) 10 Can. Public Administration 235, 240-1.

was made to reserve from settlement all unclaimed watercourses and to set them aside for the watering of stock, it was apparent that more fundamental changes were required in the law allocating water resources. Secondly, the development of even riparian lands was inhibited by supply problems under the common law doctrine. Major consumptive uses of water clearly were denied to riparian owners and this restriction prevented, for example, large-scale irrigation projects which might result in the substantial diminution of streamflow, especially in times of drought. However, investment in smaller projects, which nevertheless required a secure source of supply, was also discouraged because the quantity of water to which the riparian owner was entitled for other than domestic purposes was so ill-defined. Finally, in dry years when there might not be sufficient water to satisfy the legitimate needs of riparians, no scale of priorities was available to apportion the scarce water to its most important uses. All riparians had equal claims to the resource, depending effectively upon their position on the stream, and productive uses suffered from the shortage just as much as the unproductive.[8]

These serious defects were highlighted dramatically when drought beginning in 1887 brought widespread demands for irrigation, which was envisaged as the salvation of the arid regions of the Canadian plains in the days when dryland farming was in its infancy. Apparently the technique had first been tried successfully by John Glen on Fish Creek, just to the south of Calgary, in 1879.[9] During the next decade, interest in irrigation grew rapidly, fostered by its introduction by Mormon settlers who had brought considerable knowledge and experience of this method of farming from Utah.[10] Much enthusiasm was also generated by William Pearce, the Superintendent of Mines for the Department of the Interior, who persistently advocated the principle, being impressed by the similarity of geographical conditions in southern Alberta to those in Colorado and Utah where irrigation had been most successful.[11] Pearce saw that widespread development by irrigation was incompatible with the doctrine of riparian rights and became a strong advocate of its repeal, despite being discouraged by Sir John A. Macdonald himself, who feared that suggestions of water shortage might deter the settlers needed to unite the new country.[12] Irrigation leagues were formed to promote what was now seen as the panacea for the agricultural ills of the southern prairies and the clamour for a new statute to facilitate irrigation and to abolish riparian rights grew irresistible.[13]

In 1892, Pearce was recalled to Ottawa to begin work on irrigation legislation while in 1893 and 1894 J. S. Dennis, Chief Inspector of Surveys for the Department of the Interior, examined irrigation systems and laws in operation in the states of Washington, California, Utah and

[8] Contrast the rules for apportioning water among riparians in times of shortage developed by the California courts, *See Half Moon Bay Land Co.* v. *Cowell* (1916), 160 Pac.675.

[9] *General Report on Irrigation, supra,* n. 5 at 21. There seems to be some dispute as to whether John Quirk of Millarville preceded Glen, *see* MacGregor, *supra,* n. 5 at 165. However, records of the Department of the Interior date the Quirk project at 1891.

[10] Debates of the House of Commons, June 25, 1894, 4952.

[11] *General Report on Irrigation, supra,* n. 5 at 21; Mitchner, *William Pearce and Federal Government Activity in Western Canada 1882-1904,* unpublished Ph.D. thesis, Dept. of History, University of Alberta (1971).

[12] *Supra,* n. 7 at 241.

[13] *See* the activities of the Calgary Irrigation League reported in Debates of the House of Commons, June 25, 1894, 4950-1 and in a letter to the *Calgary Tribune,* July 24, 1894, p. 4, col. 1. *See* generally Mitchner, *supra,* n. 11 at 214.

Colorado. This activity led to the introduction in 1893 of a bill for the purposes of discussion and ultimately to the Northwest Irrigation Act of 1894.[14] The provisions of the Act, although primarily designed with irrigation in mind, regulate appropriations of water for all purposes and remain the basis of water use legislation in all three prairie provinces today. It is somewhat ironic that irrigation has become rather less important in relation to other consumptive uses of water while the legislative formula to which it gave rise has flourished. The initial elation produced by the Act was lessened by the return of wet weather and by 1904 few of the original irrigation projects were in operation. A number of large-scale irrigation operations were later established in Southern Alberta and Saskatchewan, but a recent survey estimated that only 622,140 acres are now irrigated on the prairies, consuming in total 537,503 acre feet of water per year.[15]

The underlying principes of this legislation, which will be described in detail in the following section, come from two very different sources. The most fundamental notion involved a considerable restriction of riparian rights and the vesting in the Crown of the right to allocate water uses. The formula for this was taken directly from legislation in the Australian state of Victoria and as a result the experience of that State provides guidance to the solution of a number of problems under present Canadian legislation. Secondly, the Act was influenced by the doctrine of prior appropriation, the foundation of western American water law, in governing the allocation of water in times of scacity. In particular, it appears that considerable attention was paid to the experience of Wyoming, where the prior appropriation doctrine had been blended with a state-operated permit system in 1890.

The doctrine of prior appropriation in the western United States was adopted by the judiciary from the practice of the early settlers and in particular from the customs of the mining camps. The right to use water was bestowed upon those who first diverted water to beneficial use rather than upon those who owned riparian land. In times of scarcity, the right to the continued use of the water depended upon the date at which labour had commenced on the diversion works, in order to protect investors in major works requiring considerable time to complete against loss of supply to intervening users.[16] Thus the most recent appropriator on a given watercourse was the first to be required to close off his supply, followed by the other appropriators in reverse order of seniority. The senior appropriator was never required to shut off his supply and in times of extreme shortage, when all other appropriators had closed down, he was entitled to whatever flow remained. The development of lands distant from watercourses was thus made possible, because the right to use water was no longer tied to the ownership of riparian property, and in many states was further encouraged by provisions permitting the acquisition of rights of way from streams to the backlands. In addition, the allocation of water supplies in times of shortage was accomplished, though admittedly by a rather arbitrary rule. This doctrine, as will be seen later, strongly influenced the planners

---

[14] 57-58 Vic. c. 30.

[15] Environment Canada, *Canada Water Year Book* 118 (1975). These figures apparently refer to consumption in a wet year. In dry years, the irrigated acreage is almost twice this figure and the amount of water consumed exceeds one million acre feet. I am grateful to Dr. A.H. Laycock for this observation.

[16] Meyers, *A Functional Analysis of Appropriation Law*, U.S. National Water Commission, Legal Study No. 1 (1971), 9.

of the Northwest Irrigation Act, although they modified it to permit more direct government control than existed in the western states.

It is fascinating to note the characteristically different methods by which the systems of water law evolved in the western regions of the two countries. In the United States, where settlement tended to precede the arrival of the law, the doctrine of prior appropriation was adopted by bold judicial innovation to meet an obvious and pressing need.[17] In Canada, where the opposite was usually true and orderly settlement was encouraged, the necessary changes were made by legislation after careful study and preparation by a strong government department.[18] However, if legislation had not removed the need to do so, it is just possible that early western Canadian courts might have overcome their normal reluctance to put aside common law doctrine when questions concerning the reception of English law arose[19] and rejected the riparian doctrine on the ground that it was not reasonably suited to the geographical conditions of the new region. Such judicial activism would not have been typical, although an Alberta court was soon to show itself willing to reject English law in another area of water law concerning the right of an owner to appropriate occasional surface water found on his land.[20]

These two elements of Crown control and prior appropriation were engrafted upon the remnants of the riparian system in the Northwest Irrigation Act. That Act remained in force until 1952, although it probably ceased to be of any effect on the prairies in 1930 when jurisdiction over natural resources came under provincial authority by virtue of the Natural Resources Transfer Agreement.[21] However, some doubts arose as to whether the general transfer of natural resources had included water and it was not until 1938 that an amendment to the Agreement absolutely confirmed provincial jurisdiction in this respect.[22] The principles of the Irrigation Act were incorporated with only minor drafting amendments into the Alberta Water Resources Act in 1931 and into similar legislation in the sister provinces of Saskatchewan and Manitoba.[23] The present application of these principles in Alberta will be discussed in detail in the next section.

III. MODES OF ACQUIRING WATER RIGHTS

A. The Licensing System

As indicated earlier, the cornerstone of Alberta's water resource allocation system is the vesting of the property in all water within the Province in the Crown, together with an added safeguard preventing Crown grants of interests in land from including any exclusive right or privilege with respect to any water.[24] In this way direct control of the resource is confirmed and the power given to ensure that the water

---

[17] *See Coffin* v. *Left Hand Ditch Co.* (1882), 6 Colo. 443.

