November 2001

SECURITY OR SCARCITY? NAFTA, GATT AND CANADA'S FRESHWATER

Karen Campbell, Staff Counsel
Yasmin Nizami, Summer Law Student
West Coast Environmental Law

INTRODUCTION

We Canadians often assume that Canada has an inexhaustible amount of water. However, statistics indicate otherwise. Canadians are second only to Americans in terms of water consumption: we consume an average of 638 L per day.[1] And the volume of water required by Canadians continues to grow. Although Canada has a 20 per cent share of the world's freshwater, only 9 per cent is renewable and available, the rest is captured in glaciers and polar icecaps.[2] In addition, most Canadians live in a narrow strip along the border with the United States, while 60 per cent of our water supply flows north. Also unknown are the potential effects of climate change. There are indications that the northern hemisphere will be more greatly affected by climate change than anywhere else.

In 1999, a report by the International Joint Commission warned that water levels in Lakes Michigan and Huron had dropped 22 inches since 1998. In 2000, the US National Oceanic and Atmospheric Administration predicted that levels would fall an additional 2 feet by 2030.[3] According to Environment Canada, approximately 26 per cent of Canadian municipalities with water distribution systems reported problems with water availability within the past five years. The amount of "clean" water is also being reduced through surface and groundwater contamination. In a recent report analyzing economy based projections of environmental pressures and conditions to 2020, the Organisation for Economic Cooperation and Development (OECD) categorizes groundwater pollution, especially from non-point sources, as an urgent concern.[4]

If Canada's water situation is less than idyllic, the world's situation is much worse. Available freshwater amounts to less than 0.5 per cent of all the earth's water. Freshwater is only renewable by rainfall at a rate of 40,000 to 50,000 m^3 per year, yet global consumption of water is doubling every 20 years, more than twice the rate of human population growth. According to the UN, one billion people currently lack access to fresh drinking water, and 31 countries face water stress and scarcity. If current trends are not reversed, by 2025 the demand for freshwater is expected to rise 56 per cent.[5]

Faced with this scenario, the reasons for the interest in exporting Canadian water are plain to see. The US, whose citizens are the highest per capita water users in the world, see importing Canadian water as a solution to their water shortage issues. President George Bush has recently indicated that he is open to discussions about a possible continental water pact.[6]

---

1 Environment Canada, *Tracking Key Environmental Issues* (Minister of the Environment, 2001) at 19.

2 *Water Facts Backgrounder*, online: Department of Foreign Affairs and International Trade <www.drait-maeci.gc.ca/english/news/press_release/99_press/99_023-e.htm> (date accessed: 13 August 2001).

3 Stephen Handelman, "Exporting Fresh Water"(5 August 1995), online: Time Magazine <www.time.com/time/global/august/hotcom.html> (last modified 5 August 2001).

4 OECD *Environmental Outlook* 2001, OECD, Paris, France.

5 Maude Barlow, *Blue Gold, The Global Water Crisis and the Commodification of the World's Water Supply* (Ottawa: Council of Canadians, 2001).

6 "Bush eager for talks on Canadian water", *The Globe and Mail*, 18 July 2001.

However, while “thirsty” western states may welcome such an agreement, water rich eastern states may not support this approach.

With these obvious stresses on the supply of water, why should Canada not exploit freshwater sources as it does other natural resource? Some of the many reasons are:

- The amount of water in a watershed has developed over thousands of years and that amount of water is required for ecosystem survival;
- Water is not really a renewable resource;
- Selling water on the open market will not address the needs of poorer nations;
- Public reaction to recent proposals indicates that Canadians have real concerns about water exports;
- The financial benefit to exporting water would be to a limited few, likely multinational, corporations; and
- International trade agreements may make it difficult for Canada to control the export of water.

These last three points have been the cause of considerable debate and concern about the security of Canadian water. Recent actions by private companies such as Sun Belt Water Inc. who have filed a claim for compensation under NAFTA, and proposals by governments such as Newfoundland to export bulk water, have ensured that this issue remains live. Media coverage has made clear that this issue is both contentious and emotional for Canadians. Surveys have shown that Canadians are seriously concerned about unlimited American access to our natural resources. This debate will continue until clear action is taken, either by a government or a trade tribunal to clarify exactly how bulk water exports will be treated under NAFTA or the GATT. Until then, uncertainty about the status of our water remains, but the prospects don’t look very good.

