



Panel on the Future of the Trent-Severn Waterway Commission sur l'avenir de la voie navigable Trent-Severn

DISCUSSION PAPER #6 **JURISDICTION FOR THE WATERWAY** **AUTHORITIES AND RESPONSIBILITIES**

These discussion papers do not represent the conclusions or positions of the Panel. They are intended to stimulate discussion of some of the broad issues facing the waterway.

Introduction

Writing in 1938, Federal Government lawyer, Robert Dornan, used the wonderful word, “befogged”, to describe the state of understanding of federal versus provincial jurisdiction over the waterway and suggested a “brand new start” to resolving the jurisdiction issue.¹

Almost since the beginning of construction, questions of ownership and thus legal authority and jurisdiction of the Trent-Severn Waterway have challenged citizens and administrators. A multitude of legal authorities have been consulted and formal federal-provincial discussions have considered the issue at least since 1940 and perhaps earlier.

This paper is intended to briefly summarize the jurisdiction issues and discussions toward its resolution. It reflects both on the issues that apply to the lakes and rivers that make up waterway proper and also on those which apply to the extensive network of reservoir lakes and rivers that provide water to assure maintenance of navigational levels. The paper proposes that it is important that efforts be made to resolve the issue in some final form and suggests several options available to governments.

It is not the intention of the paper to build an argument in support of any particular approach to jurisdiction. Rather, the paper seeks to build on the work of the Province and the federal government over the years and to promote a case for the regime that best serves Canadians into the future.

Why Is Resolution of Ownership/Jurisdiction Important?

Jurisdiction was, and is, the essential path to defining both authorities and fiduciary responsibilities for the management of the waterway in the public interest. The authorities component confers the legal ability and requirement to control processes and activities that occur on land and waters such that public interest goals are achieved. The fiduciary responsibility component confers on an order of government the obligation to ensure that land is broadly managed with a view to the public interest

When confusion or uncertainty exists between orders of government as to where jurisdiction lies, there exists the potential for no or inadequate jurisdiction to be exercised

¹ Department of Transport Memorandum to Mr. Smart, July 26, 1938
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with potential negative results to the public interest. There also exists the potential for unproductive exercising of duplicate jurisdiction. Confusion in the minds of citizens and stakeholders is also an inevitable product of this uncertainty.

Background

(a) Legislative/Legal

A lengthy list of legal references is available to describe legislation and court findings that bear on the understanding of the ownership/jurisdiction issue. Following are some of the key references.

- March 26, 1859 Statute of the Province of Canada enumerates public works from the Bay of Quinte to Lake Scugog and Fenelon Falls falling under the aegis of the newly formed Department of Public Works.
- The British North America Act, 1867, Schedule 3, includes 1- Canals and 5- river and lake improvements under the ownership and exclusive jurisdiction of the Dominion of Canada.²
- May 15, 1879 federal legislation creates the Department of Railways and Canals.
- July 22, 1905 Provincial Order in Council transfers certain dams, canals and other works to the Dominion Government including the dams in the Haliburton region with the rights to use the Haliburton lakes as reservoirs for the Trent system. The transfer was accepted by a Dominion Government Order in Council in 1906.
- May 26, 1919 Exchequer Court decision that the whole of the Trent River from Rice Lake to the Bay of Quinte is part of the canal system and is thus vested in the federal Crown.

Numerous other pieces of legislation and Orders in Council record decisions involving the exercising of federal authorities on aspects of the system, however, none speak with absolute clarity to the jurisdiction issue.

Pursuant to the Department of Transport Act, the Minister “has the management, charge and direction of (a) all Government canals and works and property pertaining or incidental to them;”³ In this legislation:

“canal” means every canal and lock that belongs to Canada and includes every canal and lock acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public money is voted and appropriated by Parliament, except works for which money has been appropriated as a subsidy only, and all works and property appertaining or incidental to such a canal or that are placed under the management, charge and direction or control of the Minister of Transport by the Governor in Council.

The Historic Canal Regulations, otherwise known as “Regulations Respecting the Management, Maintenance, Proper Use and Protection of the Historic Canals Administered by the Canadian Parks Service”, says an “historic canal means a canal set out in column 1 of an item of Schedule 1.” Schedule 1 does not define extent of the

² Lands and waters other than those enumerated fall under the purview of the Provinces.

³ Authorities also extended to the Ministers responsible for Parks Canada since 1972

canal in any detail but rather refers only to the “Trent-Severn Waterway including the Murray Canal.”

(b) Jurisdiction Through Practice

An understanding of jurisdiction sometimes emerges from the application or assertion of authorities over time. As a general rule, authorities from the Historic Canal Regulations have been traditionally exercised by the federal government for the entirety of the Waterway except for Lakes Simcoe and Couchiching and the Holland River. For those bodies of water, a number of Provincial authorities have been applied using what has been referred to by some sources as “a handshake agreement” although there is no record of formalization of that agreement. The exception to this is found in administration of the aids of navigation on the three bodies of water that continue to be managed by the federal government.