[18] In this respect Canadian development was very similar to that of Australia. *See* 1 Clark and Renard, *The Law of Allocation fo Water for Private Use* (Australian Water Resources Council, 1972), 151-154. A condensed version of part of this work is found in (1970), 7 Melbourne U.L. Rev. 475, and citations will be made to this more accessible source.

[19] Cote, *The Introduction of English Law into Alberta* (1964) 3 Alta. L. Rev. 262, 173.

[20] *Makowecki* v. *Yachimyc* (1917), 1 W.W.R. 1279 (Alta. A.D.).

[21] 1930 20-21 Geo. 5, c. 3.

[22] 1938 2 Geo. 6, c. 36.

[23] S.A. 1931, c. 71; S.S. 1931, c. 17; S.M. 1930, c. 47.

[24] Water Resources Act, R.S.A. 1970, c. 388, ss. 5(1), 8. These two sections are discussed in more detail later. See text, *infra*, p. 155.

rights vested in the Crown can be acquired only by the licensing system set out in the Act or, in limited circumstances to be discussed below, by virtue of riparian ownership.

1. Preliminaries to Obtaining a Licence

A considerable number of hurdles must be overcome before a licence can be obtained. Only the most important steps are outlined here and the following summary assumes that there are no difficulties concerning the acquisition of rights of way or interference with public highways and that the applicant has no need to expropriate land for his project.

Water licences can be obtained for any consumptive purposes, for various water management purposes such as flood control and erosion control, and for the purpose of using water in its natural state for conservation, recreation, the propagation of fish or wildlife and similar pursuits.[25] The Act requires an applicant for a licence to file an application setting out the nature and purpose of the proposed diversion, together with such other particulars as the Minister may require.[26] Notice must be given of this application in the normal case by posting details of the proposed works for a fifteen day period in the office of the relevant municipality and at the intended site of the works or, if the Minister prefers, in a local newspaper. The requirement of notice may be waived at the discretion of the Minister.[27] A thirty-day period is fixed for the filing of objections, which the Minister is required only to consider, apparently with complete freedom to accept or reject them. Unless he is convinced by some objection, the Minister will ordinarily issue an interim licence authorizing construction of the proposed works.[28] At this stage of the application process it is decided whether the proposal is acceptable and, if an interim licence is granted, changes may be required or conditions imposed to the extent deemed necessary by the Minister. Once construction is completed and the works prove upon inspection to be satisfactory, the applicant is entitled to receive a final licence.[29]

2. Nature of the Licensee's Interest

A person who succeeds in obtaining a licence by the method described above clearly obtains much less than a full property right to the quantity of water specified in the licence, as the amount of water to which he is entitled may be subject to diminution in certain circumstances and the right is not freely transferable.

The rules of priority set out in the Act permit the suspension of the licensee's right to water when there is insufficient water to satisfy all licensed uses and the domestic requirements of riparian owners. The statutory scheme of priorities operates in much the same way as the American rules of prior appropriation, which were discussed earlier, except that precedence is determined by the date upon which the application for the licence was filed rather than the date of commencement of the works. However, if two or more licence applications are submitted on the same day, precedence is decided according to a

---

[25] R.S.A. 1970, c. 388, s. 11(1)(a), (b), (c), (d); as am. S.A. 1971, c. 113, s. 5; S.A. 1975, c. 88, s. 7.

[26] R.S.A. 1970, c. 388, s. 14(2).

[27] R.S.A. 1970, c. 388, s. 15(1), (2), s. 17. The limiting of waivers to projects of less than $10,000 was abolished by S.A. 1975, c. 88, s. 11.

[28] R.S.A. 1970, c. 388, s. 15(4), s. 16. The Hydro and Electric Energy Act provides for the advice of the Energy Resources Conservation to be sought in certain circumstances, S.A. 1971, c. 49, s. 40. In practice this provision is virtually ignored.

[29] R.S.A. 1970, c. 388, s. 35; as am. S.A. 1975, c. 88, s. 21.

statutory list of preferred uses rather than the time of filing. In this rare event, applications for domestic purposes are given the highest priority, followed in order by applications for municipal, irrigation, industrial, water power and other purposes.[30] Just as under the doctrine of prior appropriation, a senior licensee may receive the entire amount of his licensed supply before a junior licensee is entitled to any water and, if necessary, the sources of supply of junior licensees can be closed down to enforce the scheme of priorities.[31]

In one way the statutory rules of priority are less strict than those judicially developed in the United States. In American courts an appropriator was generally entitled only to the amount of water of which he was making beneficial use in the eyes of the court. In Alberta, the licensee is entitled to receive the entire amount stipulated in his licence, regardless of whether it is all being put to beneficial use. The only exceptions to this would arise in rather unusual circumstances where a licensee was entitled to more water than his works could carry, in which case his right would be limited to the capacity of his works,[32] or where he was deemed to have wasted water.

Unless it is accompanied by provisions permitting the transfer of water rights, a system based on prior appropriation is open to the obvious objection that it freezes water rights according to the time at which they were first used, rather than taking into account the relative social importance of various different water uses. This objection has considerable validity in Alberta, for there are significant restraints on the transferability of licences issued under the Water Resources Act. The licence is appurtenant to the parcel of land or the particular undertaking for which it is issued and normally can be transferred only with that land or undertaking.[33] The Lieutenant-Governor-in-Council has the power to make exceptions to this general rule, but in the ordinary case it imposes an important limitation on the rights obtained by the licensee. This requirement appeared in the first Provincial Water Resources Act in 1931. It seems that the attachment of water rights to land was imported from the western United States, where ironically it was the product of an expansionist philosophy, although its effect is exactly the opposite today. The prior appropriation doctrine and early permit systems gave an obvious incentive to developers to claim more water than they really required, in order to assure themselves of future supplies if their needs became greater. Apparently, the legislatures in a number of western states tied water rights to land to discourage this practice. The effect of the rule was to prevent the owner of inflated water rights from selling or leasing his excess water for use on other land. This, in turn, would encourage settlement by releasing water at no cost for use by newcomers, as the original owner would be unable to use all the water to which he was entitled and thus would be liable to forfeit it.[34] Clearly this rule was designed to secure fairness in the initial distribution of water rights and was not concerned with the modern problem of reallocating a scarce resource among various competing uses.

---

[30] R.S.A. 1970, c. 388, s. 11(2), (3); as amended, S.A. 1975, c. 88, s. 7. Priorities are accorded to licensees according to both their source of supply and the drainage basin upon which they are located; Alta. Regulation 91/58 s. 17(1).

[31] R.S.A. 1970, c. 388, s. 39.

[32] R.S.A. 1970, c. 388, s. 38.

[33] R.S.A. 1970, c. 388, s. 21.

[34] *Supra*, n. 16 at 18.

In some instances, however, the terms of a licence specify that it is appurtenant to an undertaking rather than to a specific piece of property as, for example, where railways were licensed to dam streams in order to provide water for their steam engines. Where a licence has been issued in this way, regulations under the Water Resources Act specify that it may be transferred with the approval of the Minister by means of a form provided with the original licence and its priority remains unchanged.[35] It is difficult to discover the criterion which determines when a licence will be issued appurtenant to an undertaking rather than to land, for the former term is very loosely defined in the Act. Licences of this type appear in practice to be used for a limited number of projects, such as those of the railway companies mentioned above, where the water use does not relate to a particular parcel of land. But there is no such restriction in the Act or regulations and in recent times it appears that licences have been attached to undertakings when the restriction of water use to a particular block of land has seemed likely to prove inflexible. Hence licences awarded to irrigation districts, whose boundaries change frequently, have been made appurtenant to the irrigation undertaking as a way of avoiding the need to issue a new licence each time a farm is added to or removed from the district. However this method of issuing licenses does not seem to increase the transferability of water rights in law, although departmental practice occasionally reveals a flexibility not found in the Act. The licence remains, in statutory language, "appurtenant to" and "inseparable from" the undertaking, so that it must surely be necessary to purchase the entire undertaking in order to acquire the water right, despite suggestions to the contrary in regulations made under the Act.

