

LEGAL REGIME APPLICABLE TO FRESH WATER IN QUEBEC

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INTRODUCTION

It is a euphemism to state that Canada does not figure amongst the list of dry countries. However, one should not be deluded by this apparent abundance of fresh water. Much of it is situated in the Arctic and flows north, whereas the population is largely established on a narrow strip of land along the border with United States. In southern Quebec, there is serious concern about the St. Lawrence River, which supplies half of its inhabitants with fresh water, and elsewhere, some localities face pollution or overuse of the groundwater reserves on which they depend. It is against this backdrop that fresh water has been the object of much legislative attention recently. Having set up a Commission of inquiry on the management of water in 1999, which delivered a monumental report in 2000,¹ the Quebec Government is under pressure to act on its recommendations.

Within the structure of the Quebec legal system, water can be viewed as a part of both private and public law, if that classical distinction is considered relevant. The *Civil Code of Québec* has a number of articles on water which we will consider first as they provide the foundation on which other legislation on water is, in principle, elaborated.²

The Code's provisions on water are found within the Book on Property (Book 4).³ Their main object is to exclude water from the category

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1. See *L'eau, ressource à protéger, à partager et à mettre en valeur*, [Water, a Resource to Protect, to Share and to Value], also known as the « Rapport Beauchamp », Bureau des audiences publiques sur l'environnement (or BAPE), Québec, 2000, 2 vol., ISBN 2-550-35937-2.

2. The status of the Civil Code within the Quebec legal order is formalized in its Preliminary provision as follows:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune* (droit commun), expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

Footnote need.

3. Articles 899 and fol. C.C.Q.

of property. In addition, the Code formulates a few basic rules for the use of water by the owners of land having direct access to it. The Code does not address issues related to the use of the watercourses themselves, such as rivers or lakes. The focus of the Code's articles which is to delimit the use of water by landowners with direct access to it points to a distinction which must necessarily be made, in Quebec Law at least, between the use of water and the use of a body of water, as these two types of use rest on opposite legal premises: the use of water does not depend on a right of ownership, whereas it is ownership of land which largely determines the exercise of rights on a watercourse. We will first look at the attribution of the rights pertaining to a watercourse. It should be noted that issues related to the exercise of those rights were, until recently, the main object of legislation and litigation.

I. RIGHTS PERTAINING TO A WATERCOURSE

Watercourses may be used for various purposes such as commercial transportation and recreational navigation, fishing, the removal of surface mineral substance from the river bed, the construction of wharves or other works and the development of hydraulic power. In Canada, not all these activities are within the competence of the Provincial legislatures. The constitution grants to the Federal Parliament exclusive powers to legislate over navigation and shipping,⁴ which may be carried on by anyone, provided that the framework established by the law is respected.

The other uses enumerated are within the competence of the Provinces. In Quebec, ownership of the bed of a watercourse carries with it, as ancillary rights, the right to fish, to incorporate a construction, to take gravel or sand from the banks, etc.—subject however to environmental and other regulatory constraints. The same rule applies to hydraulic power but this activity is reserved almost exclusively to Hydro-Quebec, a company whose sole shareholder is the Provincial State.⁵ Generally, the Province is the owner of the bed of navigable watercourses. It also owns the bed of non navigable rivers or lakes unless the land bordering such watercourse was

4. Constitution Act, 1867, section 91, paragraph 10. One might wonder if article 920 C.C.Q., which states that: “[a]ny person may travel on watercourses and lakes provided he gains legal access to them, does not encroach on the rights of the riparian owners, does not set foot on the banks and observes the conditions of the use of the water”, encroaches on this exclusive jurisdiction of the Federal Parliament. It should also be noted that section 3 of the recent *Act to affirm the collective nature of water resources and provide for increased water resource protection* (the *Water Act*), S.Q. 2009, c. 21 includes a reference to article 920 C.C.Q.

5. *Hydro-Québec Act*, R.S.Q. c. H-5. and *Watercourses Act*, R.S.Q. c. R-13, section 3.

first transferred to a private person before 1918.⁶ The bed of a watercourse extends to the high water mark. Private persons, who do not own the bed of a river or a lake, may nevertheless exercise the activities mentioned above if a permit has been issued to them under the appropriate statute. Various statutes provide for such permits.⁷ Early decisions of the courts dealing with the rights to the bed of a watercourse may appear to have relied in some way on the concept of water as a *res communis* that we are about to examine. However, upon further analysis, it becomes clear that it was not relevant in determining whether a private person may lawfully exercise ancillary rights attached to the bed of a river.