This paper is divided into five parts. In addition to the introduction, part II provides an overview of trade agreements as they may relate to bulk water export and trade. Part III considers how the federal and provincial governments have responded to concerns about bulk water exports. Part IV will discuss several case studies on the issue, including two relevant BC examples. Finally, part V provides some concluding remarks.

A PRIMER ON TRADE

This section provides a brief overview of the basic provisions of international trade law, and how they may operate with respect to trade in bulk water. The core principles of facilitating trade liberalization through lowering tariff barriers and ensuring market access originated in the General Agreement on Tariffs and Trade (GATT) in 1947. These basic obligations now form the basis for the World Trade Organization, through its principal agreement, the GATT (1994); and the North American Free Trade Agreement (NAFTA).

It is worth noting that the primary goal of these agreements is trade liberalization: any provisions for environmental protection or resource conservation are framed as exceptions to the general rule, not positive obligations in their own right.

GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

The original GATT was first negotiated just after the second world war, and was concluded in 1947. This agreement was absorbed into the structure of the World Trade Organization when it was created in 1995. The current GATT is now the main WTO agreement. The WTO also contains a host of other sector specific agreements, such as agreements on agriculture, textiles, and services. The GATT is founded on three core principles of trade liberalization: most favoured nation, national treatment, and prohibitions on quantitative restrictions.[7] Some combination of these provisions has been at the core of most WTO trade disputes.

The general rules of non-discrimination are found in Articles I, III and XI of the GATT. The basic text of these articles has been reproduced only to give an indication of the wording; we have not included full text or related subsections, which are important for legal interpretation.

Article I, most-favoured nation treatment, requires WTO member countries to treat "like" products from other WTO members equally.

> **Article I:1.** With respect to customs duties and charges of any kind … any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article III, national treatment, requires trading partners to treat "like" products of other member countries the same as its own domestic products.

> **Article III:4.** The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. …

[7] David Hunter et al., *International Environmental Law and Policy* (New York: Foundation Press, 1998) at 1182.

Article XI prohibits import and export restrictions of products. It covers bans, quotas and licences on exported and imported products.

> **Article XI:1.** No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

There are exceptions to the prohibition, including allowing countries to impose temporary restrictions in the face of domestic shortages of essential products. These exceptions are generally inapplicable to environmental issues, however, under Article XI, it is arguable that Canada could impose an export duty or tax to control bulk water exports.

In addition to some of the article specific exceptions, the GATT contains general exemptions in Article XX. The two environment specific exemptions are listed below.

> **Article XX.** Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …
>
> (b) necessary to protect human, animal or plant life or health; …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; …

It is noteworthy that the language qualifying these exemptions is fairly broad. As a result, most GATT jurisprudence has been dedicated to narrowing the scope of these exceptions, and occasions where they have been broadly interpreted are rare. The WTO's Appellate Body (the appeal panel established under the WTO's Dispute Settlement Mechanism) has outlined a detailed test for the assessment of how an evaluation of a conservation measure should be conducted.[8] In this same decision, the *Reformulated Gasoline* case, the Appellate Body held that clean air is an "exhaustible natural resource". It is possible that this same exception could arguably be used if measures were enacted to protect Canadian freshwater from bulk exports. In another decision, the Appellate Body has also confirmed that the term "exhaustible natural resource" is evolutionary and must be read in light of "contemporary

---

[8] The Appellate Body has established a two-tiered test for evaluating the consistency of an environmental measure under Article XX. Panels must first evaluate whether the action qualifies as an exemption before evaluating whether it amounts to unjustified discrimination or is too restrictive a measure on trade; *United States —Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996.

concerns" about environmental protection, keeping in mind the objective of sustainable development contained in the WTO Agreement.[9]

NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

The NAFTA is a regional trade agreement under the GATT. It is substantially more specific and detailed than the GATT. Like the WTO agreements, it generally prohibits restrictions on the exportation of goods, subject to certain exceptions, among the three trading partners: Canada, the US and Mexico. In the preamble, the governments commit to the liberalization of trade and services and to environmental protection and conservation, the promotion of sustainable development and the strengthening of environmental laws and regulations. This latter goal is given effect not through the NAFTA itself, but through the side agreement, the North American Agreement on Environmental Cooperation. This side agreement is limited to environmental enforcement in the NAFTA countries; it does not regulate the interface between environmental measures and trade liberalization.