It was quickly recognized that the failure to provide for the transfer of existing water rights to new and more socially important uses could seriously retard development as soon as demand for water exceeded the available supply. In Southern Alberta particularly, there was great concern that large scale grants of water for early irrigation projects might have pre-empted the water supply needed by newly emerging towns for their municipal purposes and for the domestic requirements of their inhabitants.[36] In 1920, some attempt was made to overcome this problem by amending the Irrigation Act to permit the transfer of water rights apart from the land or undertaking to which they would normally be appurtenant. This scheme employs the same set of statutory purposes that are used to allocate priorities when licence applications are filed on the same day. Any applicant requiring water for a higher purpose than that for which it is presently being used is entitled to request the Minister to cancel the licence for the inferior purpose and to replace it with his own licence. The new right created in this manner has the same priority in time as the cancelled right. The Minister's decision on such a request is entirely discretionary, but the owner of the supplanted right is entitled to be compensated by the applicant for any loss sustained in consequence of the cancellation.[37]

These provisions mitigate the rigidity of a purely temporal set of priorities to a minor extent, though little advantage is taken of them now. Their potential for reassigning water rights in the future is limited

[35] Alta. Reg. 91/58, s. 9(8).

[36] Debates of the House of Commons, June 17, 1920, 3695.

[37] 1920 10-11 Geo. 5, c. 55, s. 4. Now R.S.A. 1970, c. 388, s. 11(4), (5), (6); as am., S.A. 1975, c. 88, s. 7.

by their strict dependence upon the list of statutory purposes. Although the priorities reflected in this list may have been an understandable response to a particular problem more than half a century ago, they seem entirely arbitrary in modern times because they imply, for example, that the use of water in irrigation is always more important than its use to generate power. Even if this proposition was once true, no allowance is made for the fact that changed economic conditions may have reversed the order of importance, for it remains impossible to transfer a water right from a higher to a lower purpose. Of course it can be argued that the statutory ranking can always be amended in light of changed conditions, but history provides little evidence that this is likely to occur in practice. Only one such amendment has been made, when irrigation was moved ahead of industry in the list of preferences in 1975, and that appeared to result from pressure from an irrigation lobby rather than from any conscious decision that irrigation uses of water had become more important than industrial uses. Apart from that isolated instance, the statutory water priorities remain those that were set in a vastly different economy in 1920 to accomplish a very specific purpose. Their present worth must therefore be severely doubted.

Whatever the other infirmities in the water rights granted by a licence, at least they have the advantage of permanence. Licences are granted for an indefinite period and may be terminated only on the specific grounds set out in the Act. Again this rather unusual provision results from the historical relationship of the modern Act to irrigation. Originally it was felt necessary to grant perpetual water rights because of the manner in which irrigation development was carried on. Irrigation companies would sell their lands as irrigated lands to settlers and guarantee a certain amount of water each season. In order to protect the purchasers it was therefore necessary to make the water rights permanent, for without water the farms would not be worthwhile.[38]

This rather uncharacteristic loss of control of the resource by the Crown is only partly offset by its statutory powers to terminate a licence. Generally a licence can be cancelled only for a number of specified delinquencies perpetrated by the licensee, such as a failure to exercise his rights, wasting water, or a breach of any covenant in a licence or of the Act or regulations.[39] Cancellation in the absence of some misdeed by the licensee is permitted only where the licence was issued in error or where the licensee holds provincial lands which are required for a water power project.[40] The Crown does not apparently retain a general right to cancel a licence, for the detailed specification of these grounds of termination suggests that they were intended to be exclusive. This conclusion, drawn from the wording of the statute, is supported by an examination of the nature of a licence, which is essentially a permission to use the property of the Crown. The permission may probably be regarded as contractual, so that the licensee obtains the right to use the water without any definite term in exchange for valuable consideration in the form of a fee.

Apart from the detailed rules permitting the cancellation of licences, the Crown may accomplish the same object indirectly by taking over the

[38] Debates of the House of Commons, June 17, 1920, 3695. In the same debate, the cost of the Bow River Irrigation project of the Northwest Irrigation Company was quoted as $12 million.

[39] R.S.A. 1970, c. 388, s. 53, 54; as am., S.A. 1975, c. 88, s. 27. *See* also s. 69(b) for cancellation upon default by a licensee where water power is involved.

[40] R.S.A. 1970, c. 388, s. 54(1)e, s. 73(1).

works of a licensee in certain circumstances. This may be done without compensation where the licensee has ceased to operate his works, or failed to supply water for irrigation to all those who are entitled to receive it, or where he has become insolvent.[41] In addition, in 1975 the Crown was empowered to expropriate any existing or planned works.[42] As the law now stands, it must therefore be concluded that the water right obtained by a licensee is permanent, unless it can be cancelled for one of the reasons specified in the Act or unless his works can be taken over by the Crown, either through expropriation or through his own default.

3. Supervision of Licensees

Although the licensee enjoys fairly secure water rights under the Water Resources Act, these rights are subject to very wide regulatory powers. As will be readily apparent, many regulations were instituted in the past to meet specific concerns and in particular out of a fear of rapacious irrigation companies. Most of them remain to the present day as significant restraints on all licensees.

The concern that irrigation companies might abuse their control of water supply to extract high prices from settlers led immediately to the regulation of prices charged by licensees.[43] A provision in the original Irrigation Act has been carried forward to the present day prohibiting price discrimination by any licensee supplying water to water users, on pain of a fine of $1,000 or imprisonment for two months or both.[44] This deceptively simple prohibition could mean almost anything, as is illustrated by the voluminous history of a similarly worded phrase in American antitrust law. It could mean that the same price must be charged to all consumers, regardless of the fact that the costs of supplying each consumer might be different, or that different prices can be charged to different classes of consumers, depending on the costs of supply, or that different prices can be charged to every consumer calculated on the cost of service plus a uniform rate of return. Not surprisingly, this section does not appear to have been employed in litigation, although it no doubt served as a blunt warning to early irrigation companies. Further, since 1894 the power has been reserved to regulate the water rates that may be charged by licensees.[45]

Allied to the fear of unfair pricing by irrigation companies was the anxiety that they would abuse their local monopolies of water supply facilities, which were often situated in the most advantageous locations in an area as a result of the land grant method of encouraging irrigation.[46] This led to a strict requirement that licensees pro-rate the available water among users in time of shortage[47] and to amendments permitting the use of a licensee's existing works by others in certain circumstances. Firstly, the Minister is empowered to grant to any applicant for a licence to carry water to his own lands the right to use the works of another licensee where, in the Minister's opinion, to do so

---

[41] R.S.A. 1970, c. 388, s. 50; as am., S.A. 1975, c. 88, s. 25.

[42] S.A. 1975, c. 88, s. 24. Previously the power of expropriation was limited to works for domestic or irrigation purposes.

[43] Debates of the House of Commons, June 11, 1898, 7789-90; January 9, 1908, 959-70.

[44] 1894, 57-58 Vic. c. 30, s. 28. Now R.S.A. 1970, c. 388, s. 39(1). The penalty has remained unchanged since 1894.

[45] 1894, 57-58 Vic. c. 30, s. 45. Now R.S.A. 1970, c. 388, s. 76(b)(ix).

[46] Debates of the House of Commons, May 12, 1914, 3600.

[47] R.S.A. 1970, c. 388, s. 39(2).

would "secure a more equitable or economical use of the available water supply" and the granting of the right would not interfere with the licensee's use of his own works. This right may be granted even if it involves the enlargement of the existing works, though of course their owners are entitled to be compensated for the use made of the works and for any costs incurred by their enlargement. The costs of the subsequent maintenance of the works are also to be shared. Secondly, where any existing works for the carriage of water are not utilized to their full capacity, they may be used by the Minister for the carriage of water for domestic purposes, provided that this does not interfere with the use of the works by their owners.[48]

Similar concerns about the probity of the early irrigation companies have left behind a residue of regulations affecting modern licensees in many ways. Licensees are required to commence their works within two months of receiving an interim licence, except in the winter months, and then to proceed with construction continuously, subject to the supervision of the Minister, who is the sole arbiter of whether the works are being prosecuted "with sufficient vigour". This requirement was apparently drawn from case law in the western United States, where the rule that an appropriator obtained priority form the date of commencement of his works was subject to a similar restriction. It was designed to prevent developers from playing a dog-in-the-manger role.[49] In addition, mechanisms are set up for dealing with the complaints of neighbouring landowners about the condition of a licensee's works.[50] Finally, considerable supervision is maintained over companies subject to the Act, though it was mercifully restricted in 1971 by the repeal of a section requiring annual returns from irrigation companies on every conceivable facet of their operations.[51] At the present time, all companies subject to the Act must submit to the Minister for inspection and possible revision copies of their by-laws, regulations, tariffs and of any agreements for the supply of water to consumers.[52] Although there is no longer any definition of what constitutes a company "subject to the Act",[53] the powers were originally intended to cover irrigation companies. As the Act presently stands, however, the supervisory powers could well extend to every company licensed to abstract water within the Province.