The federal government has also exercised jurisdiction over most of the Waterway through the disposition of made lands.

Federal authorities under the Dominion Water Power Act have been exercised in the licencing of most of the hydro-generation facilities along the waterway. Water rental revenues associated with those facilities have accrued to the Government of Canada.

Also on the waterway proper, the Government of Ontario has traditionally exercised authorities under the Ontario Water Resources Act, Section 35, requiring permits to take water in excess of 50,000 litres per day and through the licencing or permitting of municipal sanitary and storm sewer outfalls.

Jurisdiction and responsibilities for matters relating to contaminant spills and contaminant dredging and removals is a source of considerable confusion at the present time. The general view of the Canadian Coast Guard, Environment Canada and the Ontario Ministry of Environment is that Parks Canada is responsible for spill response and clean-up although OMOE particularly appears to exercise some legal and other authorities in the event of traceable spills.

The drainage system incorporating the reservoir lakes has been managed as if they are exclusively in the Provincial domain for purposes of permits to take water and the approval of in-water works.

(c) Federal -Provincial Discussions

Discussions between the Province and the federal government on the ownership/jurisdiction issue have extended over many decades and have focused almost exclusively on the waterway proper and not on the reservoir lakes. Correspondence and meeting records document recognition that clarification would benefit all parties and chronicle a series of efforts to collaboratively arrive at a common understanding of ownership and jurisdiction. In a letter dated August 29, 1960, Ontario Lands and Forests Minister J.W. Spooner writes to Minister of Transport George Hees noting that “it will greatly assist the administration of public lands to have a clear understanding of the respective jurisdictions of the Federal and Provincial authorities.”

1978

On November 8, 1978, federal and provincial officials met at the suggestion of the Province.⁴ A draft “Background Paper” prepared by Parks Canada officials was tabled and the Parks Canada record of the meeting reported that “the Provincial officials indicated that the background paper was a reasonable statement of the circumstances and that they had no serious differences with what was said in the paper.” In summary, the paper observed on the following.

- Jurisdictional confusion and disagreement between the Province and the federal government has arisen over different interpretations of the intent of statements in Section 108 and Schedule 3 of the British North America Act;
- Legal advice to the federal government over the years suggests that the beds of the waterway are vested in the federal Crown however that question can “probably only be settled by the courts.”
- Both Governments recognize the inherent problems in ownership and jurisdictional uncertainty;
- There is significant inconsistency in regulatory administration on different parts of the waterway;
- The public has “repeatedly” raised concerns about confusion and lack of certainty as it pertains to the issuance of water lot licences and in ownership disputes between the Crown and private individuals; and,
- The lack of clarity has seriously hampered federal efforts to bring commercial water lot users under licence.

Several alternatives to the status quo were advanced.

- a. Codify the existing situation through formal agreement with the Province to “parcel” up the waterway for administrative purposes.
- b. Negotiate complete federal control as had been done with the Rideau Canal.
- c. Adopt a “reservoir lakes” approach wherein Ontario would receive the interest in all land under water except for man-made cuts and the Government of Canada would retain “rights-in-waters.”
- d. Adopt the “harbour” approach whereby negotiations would establish the areas to be retained by the Government of Canada including land under water and these would be formally confirmed by survey and description.

Although no formal recommendation was made in the Background Paper, the “harbour approach” was thought to be the most desirable.

1988

On April 26, 1988, provincial and federal representatives met to discuss several issues related to Parks Canada interests in Ontario. The record of the meeting reflects the following.

⁴ Keenan, August 17, 1978
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- The acting Director, Land Management Branch, Ontario Ministry of Natural Resources “confirmed his understanding that no ownership problems exists (sic) along the Rideau Canal and that it falls under federal jurisdiction.” He also “felt that the Trent-Severn Waterway was also federal jurisdiction with the exception of the reservoir lakes, which included in his definition, Haliburtons, Simcoe and Couchiching.”
- Three approaches to resolving the ownership issue on the Trent-Severn Waterway were suggested.
 - Formal approach – draft legislation
 - Memorandum of Understanding
 - Deal with problems on a site-specific basis then the issuance of an Order-in-Council.
- A course of action as follows was agreed to.
 - The development of a blanket Order-in-Council to Quit Claim what interest the Province may have to the Rideau Canal.
 - The signing of a memorandum of understanding for the Trent-Severn Waterway, to formalize lines of jurisdiction for Crown lands and establish a mechanism for reviewing on a site specific basis lands which may be subject to conflicting federal/provincial interest.