II. WATER IS NOT PROPERTY: WATER IS A *RES COMMUNIS*

The law of Quebec incorporates the concept of *res communes* (common things, choses communes) as formulated in Roman law.⁸ Article 913, para.1, of the present *Civil Code of Québec* (C.C.Q.), as did article 585 of the previous *Civil Code of Lower Canada* (C.C.L.C.),⁹ acknowledges that the notion of *res communes* is part of our law.¹⁰ As a *res communis*, fresh water cannot be property. It is not susceptible of being appropriated nor owned by anyone, neither a private person nor the State. As a *res communis*, water is destined to the use of everyone. Ownership of land does not carry with it a right of ownership in the water that runs through the land or lies underground.

It is important to understand that the treatment the law reserves to water is different from the legal regime applicable to the minerals found underground and to animals in the wild. Minerals are, in principle, owned by the owner of the land,¹¹ although they may be the object of an exclusive right, distinct from ownership of the land, which may be attributed to

6. See article 919 C.C.Q.

7. The Watercourses Act, R.S.Q. c. R-13; An Act respecting Agricultural Lands of the Domain of the State, R.S.Q. c. T-7.1; An Act respecting the Lands in the Domain of the State, R.S.Q. c. T-8.1 and the Mining Act, R.S.Q. c. M-13.1, are the main pieces of legislation under which rights in State land are granted to private persons.

8. For the classification of things in Roman law, see Jean Domat, *Loix civiles dans leur ordre naturel*, nouvelle édition, Paris, Nicolas Gosselin, 1713, 1^{ère} partie, livre préliminaire, titre III, section I premier article.

9. The *Civil Code of Québec* (C.C.Q.) replaced the *Civil Code of Lower Canada* (C.C.L.C.) in 1994.

10. Article 913 C.C.Q. reads: "Certain things may not be appropriated; their use, common to all, is governed by general laws and, in certain respects, by this Code. However, water and air not intended for public utility may be appropriated if collected and placed in receptacles." Former Article 585 C.C.L.C. read: "There are things which have no owner and the use of which is common to all. The enjoyment of these is regulated by laws of public policy."

11. Article 951 C.C.Q.

another. The Province may, in fact, have retained extensive mineral rights under land transferred in ownership to private persons.¹² Wild animals and aquatic fauna are susceptible of being owned, although they are *res nullius*, that is to say, without an owner until they are captured.¹³

The characterization of water as a common thing is stated in general terms in the Civil Code. The courts have had the opportunity to confirm authoritatively that the water of a lake or a river is a common thing, or a *res communis*, regardless of its status as a navigable or non navigable watercourse.¹⁴ The situation was somewhat different with respect to groundwater and water which springs naturally above ground. Their characterization was debated. Some were of the view that the status of *res communis* applied only to water running on the surface, not to groundwater, nor water from a spring which is not the head of a watercourse. It would follow, still according to this view, that groundwater and water from a spring are, in law, owned by the owner of the land above which such water is found.¹⁵

The controversy, which was never directly considered by our courts, is resolved by the new legislation on fresh water. The *Act to affirm the collective nature of water resources and provide for increased water resource protection*,¹⁶ in its Preliminary provision, declares water resources to be a common heritage. In addition, the 1st section of the Act expressly states that surface water and groundwater share the same status of common resource and refers to article 913 C.C.Q. One can only welcome this clarification. Not only does it provide for the same protection wherever

12. See section 1 of the *Mining Act*, R.S.Q. c. M-13.1 which excludes water from its definition of *mineral substances*.

13. The relevant texts of the Code, articles 914, 934 and 935, read as follows:

914. Certain other things, being without an owner, are not the object of any right, but may nevertheless be appropriated by occupation if the person taking them does so with the intention of becoming their owner.

934. Things without an owner are things belonging to no one, such as animals in the wild, or formerly in captivity but returned to the wild, and aquatic fauna, and things abandoned by their owner. . . .

935. A movable without an owner belongs to the person who appropriates it for himself by occupation. . . .

14. For the most recent decision see *Morin v. Morin*, [1998] R.J.Q. 23 (Court of Appeal).

15. The point of view which attributed a different legal status to water depending on where it appears in nature relied primarily on article 502 C.C.L.C. which read: "He who has a spring on his land may use it and dispose of it *as he pleases*" (my italics), whereas the present article 980 C.C.Q. says: "An owner who has a spring on his land may use it and dispose of it."