Obviously the proper application of all these regulatory powers would involve enormous administrative costs, with the result that many of them must now be ignored. Their very existence, however, underlines one of the recurring themes of this article, which is that an Act basically designed to regulate one form of water use may now have become inadequate to deal with the varied water uses of the late twentieth century.

B. Rights to 'Reserved' Water

It is possible to acquire licensed water rights by virtue of a special procedure, which owes its existence to a power granted to the Lieutenant-Governor in Council under Section 12 of the Water Resources

[48] 1914 4-5 Geo. 5, c. 37, s. 9. Now R.S.A. 1970, c. 388, s. 41, 42.

[49] 1894 57-58 Vic. c. 30, s. 17. Now R.S.A. 1970, c. 388, s. 26, 16(2), as am., S.A. 1975, c. 88, s. 10. See Meyers, *Supra*, n. 16 at 10.

[50] 1894 57-58 Vic. c. 30, s. 14(2). Now R.S.A. 1970, c. 388, s. 46.

[51] S.A. 1971, c. 113, s. 9.

[52] R.S.A. 1970, c. 388, s. 56.

[53] The only possible section limiting the companies subject to the act was repealed by S.A. 1975, c. 88, s. 4.

Act. Under this power, the Lieutenant-Governor is permitted to reserve any body of unappropriated water and to allocate it among applicants "as he deems best in the public interest." Any licence granted under this section is subject to rules rather different from those governing ordinary licences. The Lieutenant-Governor is authorized to prescribe the relative order of precedence of any allocations he chooses to make and clearly this may differ from the usual priorities set out in the Act. As an extension of this principle, the operation of those sections of the Act permitting an applicant in effect to expropriate the rights granted under a prior licence for an inferior purpose is expressly excluded. Except in an emergency, only if the necessary power is reserved in the licence itself can the rights under it be cancelled or diminished on the grounds that the water is required for some other purpose and then compensation is to be paid in a manner specified by the Lieutenant-Governor and set out in the licence.[54] Apart from these special provisions, an applicant for rights to reserved water must follow the normal procedures for obtaining a licence.

It is interesting to note that the broad powers in this section were first passed in 1920 to meet a very specific problem. While the Department of the Interior was examining a certain coal area, it found that the supply of available water fell far short of what was needed and that the ordinary rules of priority under the Irrigation Act probably would not distribute the water to its most beneficial uses. Accordingly, the water in the area was reserved by Order in Council to enable a survey to be made of its potential applications. As there was justifiable doubts as to the Minister's power to pass the Order in Council, this section was passed to validate it retroactively.[55]

Despite this narrow *raison d'etre,* the present section gives a government very wide powers, which are in fact exercised from time to time, to set its own water priorities. They are of great potential importance in areas such as the Athabasca Tar Sands, where a large amount of water is presently unappropriated but major consumptive uses are planned.

C. Water Rights Under the Irrigation Act

Although there is no conceptual conflict between the modern Alberta Irrigation Act and the Water Resources Act, confusion sometimes arises because water rights are allocated under the former legislation to individuals in certain areas by a quasi-governmental body. Indeed, the two statutes have very different histories. As has been shown, the licensing system for the allocation of water rights, now governed by the Water Resources Act, was a matter of federal jurisdiction until 1930. However, the Irrigation Act has its source in three types of legislation which were originally under territorial and later provincial authority.

At the same time as the federal Northwest Irrigation Act was being developed, an Irrigation Ordinance was passed by the Legislative Assembly of the Northwest Territories in Regina.[56] The Ordinance was the product of a considerable amount of agitation by farmers in the Springbank area, west of Calgary, where drought had been so severe as to interfere with stock-raising.[57] It was designed to enable organizations

[54] R.S.A. 1970, c. 388, s. 12(3), (4); as am., S.A. 1975, c. 88, s. 8.

[55] 1920, 10-11 Geo. 5, c. 55, s. 5. *See* Debates of the House of Commons, June 17, 1920, 3699.

[56] N.W.T. Ord. No. 6, 5th Session, 2d Legislative Assembly, 1894.

[57] *General Report on Irrigation, supra,* n. 5 at 32-34.

of neighbours to construct irrigation systems as mutual ventures where there was little prospect of an irrigation company undertaking the work as a business enterprise. The legislation, which was regarded as an improved version of the Wright Act in California, required the preparation of surveys and plans to the extent demanded by the Northwest Irrigation Act before a petition for the formation of an irrigation district was submitted to the Lieutenant-Governor. It was hoped that the costs of surveying alone would discourage frivolous applications, so that the project would normally proceed after notice had been given in the Official Gazette and time had been allowed for the receipt of objections. If no compelling objections arose, an election would be held within the proposed district and, provided that the vote was favourable, construction could begin under the supervision of a Board of Trustees which was provisionally elected at the same time. At that stage, the Board was required to apply for a licence under the Northwest Irrigation Act or, after 1930, under the Provincial Water Resources Act. Despite some early doubts as to its constitutional validity, there was no possible conflict between the Irrigation Districts Ordinance and the overall water licensing scheme, for a District was in the same position as any other applicant for a licence and a failure to obtain a licence led to its automatic dissolution. Within the Irrigation District, the Board of Trustees was empowered to regulate the equitable distribution of the water which it obtained under its licence,[58] in much the same way as a city, as a licensee under the Water Resources Act, apportions water to its inhabitants. When this power was combined with the vitally important ability to raise money by levying property taxes upon District lands, a strong impetus for irrigation had been created. Of course the legislation governing Irrigation Districts became much more elaborate over the years,[59] but its relationship to the federal and later to the provincial licensing systems remained unchanged.

A little later, organizations known as Water Users' Districts began to appear. They were authorized originally under the Irrigation Districts Act of 1915,[60] but from 1920 until 1968 they were the subject of separate legislation.[61] Water Users' Districts could be formed where in a given area an irrigation system, whether it was operated by a private company or an Irrigation District, required water users to undertake the distribution of water from the main supply. The District could be formed by the petition of the owners of at least half of the land within its proposed boundaries, with the consent of the owners of the main irrigation works. Following a vote, an elected Board of Managers was empowered, *inter alia*, to maintain the irrigation ditches under their care and to provide for "the equitable distribution of water within their district." Again, there was no conflict with water licensing legislation because a licence would be held for irrigation purposes by the owner of the main works and the Board would merely facilitate the distribution of the already diverted water.

In addition to the co-operative associations provided for under the two Acts described above, the Provincial Government set up a number of irrigation districts with differing degrees of direct government control

[58] For the developed rule on this point, *see* R.S.A. 1955, c. 162, s. 18(a)(ii).

[59] For a detailed discussion of the old legislation, *supra*, n. 1 at 90.

[60] S.A. 1915, c. 13, s. 76, 77.

[61] S.A. 1920, c. 16. The final version of the Act is found in R.S.A. 1955, c. 363.

under various special Acts. These Acts resulted often from the acquisition by an Irrigation District of works formerly owned by a private company and apparently found unprofitable[62] and sometimes simply from the creation of an irrigation district with a different administrative structure from that set out in the Irrigation Districts Act.[63] This piecemeal development led to a proliferation of rules governing Irrigation Districts and the distribution of water rights within them until they were all consolidated under the Irrigation Act of 1968.[64]

The present Irrigation Act provides uniform rules and administrative authorities for all Irrigation Districts and subsumes Water Users' Districts. Each District is now run by a Board of Directors subject to the direct supervision of a provincially appointed Irrigation Council. The Board is entitled to regulate by by-law the supply and distribution of water to water users within the District and to provide for the conditions under which the supply of water to any parcel of land may be stopped.[65] As a result, the general allotment of water rights is accomplished by the water licence granted to the Irrigation District and its local distribution within the District is made by the Board of Directors. The major exception to this rule occurs in those localities where Irrigation Districts took over the works of private companies, for then the Board of Directors is bound to carry out the water agreements entered into by their predecessors in title.[66] It is clear therefore that the distribution of water rights within Irrigation Districts is perfectly consistent with the overall scheme of the Water Resources Act.