Current Status

The recommended Provincial Order-in-Council to clarify ownership and jurisdiction of the Rideau Canal was passed on December 8, 1991. Work on resolving the Trent-Severn situation has not advanced to any degree. Some discussions have been held between Parks Canada and the Province at the District level to “draw lines on a map” and some specific surveys have been completed. The principles and methodology have not been reconfirmed at a senior level in recent years.

By way of addendum, the jurisdiction issue was addressed again in 1996 in connection with a proposal to implement water lot licencing requirements that had been considered for many years. Legal advice obtained in connection with the licencing proposal raised an associated issue – that being the need to confirm ownership of the natural resources – particularly the water. As has been noted in a separate discussion paper on “Improving Governance”, both the Province and the federal government seem to lay claim to ownership of the water through various licencing and permitting requirements. The 1996 legal advice recommended that this be clarified in the proposed Order-in-Council.

In summary:

- Both governments have agreed several times at the officials level that clarification of the ownership and jurisdiction issues would best serve the public interest.
- Both governments have informally signaled their support for an approach wherein geographical lines of jurisdiction are negotiated and confirmed through a process that gives them a degree of legal standing.
- There is no record that the governments have discussed the “ownership of natural resources” issue particularly ownership of the water. Issues with respect to the reservoir lakes have not been discussed.

- Clear definition of the mandate and governance of a future waterway is, in some measure, dependent upon resolution of these issues. This is particularly important to ensure appropriate protection of natural and cultural resources and the regulation of land and water use in the public interest.

Proposed Outputs for Jurisdictional Clarification

1. Standard constitutional arrangements are respected and built upon.
2. Relevant legal instruments are understood, adhered to or amended as appropriate.
3. The strengths and mandate of governments and their agencies including their regulatory and policy support are respected and built upon.
4. Natural and cultural resource protection is improved.
5. Regulatory inconsistency, complexity and duplication is reduced.
6. Revenue is fairly and appropriately allocated commensurate with operational and investment requirements.

Available Options for the Waterway Proper⁵

Option 1 - Codify the Status Quo

- ✓ Federal jurisdiction would extend to the entire waterway with the exception of Lakes Simcoe and Couchiching including the water bed to the high water mark;
- ✓ Lakes, rivers and channels with a marked navigation channel would be included in the definition of the waterway;
- ✓ Federal jurisdiction would not include the waters and beds of tributary streams and rivers flowing into the waterway as defined above unless they included marked navigation channels;
- ✓ Federally-owned and operated dams including those on the waterway and on the reservoir lakes would be included in the definition of the waterway for purposes of application of the Historic Canals Regulations. Dams on the reservoir lakes would be formally described either by regulation or survey and title.
- ✓ "Rights in Waters" would be formally acknowledged for the waterway.

Implications of this Option

- A mechanism for codification and description would be required including definition of jurisdiction at the mouths of tributary streams and rivers.
- Discussions would be needed to determine how the navigation channel through Lake Simcoe and Lake Couchiching would be managed including a determination if the Historic Canal Regulations would apply particularly as they relate to aids to navigation and similar issues.
- Discussions would be required to determine how and under what legislation Atherley Narrows (between Lakes Simcoe and Couchiching) would be managed

⁵ The options presented build on the conclusions of past federal/provincial discussions
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due to the presence of the Mnjikaning Fish Fence National Historic Site. The First Nation would need to be a partner in those discussions.

- Analysis of the implications of codification on First Nation interests would be required – to be developed in partnership with relevant First Nations.
- General principles would be required to determine the associated land requirements around dams which are not on the main waterway system.
- “Rights in Waters” would need to be clarified particularly as they apply to hydro-electric developments not currently under licence to the federal government. Similarly, discussion is required on the application of the Ontario Water Resources Act, particularly Section 35 pertaining to permits to take water.
- Clarification would be required on roles and responsibilities with respect to contaminants and spills.
- A memorandum of understanding should be developed which clarified the application of relevant legislation to improve agency and public understanding of responsibilities and authorities.
- The Government of Canada would need to better understand its obligations and the resource implications for the administration and enforcement of the Historic Canal Regulations.

Option 2 – Reduction in Federal Jurisdiction by Agreement

- ✓ This option is generally described in J.C. Christakos’ letter of August 17, 1978 to Mr. J.W. Keenan of the Ontario Ministry of Natural Resources.

Simply put, I believe that Parks Canada’s position is one of wanting to retain full control over the canal itself and those things directly tied to it, such as locks, dams, narrow corridors, the right to control water levels, flow, use for power etc and protection of the navigation channel i.e. dredging, control of weeds etc. Outside of that, Ontario should be free to carry out the provincial responsibilities it normally applies elsewhere in the Province.