16. Afterwards designated as the Water Act, S.Q. 2009, c.21 (Bill 27). It should be noted that, although it did not attract much attention at the time, a 2002 statute, the *Act to establish the Fonds national de l'eau*, R.S.Q., c. F-4.002, had already in its preamble assimilated surface water and groundwater as "common heritage".

water is found, but it disavows a distinction between water on the surface and groundwater which is outdated and contradicted by current scientific knowledge. Today's hydrological science amply establishes that the physical state of water does not support the establishment of a legal distinction between water on the surface, groundwater and spring water. Since there is continuity in nature between surface water and groundwater, water must receive a single legal characterization.¹⁷ We shall see how, by dissociating water from ownership, the concept of common thing constitute an optimal legal tool for the preservation of freshwater resources.

III. THE USE OF WATER IN THE CIVIL CODE

If access to fresh water does not depend on ownership of land, there is no question that ownership of land may ensure easy access to the resource. What is the legitimate use of water by the owner of land bordering or overlying it is broadly determined by articles 980, 981 and 982 C.C.Q. The legal regime there established derives from the character of water as a common thing or a *res communis*.

Article 980, 1st par., C.C.Q. reserves the use of the spring arising on land to its owner. This rule recognizes that allowing public access to the spring would considerably impair the owner's exclusive enjoyment of the land. When the owner of the land alone has access to a spring, its water remains a *res communis*, to be used to satisfy his needs, even though his use may consume it entirely.¹⁸ The position of the owner with respect to a body of water entirely situated on his land is examined at article 980, 2nd par. The owner of the land also has exclusive access to the water in a pond or a lake to meet his needs, but since his use will not consume it entirely, it is expressly stated that he has the obligation not to pollute the water.¹⁹

Article 981 C.C.Q. addresses the situation of the owner of land bordering or crossed by a watercourse. Again, the rule formulated is entirely consistent with the special status of water. The riparian owner's use of the water is limited with respect to both quality and quantity. He may

17. We had developed this argument in our submission prepared for the 1999 *Commission sur la gestion de l'eau* (also referred to as the Commission Beauchamp) It is substantially reproduced in Madeleine Cantin Cumyn, Michelle Cumyn and Claire Skrinda, "L'eau, chose commune: un statut juridique à confirmer", 2000 *Canadian Bar Review* 398. For the Commission's recommendations see *L'eau, ressource à protéger, à partager et à mettre en valeur*, [Water, a Resource to Protect, to Share and to Value], cited above at footnote 1.

18. The quantity of water provided by a spring is, by inference, limited, the spring which is the headwater of a watercourse being treated as such in article 981 C.C.Q. Its status as a common thing is not questioned. See also article 982 C.C.Q.

19. Article 980, 2nd par. reads: "He (the owner) may, for his needs, use water from the lakes and ponds that are entirely on his land, taking care to preserve their quality."

take the quantity of water required to meet his needs, providing that his riparian neighbours are not thereby prevented from making the same use. The owner must return the water to its course without substantial alteration of quantity or quality.²⁰

IV. THE ROLE OF THE STATE AS REGARDS FRESH WATER

The recognition that water, as a *res communis*, forms, with air, a distinct legal category establishes the authority of the State to act as custodian of the resource in the common interest of present and future generations. The role of the State is affirmed in the preliminary provision of the new statute on water, which reads: "... the State, as custodian of the interests of the nation in water resources, must be vested with the powers required to protect and manage those resources."²¹ From a comparative law perspective, it is interesting to note that the intervention of the Provincial State in the protection and management of water is based, not on rights that it may have in land, but in the powers vested in it as the State. This formulation accounts for the specific nature of the right of ownership in Quebec. In 1854, a Statute abolished the tenure system under which land was initially granted to individuals.²² Estates in land were replaced by a full title based on the Roman law model of the *dominium*. The owner of private land has therefore the ultimate title. No eminent or overriding domain remains with the State as regards land owned by private persons in the Province. Neither the State's power to expropriate land nor its power to regulate its use derives from a title in the land, but rather from its mission as public authority to ensure the peaceful enjoyment of private property, public order and the common good.²³ It follows that the Provincial State exercises legal powers as a custodian of the water resources irrespective of

20. Article 981 C.C.Q. states:

A riparian owner may, for his needs, make use of a lake, the headwaters of a watercourse or any other watercourse bordering or crossing his land. As the water leaves his land, he shall direct it, not substantially changed in quality or quantity, into its regular course.

No riparian owner may by his use of the water prevent other riparian owners from exercising the same right.

21. See the preamble of the 2009 Water Act, which, together with sections 1 to 17 are in force since June 18, 2009. The 2002 *Act to establish the Fonds national de l'eau*, R.S.Q., c. F-4.002, in its preamble, had previously affirmed the status of the State as custodian of water resources.