D. Riparian Rights

As the account of the development of the licensing system of granting water rights has shown, the Northwest Irrigation Act and its successor statutes impose considerable restrictions on riparian rights. However, before the extent of these restrictions can be examined, it is necessary to consider the effect of public lands legislation upon the existence of riparian rights.

1. Public Lands Legislation

It is possible that two sections of public lands legislation, both originally found in the Federal Irrigation Act but now transferred to the Provincial Water Resources Act and Public Lands Act respectively, may inspire arguments that riparian rights in Alberta exist only in a very restricted fashion, if at all.

Firstly, it may be argued that Section 8 of the Water Resources Act precludes the existence of riparian rights in much of the land within the Province. Section 8 now reads:

> Except in pursuance of a valid agreement or undertaking existing on the first day of April, 1931, no grant shall be made by the Crown of lands or of any estate therein, in such terms as to vest in the grantee any exclusive right or privilege with respect to any water.[67]

---

[62] *See e.g.*, St. Mary and Milk River Development Act, S.A. 1950, c. 68; Eastern Irrigation District Act, R.S.A. 1942, c. 101; Western Irrigation District Act, S.A. 1944, c. 16. In each case the agreement transferring the irrigation project is set out in a schedule to the Act.

[63] *See e.g.*, Bow River Development Act, S.A. 1955, c. 48; Lethbridge Northern Colonization Act, R.S.A. 1942, c. 102.

[64] S.A. 1968, c. 49.

[65] R.S.A. 1970, c. 192, s. 45.

[66] *See e.g.*, St. Mary's and Milk River Development Act, S.A. 1950, c. 68, s. 7, 17(b), continued by the Irrigation Act, S.A. 1968, c. 47, s. 190-193.

[67] R.S.A. 1970, c. 388, s. 8. The original section in the Irrigation Act is found in 57-58 Vic. c. 30, s. 5 and its

Because of the earlier federal legislation, the effective date after which the exclusive water rights referred to in this section could not be granted was 1894. This provision has never been judicially discussed other than by mere mention and there is no reference to it in the debates prior to the passage of the Irrigation Act. As it now stands, without any guide to its meaning, it may be interpreted to mean that riparian rights cannot arise upon a grant of title from the Crown after 1894, especially as later consolidations of the Federal Act gave a broad precis of the section stating "grants of lands not to convey water rights."[68] However, it seems that the present Section 8 was not intended to affect riparian rights, which are not "exclusive", but shared in common by all who own property bordering a watercourse. This suggests that the section must have been designed to prohibit Crown grants of land which purported to give all the rights in a particular body of water to, for example, a water power company. This view is supported by the phraseology of the section, which is aimed at preventing express grants of water rights, because riparian rights were not given by express grant but were incidental to a grant of riparian property. If the intention had been to prevent Crown grants from including riparian rights, one would have expected the formula that the grant "shall not be construed" so as to vest that category of water rights in the grantee. In addition it is interesting to note that in Manitoba, where a similar provision is retained in the Water Rights Act, the section was obviously not deemed to have abolished riparian rights for it was found necessary to enact a specific amendment to effect that purpose.[69]

The second argument that public lands legislation may have abolished riparian rights is derived from the declaration that "the title to the beds and shores of all rivers, streams, watercourses and other bodies of water" is vested in the Crown, with retroactive effect.[70] Although the vesting of title to the beds is irrelevant, as the ownership of the bed does not affect the rights of the owner of the bank, it might be argued that Crown ownership of the shores of watercourses prevents the contact with the water necessary to create a riparian tenement. However, as might be expected from the context, the word "shore" in this section has been interpreted not to mean a permanent strip of land separating what would otherwise be riparian land from the water, but rather to denote "that part of the bed which is uncovered when the water is low".[71] Accordingly, it does not seem that public lands legislation can be taken as precluding the existence of riparian rights in Alberta.

2. Water Rights Legislation

The degree to which water rights legislation abridges riparian rights is a matter of much controversy. Clearly the framers of the original Federal Irrigation Act considered that riparian rights had been abolished completely. J. S. Dennis, one of the main forces behind the Act, stated unequivocally that it was founded upon the principle of "the total suppression of all riparian rights in water" and this opinion was

enactment led to the inclusion of a similarly worded reservation in Crown grants of land. *See Flewelling* v. *Johnston* (1921), 59 D.L.R. 419 (Alta. A.D.).

[68] This was inserted in R.S.C. 1906, c. 61, s. 7. It was not present in the original Act.

[69] R.S.M. 1970, c. W-80, s. 11(2).

[70] This section was transferred from the Water Resources Act to the Public Lands Act in 1966. It is now found in R.S.A. 1970, c. 297, s. 4.

[71] *Flewelling* v. *Johnston* (1921), *supra*, n. 67 at 428-9. Compare the different effect of Australian legislation, where in some rivers the banks were vested in the Crown. Clark and Renard, *The Riparian Doctrine and Australian Legislation* (1969-70) 7 Melb. U.L. Rev. 475, 491.

shared by the Minister of the Interior when the original Bill was introduced in the House of Commons.[72] But despite the ringing confidence of such statements, the somewhat oblique method by which the legislation deals with riparian rights leaves the question whether they have survived open to contention. Indeed this question has been hotly disputed in a number of jurisdictions which adopted a legislative formula similar to that found in the Prairie Provinces.[73] In the light of this, the extent of riparian rights to the flow of water in Alberta at the present day must be considered.

(a) The right to water for domestic purposes

As was noted earlier, the general scheme of the Irrigation Act was to vest the property in water in the Crown, by means of a much amended section which will be considered in detail below, and to prohibit abstractions of water except under a statutory licence. However, from the beginning the right of a riparian owner to use water for domestic purposes has been protected and in 1895 it was made clear that no licence was required for this type of use.[74] This right has been subject to frequent redefinition by statute, even to the extent at one stage of permitting consumptive uses for industrial purposes, which would not have been allowed at common law.[75] In the present Water Resources Act, it is expressly provided that the Act does not affect the right of a riparian to take water for domestic purposes, which are defined as "household requirements, sanitation, and fire prevention, the watering of domestic animals and poultry, and the irrigation of a garden not exceeding one acre adjoining a dwelling house".[76]

As a corollary of the preservation of the right in this way, it appears that a riparian must be able to bring an action to restrain any diversion, whether licensed under the Act or not, which would impair his use of water for domestic purposes. If the provisions of the Act "do not affect" this right of the riparian owner, except for the statutory definition of domestic purposes, then it must remain unimpaired and not subject to diminution by licensed appropriations, even in times of shortage. *A fortiori,* there is nothing in the Act to suggest that a riparian's right to prevent unauthorized diversions affecting his domestic uses has been removed.

Some support for this construction of the statute may be derived from the decision of the High Court of Australia on an analogous problem in *H. Jones and Co. Pty. Ltd.* v. *Kingborough Corporation.*[77] In that case, Section 209 of the Tasmanian Local Government Act had vested in the defendant municipality "every river, creek or watercourse" in the relevant district, together with "the absolute control and regulation" of the supply of water therein. The reservation of riparian rights was wider than that in the Alberta Act, for the statutory vesting was "subject to the previously existing rights of any riparian proprietors to the use of

---

[72] *General Report on Irrigation, supra,* n. 5 at 28; Debates of the House of Commons, June 25, 1894, 4950. One historical commentator, however, has noted that the implications on this aspect of the Act were "understood neither by the Minister who sponsored the Bill nor by the members of the Parliament which approved it." Burchill, *supra,* n. 3.

[73] *See* Clark and Renard, *supra,* n. 71; Armstrong, *The B.C. Water Act: The End of Riparian Rights* (1959-63) 1 U.B.C. L. Rev. 583; Lucas, *Water Pollution Control Law in B.C.* (1969) 4 U.B.C. L. Rev. 56, 80-82.