- ✓ Reflecting the apparent intent of the definition of “canal” in the Department of Transport Act, federal jurisdiction would be reduced to include only constructed and improved works such as locks, dams (including those on the reservoir lakes), bridges and constructed canal cuts.
- ✓ Federal jurisdiction would also extend to the formally marked navigation channel.
- ✓ Rights in waters would be retained by the Government of Canada.

Implications of this Option

- Mechanisms would be required to formally define the parcels of land that would continue to be owned by the federal Crown.
- Mechanisms would be required to formalize Provincial jurisdiction over lakes and rivers not owned by the Federal Crown.

- The Province, municipalities and Conservation Authorities would assume responsibility for the regulation of in-water works.
- Analysis of the implications of this option on First Nation interests would be required – to be developed in partnership with relevant First Nations.
- Provincial responsibilities for Species at Risk would be confirmed for all lands other than those owned by the Federal Crown.
- Permits and licences now issued under the Historic Canal Regulations for lands no longer under federal jurisdiction would be transferred to the Province.
- Discussions would be needed to determine how the navigation channel would be managed including a determination if the Historic Canal Regulations would apply particularly as they relate to aids to navigation and similar issues.
- Discussions on the application of Section 35 of the Ontario Water Resources Act and other matters relating to “Rights in Waters “ would be required.

The Reservoir Lakes

(a) Background

In 1905, the Province transferred certain works and rights to the Dominion Government to enable creation and operation of a system of reservoirs to maintain water levels on the waterway. The provisions of the Order-in-Council are as follows.

1. Province transfers specified locks, dams, bridges, *rights in waters*, flooded lands and other works to the Dominion Government.
2. Dominion Government agrees to maintain them in good condition for all time.
3. The Dominion Government is given the “right of reservoir construction” including the ability to construct new dams and raise or lower the height of existing dams and increase or decrease the size or capacity of the dam opening as they deem appropriate.
4. The Dominion Government agrees to maintain logging dams as long as they are required for that purpose.
5. The Dominion Government agrees to compensate the Province at a rate of \$0.50/acre for flooding of unpatented lands and to work out compensation agreements with owners of flooded patented lands and lands under permit or licence.
6. The Province would retain mineral rights and the rights of *existing* waterpower producers would be respected.

(b) Summary of the Reservoir Lakes Issues

To the non-legal observer, it appears that the effect of the 1905 Order-in-Council was to transfer to the Dominion government all rights to use the water and, possibly, ownership of the bed for a vast area encompassing several watersheds. The latter point seems to be reinforced by the requirement to pay compensation for any additionally flooded lands.

The Province administers these water bodies as if they were totally within the Provincial domain. Permitting for in-water works and licencing of water lot occupancy is carried out through the Province. More than one hydro-electric generation facility has also been licenced by the Province on these waters. The Province also issues permits to take water from these drainage areas without engagement of the Federal Government.

Federal/Provincial discussions and exchanges of correspondence on the issue of ownership of the beds of the reservoir lakes occurred in the late 1950's. In correspondence between the Chief Engineer and Legal Counsel, there was a signal that the Federal Government was prepared to waive any claim to the beds of the reservoir lakes however there is no evidence that formal waiver took place.

Several questions emerge.

- What does the term "rights in waters" mean in terms of jurisdiction and ownership of the bed of the reservoir lakes and associated streams in the drainage areas?
- Does the Order-in-Council imply that the Federal Government has exclusive use of the water?
- What effect does the Order-in-Council have on riparian rights including those existing in 1905 and those relating to property patented by the Province after 1905?
- What effect does the Order-in-Council have on the exercising of Provincial authorities over these waters?
- Should Canada formally waive rights to the beds of the reservoir lakes and rivers and, if so, what are the implications?

Questions to be Considered by Canada and Ontario

The Panel is soliciting the views of both Canada and the Ontario on the jurisdictional questions and options presented in the foregoing paper. Specifically, the following questions are advanced.

1. Discussions in the past have concluded that clarification of ownership and jurisdictional issues would result in less confusion, duplication, inconsistency and better service to Canadians. Do you agree?
2. Do you have a preference for either of the broad jurisdictional options which are advanced in the discussion paper?
 - a. The Federal government would own the bed of the Waterway proper exclusive of Lakes Simcoe and Couchiching and have authority over the navigation channel through those two lakes. The Federal government would retain control over water levels and flows and the use of waters including those in the reservoir lakes.
 - b. Federal government ownership would be limited to the bed of the "constructed" portions of the waterway and have authority over the navigation channels. The Federal government would retain control over

water levels and flows and the use of waters including those in the reservoir lakes.

3. Are there other options that might be considered or other mechanisms that might be used to manage water levels and flows and the use of waters?
4. How should jurisdiction and responsibilities be exercised over the Haliburton reservoir lakes?
5. How might the two governments proceed to clarify jurisdiction and responsibilities?