22. An Act respecting the General Abolition of Feudal Rights and Duties, (also called the Seigneurial Act), 18 Vict, c. 3.

23. Article 952 C.C.Q. dictates: « No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in consideration of a just and prior indemnity.» Private property is also protected in the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, article 6.

where they are situated in Quebec.

V. THE LEGAL FRAMEWORK FOR THE MANAGEMENT OF FRESH WATER

In accordance with article 913 C.C.Q., the 2009 Water Act declares that every natural person has a right to have access to safe water and that the protection and management of water resources are of general interest.²⁴ What are presently the measures put in place by the Government to meet these objectives.

A. Water quality

Initially, the Province directed its attention towards the protection and restoration of water quality. Since 1972, Quebec has addressed the problems of pollution of air, water and the soil in a general statute for the protection of the environment.²⁵ A significant reduction in water pollution originating from municipal, domestic and industrial sources was achieved. The other main source of pollution that remained to be addressed results from agriculture. Raising the standards of agricultural practices is a sensitive political and an economic issue in Quebec (as elsewhere perhaps), since effective measures of preservation of water quality do increase costs to both the producer and the consumer. However, in the aftermath of a much publicized case of agricultural pollution of drinking groundwater in Ontario in 2000,²⁶ the government has started to tackle the so-called *pollution diffuse* or pernicious pollution resulting from agriculture. It is adopting the multi-barrier approach, involving the protection of the source of water supplies,²⁷ the treatment of water destined to human use²⁸ and its

24. Sections 2 and 3 of the Water Act, cited above at footnote 16. See the principles put forward in 2006 by the *Sustainable Development Act*, R.S.Q., c. D-8.1.1, also enunciated in article 46.1 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. Finally, a dedicated fund was established in 2002 by *An Act to establish the Fonds national de l'eau*, R.S.Q., c. F-4.002 to finance water governance and protection.

25. *Environmental Quality Act*, R.S.Q., c. Q-2 and the regulations adopted under its authority, in particular, the *Regulation respecting hazardous materials*, R.R.Q., c. Q-2, r.15.2 and the *Regulation respecting pits and quarries*, R.R.Q., c. Q-2, r. 2. The first statute for the protection of the environment is found at the S.Q. 1972, c. 49. Particular activities are also specifically regulated under separate statutes. See for example, the *Regulation respecting permits and certificates for the sale and the use of pesticides* adopted under the *Pesticides Act*, R.R.Q., c. P-3, r.0.1.

26. The Wakerton tragedy which caused 7 deaths.

27. Notably the *Groundwater Catchment Regulation* (GWCR), c. Q-2, r.1.3; *Agricultural Operations Regulation*, R.R.Q., c. Q-2, r. 11.1; *Regulation respecting the burial of contaminated soil*, c. 2, r. 6.02. The GWCR will have to be modified when the new requirements for water withdrawals brought by section 19 of the Water act come into force.

28. *Regulation respecting the quality of drinking water*, c. Q-2, r. 18.1.1 requiring

distribution by public or private water utilities.²⁹ Although one may regret the fragmentation and dispersion of the legal response, the right of Quebecers to have access to safe water, relative as it may be, is reasonably effective.³⁰

B. Water governance

The 2009 Water Act establishes officially a system of governance based on concerted and integrated management of the common resource within hydrologic units or watershed basins. In each hydrologic unit, a representative body, including individual users and interested actors such as the government, municipalities, economic, environmental, agricultural and community groups, must be constituted. It has the responsibility to develop, and later update, a master plan in which are recorded all relevant features of the unit such as the state of waters and water-dependant natural resources, the water uses and their effects, an inventory of zones of ecological interest, measures to protect and restore the qualitative or quantitative status of waters.³¹ Once approved by the responsible member of government, the Minister of Sustainable Development, Environment and Parks, the plan is published and a copy sent to all public departments and bodies, and the municipalities situated in the hydrologic unit to which the plan applies. However these authorities are not bound to meet the objectives set out in the master plan. They are only required to take the plan into consideration when exercising their powers in the water sector or other sector affecting water.³²

The concept of *res communis* implies that the uses which may legitimately be made of the water resources are those compatible with that exceptional status. The legitimate uses of water must therefore be identified. As we have seen, the master plan must record all current uses of water in the hydrologic unit and, presumably, anticipate on future requirements. What happens if a current or anticipated use is not compatible

municipalities to filter and disinfect both surface and groundwater. On the impact of this regulation, see B. Sylvestre and M. Rodriguez, "Protection strategies for drinking groundwater sources in small Quebec municipalities", (2008) 88 *Journal of Environmental Management*, 28-42.