[74] 57-58 Vic. c. 30, s. 9; the licensing point was clarified in 58-59 Vic. c. 33, s. 3.

[75] R.S.C. 1906, c. 61, s. 2(k), as am. by 7-8 Ed. 7, c. 38, s. 1. The riparian's right to use for industrial purposes was protected until the Act passed into provincial jurisdiction in 1931.

[76] R.S.A. 1970, c. 388, s. 5(4). "Domestic purposes" are defined in s. 2(7).

[77] (1950), 82 C.L.R. 282, discussed at length by Clark and Renard, *supra,* n. 71 at 501-505.

the water flowing" in the watercourses concerned. Despite the fact that their decision rendered the statutory grant virtually meaningless, a majority of the High Court held that by this reservation downstream riparians retained the right to the undiminished flow of the water and that they could restrain by injunction a major scheme for the abstraction of water proposed by the municipality. It is suggested that a Canadian court would probably take the same view of the plain retention of a riparian's right to use water for domestic purposes and not permit its impairment by a statutory licensee. This is particularly possible because, unlike the Tasmanian case, there is no danger of the more limited right reserved to the riparian in Alberta frustrating the overall purposes of the Act.

The right of the riparian to take water for domestic purposes is thus amply secured. However, it is necessary next to examine the effect of Alberta's water legislation upon the other incidents of the rights of a riparian proprietor.

(b) Other aspects of riparian rights

The provisions of the Alberta Water Resources Act which have been relied upon to support the argument that the legislation abolishes all riparian rights, except for the expressly preserved right to use water for domestic purposes, remain substantially similar to those of other jurisdictions which adopted the Victorian Irrigation Act of 1886 as their model.

The Alberta Act now provides for Crown control of water by a declaration which ensures that the property in all the water within the boundaries of the province is vested in the Province.[78] This formula is the result of a considerable evolution over the years. In the original Northwest Irrigation Act, the vesting section stated merely that the right to the use of all waters was presumed to be vested in the Crown.[79] In 1895, for some unexplained reason, this section was changed to vest in the Crown both the property in and the right to the use of the water, in the course of an amendment to ensure that the Act did not interfere with public rights of navigation and flotation.[80] This formula was also adopted by British Columbia and remained unchanged in Saskatchewan and Manitoba when the Act came under provincial jurisdiction.[81] In Alberta, however, the phrase "right to use" was deleted from the first provincial Water Resources Act and Crown rights were left to rest on a proprietary basis.[82] It is perhaps ironic to note that this evolution is exactly the reverse of that experienced by the parent Act in Victoria. The original Irrigation Bill in the Legislative Assembly of Victoria had sought to secure Crown control by a declaration of Crown property rights in water similar to that found in the present Alberta legislation. However, this was withdrawn and replaced by the phrase "right to use" for reasons of clarity and because the concept of property in flowing water and its consequences were unknown to the common law. In the

[78] R.S.A. 1970, c. 388, s. 5(4). The vesting section was cast in this form following the second Natural Resources Transfer Agreement of 1938. *See* S.A. 1939, c. 11, s. 3. A similar provision is found in Wyoming legislation. *See* Meyers, *supra*, n. 16 at 15.

[79] 57-58 Vic. c. 30, s. 4. *Pace* Clark and Renard, *supra*, n. 71 at 489, footnote 85, there was no mention of vesting the property in the Crown in the original Act.

[80] 58-59 Vic. c. 33, s. 2. *See* Debates of the House of Commons, June 20, 1895, 3079.

[81] *See* now R.S.B.C. 1960, c. 405, s. 3, as amended to bring under the Act water rights granted under special statutes, S.B.C. 1966, c. 54, s. 2.

[82] S.A. 1931, c. 71, s. 5(1).

words of two Australian commentators with reference to earlier Victorian legislation, "the departure from common-law theory in granting property [to running water] can only be seen as a clumsy form of 'over-kill'".[83] Yet almost as soon as Canada adopted the original Victorian section, it began to develop the legislation in a direction that had been eschewed by that State. Presumably this odd development occurred because in those times the debates on this question in the Victorian Legislative Assembly would have been unavailable in this country.

Despite this historical variation, and whatever the elegance of the respective approaches, it is suggested that there is little practical difference between the Australian vesting section expressed in terms of the Crown's right to the use and control of the water,[84] the Alberta version referring to the Crown's property in water and the hybrid found in Saskatchewan, Manitoba and British Columbia. The term "property" in this context can only refer to the right to use and control the resource and would seem to confer no more rights on the Crown than the corresponding Australian section, except perhaps that it may render an unauthorized taking of water a form of theft.[85]

The fundamental similarity of the water legislation makes it possible to employ authorities from the Australian jurisdictions and from British Columbia in assessing the status of riparian rights on the Canadian prairies, where there have been no reported cases dealing directly with the issue. However, it must be noted that the following discussion is not applicable to Manitoba, where a riparian's right to water, except for domestic purposes, has now been expressly removed by statute.[86]

When the effect of this type of vesting section was first scrutinized, judicial opinions tended to be in accord with those of the framers of the legislation in considering riparian rights totally abolished. In *Hanson* v. *Grassy Gully Gold Mining Co.*,[87] the Supreme Court of New South Wales held that the vesting of the right to the use and flow of the water in the Crown implied that riparian owners had been divested of that right. The Court considered that all incidents of riparian rights had disappeared, as in that case it was decided that a downstream riparian could no longer restrain even an apparently unlicensed diversion of water by an upstream owner.

It is clear that there are severe weaknesses in the reasoning in the *Grassy Gully* case. Firstly, in the phrase of Dixon J., as he then was, of the High Court of Australia, it tended to look upon riparian rights "as a *fasciculus* that is not to be dismembered".[88] Despite the approach taken by the court, it is quite possible to regard this type of water rights

[83] Clark and Renard, *supra*, n. 71 at 485. The history of the Victorian legislation is taken from the careful account of the same authors. It seems that Australian legislation was in turn influenced by the earlier colonial experience in India. *See* Burchill, *supra*, n. 3 at 357.

[84] The typical Australian vesting section now reads: "The right to the use and flow and to the control of the water in all rivers and lakes which flow through, or past, or are situated within the land of two or more occupiers . . . shall . . . vest and be deemed to have vested in the Commission for the benefit of the Crown". Water Act 1912, as am. 1930, s. 4A (N.S.W.). Very similar provisions exist in Queensland, Victoria and Western Australia Water Acts, except that the right to use vests directly in the Crown, and in Western Australia the Act covers all water. *See* Water Acts 1926-1964, s. 4 (Qd.); Water Act, 1968, s. 4 (Vict.); Rights in Water and Irrigation Act 1914-1964, s. 4 (W.A.).

[85] *See* Clark and Renard, *supra*, n. 71 at 486. It was the opinion of the government of Victoria that there was no practical difference between the "property" and "right to use" formulae; *id.* at 488.

[86] *Supra*, n. 69.

[87] (1920), 21 N.S.W.L.R. 271. In Canada, the *Grassy Gully* argument has been taken up by Armstrong, *supra*, n. 73 at 586-7.