29. Regulation respecting waterworks and sewer services, c. Q-2, r. 7.

30. For a complete assessment of the present situation, see H. Tremblay and P. Halley, "Le droit de l'eau potable au Québec", (2008) 49 *Les Cahiers de Droit*, 333-391.

31. Sections 13 and 14 of the Water Act. Section 16 of the act also creates a Bureau des connaissances sur l'eau where an information system will collect data on water resources, aquatic ecosystems and water uses in each watershed for their preservation and dissemination. The bureau is required to provide a report on the state of the water resources every 5 years (section 17 of the Water act).

32. Section 15 of the Water Act.

with the character of water as a collective resource or if the quantity of available renewable fresh water cannot meet all legitimate demands? The Water Act begins to answer the question of which uses of water may be considered normal or legitimate within the meaning of a *res communis* but does not yet indicate how eventual conflicts are to be resolved.³³

The legitimate uses of water are firstly those which satisfy human needs, including alimentary and sanitary requirements. The legitimacy of the use of water for agricultural purposes should not be questioned, although modern industrial agriculture and the growing practice of irrigation for crops create a new context to be taken into account. The use of water in industrial processes also appears legitimate. These three sets of uses, which share the feature of not permanently removing substantial quantities of water from the hydrologic basin of origin, ought to be considered normal provided that their environmental impact is controlled.³⁴ On the other hand, there is a fourth use consisting in the withdrawal of water, mostly groundwater, in view of its commercialization as bottled water by private interests. Clearly, this taking of water is not for the satisfaction of the needs of the taker, but an appropriation for profit. In addition, the water bottled and sold on the open market is irretrievably lost to the basin of origin.³⁵ It is difficult to argue that the commercial activity of bottling water for private profit qualifies as a legitimate use of the common thing. Ill-advisedly, for a few decades, the government has condoned this activity by allowing groundwater withdrawal permits to be issued to bottling concerns.³⁶ This practice is now in patent contradiction with the purposes and principles stated in the preamble of the 2009 Water Act.

The 2009 Water Act may however be the start of a reassessment of a conflicting activity which the Government identifies currently under the euphemism of commercial waters in its documentation.³⁷ In section 19, not

33. It was a recommendation of the Rapport Beauchamp, cited above at footnote 1, that these questions be addressed.

34. A draft regulation published in the Gazette officielle du Québec of November 5, 2008, would impose a mandatory annual declaration of volume of water removed by all major withdrawals except for those for domestic or agricultural use. This declaration will open the way for the imposition of a tariff on certain types of withdrawals, a declared intention of the present government.

35. The commercial bottling activities are currently carried out mostly in the populated part of Quebec where the needs are greatest and the water resources more at risk of being polluted. A number of recent applications for a permit of withdrawal of groundwater for bottling have caused severe frictions in local communities.

36. The Groundwater Catchment Regulation, c. Q-2, r.1.3, provides, at section 31 (2), for the government authorization of catchment projects to supply water for sale as spring water. The activity is also subject to the *Regulation respecting bottled water*, c. P-29, r. 1.1 adopted under the *Food Product Act*.

37. See *L'eau. La vie. L'avenir. Politique nationale de l'eau*, Gouvernement du Québec, 2002, p. 90.

yet in force, the Act introduces modifications to the *Environment Quality Act* to subject all important withdrawals of surface or groundwater to the authorization of the Minister for the Environment. It is stated that, in making the decision, priority must be given to public health concerns, sanitation, civil protection and drinking water supply needs. "Every decision must also aim to reconcile (1) the protection needs of aquatic ecosystems and (2) the needs of agriculture, aquaculture, industry, energy production and other human activities, including recreation and tourism." It is foreseen that the respect of these protected needs as well as the future needs of municipalities may lead the Minister to refuse to issue or renew a withdrawal authorization if it is in the public interest to do so. The Minister may even order the permanent cessation of previously authorized withdrawal without any compensation from the State. It seems to me that these recent provisions do indicate an order of priority of uses and open the way for a progressive elimination of withdrawals which are not consistent with the special status of water and the public interest.³⁸

The Law governing water in Quebec is still a work in progress, even though it has seen significant advances recently. A major challenge in the future will be to ensure that the intentions proclaimed in the Water Act become fully effective.

38. One notes that the Water Act, section 19, which adds sections 31.76 and 31.77 *Environment Protection Act*, does not mention commercial water bottling in its list of water needs or uses to be considered when deciding on an application for a water withdrawal permit. On the other hand, all uses enumerated in the Act appear compatible with the special character of water.