[88] *See* the *Kingborough Corporation* case, *supra*, n. 77 at 323.

enactment as taking away some incidents of riparian rights while leaving others unaffected. Secondly, as Duff J. noted in a subsequent British Columbia case, the argument that the legislation annuls riparian rights is based on the false assumption that those rights are rights of user, whereas in law they are simply rights incidental to the ownership of property.[89] The various Acts deal only with rights of use and do not purport to deal with the other aspects of riparian rights. Finally, in view of their status as property rights, it would be unlikely that riparian rights would be abolished other than by express enactment, particularly where a more restricted reading can be given to the statute without affecting its purpose.[90]

The problems with the *Grassy Gully* line of reasoning have been well recognized in subsequent litigation both in New South Wales and British Columbia. In the High Court of Australia, Fullagar J. criticized the view that this type of water rights legislation abolished riparian rights as imputing to the legislature the very curious intention "to cure the disease by killing the patient". In his opinion:

> . . . the Act does not directly affect any private rights, but gives to the Crown new rights—not riparian rights—which are superior to, and may be exercised in derogation of, private riparian rights, but that, until those new and superior rights are exercised, private rights can and do co-exist with them.[91]

A number of cases in Canada involving the British Columbia Water Act point to the same conclusion as that adopted by Fullagar J., although no reference was made to the Australian decisions in any of them. In *Cook* v. *Vancouver*,[92] the Privy Council made it clear that when the superior Crown rights have been exercised, the rights of riparians are correspondingly diminished. In that case, despite some wide *dicta* that may be misleading,[93] the Judicial Committee decided simply that a downstream riparian had no right of action when the flow of the stream was diminished by an appropriation licensed under the Water Act. Riparian rights were thus curtailed but by no means abolished, as was demonstrated by the later case of *Johnson* v. *Anderson*, where the defendant by an unlicensed diversion had interfered with the flow of a stream that passed through lands of the plaintiff. In rejecting the defendant's argument that the Water Act abolished the riparian owner's right to the flow of the stream, Fisher J. explained that the statute merely abrogated riparian rights to the extent that upstream appropriations had been licensed under the Act. As a result, the riparian owner still possessed the right to restrain an unlicensed upstream diversion.[94]

These decisions make it possible to draw a number of conclusions about the position of a riparian owner under the present Alberta Water Resources Act. Firstly, following the rationale of the *Cook* case, it is clear that the riparian no longer has a right of action if the flow of the stream is diminished by a licensed appropriation. As the property in the water is vested in the Crown, the Crown itself can presumably use the

---

[89] *Esquimalt W.W. Co.* v. *Victoria* (1907), 12 B.C.R. 302; reversed on other grounds, *id.* at 388.

[90] *See* the discussion by the Supreme Court of Canada of riparian rights to the flow of a stream in *Upper Ottawa Improvement Co.* v. *H.E.P.C.* (1961), 28 D.L.R. (2d) 276, especially at 289.

[91] *Thorpe's Ltd.* v. *Grant's Pastoral Pty. Ltd.* (1955), 92 C.L.R. 317, 331.

[92] [1914] A.C. 1077.

[93] *See e.g.*, Armstrong, *supra*, n. 73 at 585, where some of Lord Moulton's comments are taken out of context.

[94] [1937] 1 W.W.R. 245. In his decision, Fisher J. follows the approach of Duff J. in the *Esquimalt* case, *supra*, n. 89.

water without infringing the right of a downstream riparian and can grant that right to another. Secondly, in Alberta it is likely that the riparian owner may no longer exercise his former right to use water for extraordinary purposes without first having obtained a licence under the Act. A shadow of doubt is cast upon this conclusion by some very wide *dicta* in *Johnson* v. *Anderson,* where Fisher J. offered the comment that "until . . . licences have been granted for all the water flowing by or through the plaintiff's land . . . the plaintiff still has the right to use the water flowing by or through his land subject of course to any rights granted".[95] The validity of these comments has been doubted in British Columbia[96] and they are probably not applicable to Alberta because of Section 9 of the Water Resources Act, which has no direct counterpart in the British Columbia legislation, operating in conjunction with a general prohibition against the diversion or use of water except under the authority of the Act.[97] Section 9 now reads:

> No right to the permanent diversion or to the exclusive use of any water shall be acquired by any riparian owner or any other person
>
> (a) by length of use, or
>
> (b) otherwise than in accordance with this Act or the regulations,
>
> unless such right is acquired by a grant made pursuant to a valid agreement or undertaking existing on the first day of April, 1931.

As there is no provision in the Act for a riparian owner to acquire a right to take water for extraordinary purposes except by licence, that right would seem to be abolished by necessary implication. The saving clause in this section, operating in conjunction with a similar clause in the original Irrigation Act, can only refer to Crown grants prior to 1894. It may be that some riparian owners holding lands by virtue of agreements made before this date retain the right to use water for extraordinary purposes.

It seems that this is as far as the Water Resources Act goes in curtailing riparian rights. Following the decision in *Johnson* v. *Anderson,* the riparian owner probably retains the right to restrain unlicensed upstream appropriations or appropriations in excess of the licensed amount, as this in no way interferes with the purpose of the legislation. It cannot be seriously argued that Section 9 removes this right by denying the riparian the right to use water except under the Act because, as was discussed earlier, the right to undiminished flow is a right of property and not of user. It exists even if the riparian makes no use whatsoever of the water in the stream.[98] There is no direct authority in Alberta to support this view, though it is worth noting that in one case an Alberta court seemed to assume that a riparian owner had the right to restrain an unauthorized diversion even though his claim was denied on other grounds.[99] For similar reasons a riparian ought to be able to bring an action if a person appropriates water upstream for a purpose different from that authorized in his licence. In addition, the Water Resources Act almost certainly does not interfere with the right to

---

[95] *Id.* at 249.

[96] Armstrong, *supra,* n. 73 at 586. The position taken in the text is supported by Gisvold, *supra,* n. 1 at 58.

[97] R.S.A. 1970, c. 388, s. 9. The general prohibition is found in s. 6. The B.C. Act has a similar prohibition implied, but Fisher J. apparently thought that it was insufficiently express. *See* R.S.B.C. 1960, c. 405, s. 3. All of the other jurisdictions considered in this section of the article have provisions similar to Alberta's section 9, except New South Wales.

[98] *Sampson* v. *Hoddinot* (1859), 1 C.B. (N.S.) 540; 140 E.R. 242, 251.

[99] *Good* v. *Friemark* [1950] 2 W.W.R. 1156 (Alta. D.C.).

receive the flow of the stream unimpaired in quality,[100] for it is no more concerned with this aspect of a riparian owner's property rights than it is with other obviously unaffected aspects relating to, for example, access or accretion.[101]

As a result of this analysis it is clear that a number of riparian rights remain, although others have been curtailed by the Water Resources Act. In a jurisdiction where the enforcement of natural resources statutes is usually left to the discretion of a public official and access to the courts by individuals is limited by strict rules of *locus standi*, the remaining riparian rights have a strong role to play. They provide a potentially valuable method of ensuring by private action that the Act and its legislative policy are followed. Despite the earlier calls for the complete abolition of these rights of a privileged class of property holders, this is a major reason for their continued survival.[102]

(c) Remedies

Although the questions of the existence of a riparian's rights and of the extent of the remedies for their breach are analytically quite distinct, some difficulty is caused in Alberta by a statutory provision which may restrict the legal relief available in the event of violation of one of the remaining riparian rights.

In addition to the normal compensation for any damages he might have incurred, it is well established that a riparian may obtain an injunction to restrain the breach of one of his rights, even if the defendant's wrongful conduct caused him no direct harm. The usual justification for this rule is that, although the riparian is presently suffering no damage, his interest in land might be permanently prejudiced if the pollution of the stream or reduction in flow continued so as to found a prescriptive right in the defendant.[102a] If this is the sole reason for the grant of an injunction in the absence of any damage, then a riparian may well be precluded from obtaining the remedy in Alberta by virtue of Section 50 of the Limitation of Actions Act, which prevents an upstream riparian from obtaining a prescriptive right to pollute or to divert water from the stream.[102b]

This point was raised in a Nova Scotia case where it was argued that a similar statute, which prevented the acquisition by prescription of rights to use water, had removed the need to grant an injunction when there had been an interruption of the downstream flow. In rejecting this argument, Ritchie E.J. conceded that there were cases in which injunctions were granted solely because the upstream use might become a prescriptive right, but added:

> ". . . that is one ground on which an injunction may be granted, but no authority was cited and I venture to say that no authority can be found for the proposition that it is th exclusive ground for an injunction in cases of this kind."[102c]

---

[100] *See* Lucas, *supra*, n. 73 at 80-83. In *Groat* v. *City of Edmonton*, [1928] S.C.R. 522, the Supreme Court of Canada refused to deal with this issue as it had not been raised in argument. It is possible that this right of the riparian may be affected by the licensing scheme of the Clean Water Act, S.A. 1970, c. 17.

[101] *See Clark* v. *City of Edmonton* [1930] S.C.R. 137, for a discussion of accretion.

[102] It also seems that a licensee can safeguard the policy of the Act by bringing action to restrain unlicensed diversions that affect his interest: *Kenworthy* v. *Bishop*, [1925] 3 W.W.R. 183 (B.C.C.A.).

[102a] La Forest, *Water Law in Canada: The Atlantic Provinces* (1973), 214.

[102b] Section 50 reads: No right to the access and use of light or any other easement, right in gross or *profit à pendre* shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired. R.S.A. 1970, c. 209, s. 50. I am grateful to my colleague Gwilym Davies for bringing to my attention the argument based on Section 50.

[102c] *Stanford* v. *Imperial Oil Co.* (1921), 56 D.L.R. 402, 403 (N.S.S.C.).

The court emphasized that it would grant an injunction when it was "just or convenient under the circumstances" and it had no hesitation in doing so in that case, as the plaintiff had apparently suffered some damage. Similarly, in Alberta it seems that a riparian would be able to obtain an injunction if he was caused harm either by a licensed diversion affecting his domestic uses or by an unlicensed or excessive diversion. However, the position of a riparian who suffers no direct damage from a diversion in the latter category is less strong. If the argument of the preceding section of this article, that he retains some rights in that case, is accepted then he would presumably be able to obtain at least nominal damages, for otherwise the defendant would be allowed to violate his right with impunity. In addition, it might be argued that he would still be entitled to an injunction, for the right being infringed is a property right and the act of infringement is a clear contravention of the Water Resources Act. In the words of Lindley M.R. in an important decision on injunctions in a riparian rights context, the plaintiff riparian would be in the position of one whose "rights are infringed by persons who admit that they have no right to do what they are doing; and under such circumstances, unless the infringers are prepared to stop what they are doing an injunction to restrain them is almost a matter of course."[102d]

IV. ASSESSMENT

One commentator, echoing the sentiments of the framers of the Northwest Irrigation Act, has described the goal of the Alberta Water Resources Act and of the related legislation in the other Prairie Provinces as being "to secure the most beneficial use of water". This very general statement implies that allocations are to be made "so as to achieve the highest amount of total economic benefits which can be made out of the possible uses to which a given source of water may be put within each province".[103] While it is generally agreed that this is a satisfactory formulation of the purpose of the legislation, it seems to have led to a pervasive assumption that the purpose is fulfilled by the present Alberta Act. It is the contention of this article that such an assumption is not justified.

As was indicated by the earlier discussion of the prior appropriation doctrine, a system which allocates water rights basically according to the time at which application is made for them can maximize the benefits obtained from water use only by sheer coincidence. Those water uses that obtained priority by early licensing tended to be agricultural and might well be less important in economic terms than other possibilities which emerged at a later date, such as uses for power generation, or for industrial or municipal purposes. Yet the early water rights enjoy a highly privileged status, for they remain protected against newer uses in times of shortage. Furthermore, it is possible that existing rights may consume the available supply in a given stream or basin and thus preclude later and possibly more beneficial applications of water.

When this fundamental criticism is applied to the Water Resources Act, it is met with the defence that the scheme of the Act is not one of prior appropriation but rather one of administrative grants, generally characterized as an "authority management" system. It is certainly true that water rights in Alberta can be granted only after an application for

[102d] *Roberts* v. *Gwyrfai District Council* [1899] 2 Ch. 608, 614.

[103] *Supra*, n. 1 at 19.

a licence has been made to the Department of the Environment and that the Department is entitled to refuse an application if the proposed water use is not considered beneficial. In that sense, in contrast to a pure system of prior appropriation, water rights in Alberta are not in law dependent upon the time at which the water is first put to beneficial use. However, in practice, temporal priorities still prevail, because few applications for a licence are denied as long as there is sufficient water to satisfy the proposed use in the relevant stream. This is hardly a surprising result for, in the absence of any specific criteria in the Act or the regulations, it would be most difficult to justify the refusal of a licence unless the proposed use were clearly disadvantageous.[104] Administrative control over the granting of licences is accordingly little more than a safety valve, which may mean that the allocation of water rights is slightly superior to that resulting from the doctrine of prior appropriation. It does not guarantee that the most economically beneficial mixture of water uses will occur unless one is willing to concede that the administrator of the Act possesses an oracular vision of which water uses are truly the most important to society and that this vision is brought to bear upon each licence application.

Even if it is assumed that the initial grants of licences under the Act satisfy the principle of maximum beneficial use, the overall allocation of water rights in the Province will still be less than optimal. The misallocation will arise because the restricted methods of transferring water rights under the Act fail to make adequate provision for the licensing of new water uses that are more beneficial than the existing licensed uses, when the demand for water exceeds the available supply. The general rule that licences are appurtenant to the land or undertaking for which they are issued fails to permit the transfer of a water right where a new, more highly valued use must be carried on at a different location on the stream.[105] The same rule can produce inefficiency even where a new use of water can be made on the same parcel of land as the existing use, for it imposes on the transferee the costs of acquiring land, which may not be necessary to the new enterprise. The remedial section of the statute allowing the acquisition of water rights apart from land or undertakings is again of limited assistance, because of strict relationship to the list of statutory priorities in water use. For example, the available water supply on a particular stream may be fully committed to domestic, municipal and irrigation uses. If a potential water use emerges, perhaps for industrial purposes, which is of higher economic value but lower on the scale of statutory priorities, the Act will not permit a transfer of the licences from the existing uses even if all the parties concerned are willing to enter into the necessary transactions. These impediments are undeniably a disincentive to the allocation of water to its most beneficial uses.[106]

The distribution of water rights under the Water Resources Act is thus in form governed by an authority management scheme, but in practice most conflicts are settled by strictly temporal considerations, which are inadequate to deal with the water problems of the future in much of the Province. In the light of its history, the limitations of the Act in securing the most beneficial use of water in modern times are

[104] Contrast the Alaska Water Use Act of 1966, where criteria are specified. *See* Meyers, *supra*, n. 16 at 15-16.

[105] An exception is made for water power purposes. *See* text, *supra*, p. 163.

[106] *See* Hirshleifer, DeHaven and Milliman, *Water Supply: Economics, Technology and Policy* (1960), 39.

scarcely unexpected. Its precursor, the Northwest Irrigation Act, was drafted with considerable foresight, but at a time when the conflicts in water use were few and relatively simple, usually involving competition between riparians and non-riparians for the agricultural use of water. More complex water conflicts appeared with the rapid development of the Province and the Act was often amended in a piecemeal fashion to meet them, with the result that its broad philosophy was rarely questioned. The present Act bears many signs of this development, particularly in the survival of some anachronistic sections and of phraseology directed entirely at irrigation projects.[107] More importantly, however, the Act fails to provide an adequate framework to deal with changed patterns of water use or with the competition for water among many different uses which seems bound to emerge in some parts of the Province in the near future.

Although Alberta still enjoys relatively abundant water supplies, the problem of setting priorities in dealing with competing claims to water use must now be faced. In the northern section of the Province, which is part of the Mackenzie River Basin, major conflicts do not yet exist, but the introduction of heavily water-dependent oil extraction plants in the Athabasca Tar Sands poses important water management questions for the future.[108] However, much of the remainder of the Province and the bulk of its population is served by the Saskatchewan-Nelson River Basin, about which Environment Canada made the following comments in a recent survey:

> . . . future development . . . may be limited by its ability to supply water for its expanding and diverse activities which are continually consuming more of the available supply. This grave realization has led to the investment of over $1 billion in storage reservoirs and several studies, for example, the Saskatchewan-Nelson Basin study, which has investigated the basin's water resources, including the potential for increasing present supplies through diversion or storage. That study also constitutes the first step in ensuring the future development of adequate water supplies for the prairie region.[109]

The emphasis in this area has thus shifted from securing a fair distribution of initial water rights amongst agricultural users, which was the concern of the Northwest Irrigation Act, to ensuring that water is allocated among a large number of existing and potential uses of the resource in the most beneficial possible manner. It is this newer problem in particular which the Water Resources Act fails to meet and which requires urgent legislative attention.

---

[107] See especially some of the penalty sections which have remained unchanged since 1894, R.S.A. 1970, c. 388, s. 62, s. 64(1), and the language of s. 35 dealing with the inspection of works on completion.

[108] For a discussion of the massive requirements of a Tar Sands plant, *see* Laycock, *Water Problems in Alberta Oilsands Development*, American Water Resources Association Proceedings, No. 18, 184, 194 (1974).

[109] *Canada Water Year Book* 48 (1975).