NAFTA directly adopts the national treatment principle in Article 301, and the prohibition on import and export restrictions in Article 309. While the main agreement does not directly incorporate most favoured nation, this principle does appear in some of the issue specific chapters, such as the investment provisions in Chapter 11 (see for example Article 1103). Finally, Article 2101 directly incorporates GATT Article XX exceptions into NAFTA, and expressly mentions the Article XX(b) and (g) exceptions, noted above.

There are two provisions in NAFTA that are particularly relevant to the bulk water export issue: Article 315 and Chapter 11.

ARTICLE 315: CAN WE TURN THE TAP OFF?

Article 315 of NAFTA essentially states that even if a measure would otherwise qualify for an Article XI:2 or XX(g) exemption, the "… restriction does not reduce the proportion of the total export shipments of the specific good made available to that other Party relative to the total supply of that good of the Party …". In other words, if bulk water is considered a good eligible for international trade, and once trade in bulk water was underway or occurring, a country would not then be able to restrict exports of bulk water unless it took proportional measures (in this case, proportional restrictions) in its own market.

CHAPTER 11 INVESTMENT

NAFTA's investment chapter operates as an investment specific trade agreement designed to liberalize investment laws and practices between NAFTA parties. Chapter 11 is both unique and alarming because it extends many of the basic trade liberalization benefits to private companies as well as contracting parties. The investor-state dispute settlement provisions of Chapter 11 have become particularly notorious. Under Chapter 11 of the NAFTA, private foreign investors can challenge governments for breach of investment provisions. There are a

[9] *United States —Import Prohibitions on Certain Shrimp and Shrimp Products*, Decision of the Appellate Body, WT/DS58/AB/R, 12 October 1998.

number of different grounds upon which a foreign investor can bring a claim against a government.

Articles 1102 (national treatment) and 1103 (most favoured nation treatment) emulate GATT Articles I and III. Since Chapter 11 applies to investors, the national treatment obligation requires that any measure adopted by Canada relating to a foreign investor or investment be treated no less favourably than it treats domestic investors and investments in like circumstances. Unlike Articles 1102 and 1103 that are framed in relative terms, Article 1105 is framed in absolute terms. Article 1105 establishes a minimum standard of treatment whereby Parties must not treat investment or investors below regardless of how other investors are treated. Under Article 1105(1), parties agree to treat foreign investments in "accordance with international law, including fair and equitable treatment and full protection and security."

Another ground for a private investor claim in Chapter 11 is Article 1110, Expropriation and Compensation. This Article provides that Parties may not nationalize or expropriate an investment of an investor of another Party, either directly or indirectly, or take measures tantamount to expropriation. In circumstances where expropriation can occur (such as taking for a public purpose, on a non-discriminatory basis, and in accordance with due process of law and Article 1105(1)), the Party is expected to pay compensation. Under Canadian law, expropriation is considered to be a taking of real property and title passing to the Crown. However, under NAFTA, expropriation is not defined, and to date, this provision has been interpreted extremely broadly; one NAFTA panel has ruled that even non-discriminatory regulatory measures could amount to expropriation.[10]

In many ways, Chapter 11 gives foreign companies a better standard of treatment than domestic companies, who are accustomed to being subject to the exercise of federal and provincial regulatory functions. As the case law is evolving, domestic companies appear to not have the same rights of redress as foreign companies, should a company be adversely affected by the exercise of a regulatory duty. In addition, the arbitration process established under Chapter 11 for investor-state disputes is conducted secretly, whereas a domestic company who has a complaint about government regulation must take their case to a domestic court, which is a public process. Finally, NAFTA Article 2101 states that the Article XX exceptions are not available in an investment dispute; thus the environmental exceptions cannot be used by a government to defend against the claim of a private investor.

To date, 4 panels have rendered decisions on Chapter 11; in 3 of the 4 cases, a Chapter 11 violation has been found, and awards have been made in favour of the private investors. Clearly, NAFTA panels that have issued awards under Chapter 11 are showing a tendency to interpret the Chapter 11 provisions broadly (see also discussion of the *Metalclad* case below).

---

[10] *Pope and Talbot*, NAFTA Panel Interim Award, 26 June 2000.

IS WATER A GOOD?

The GATT and the NAFTA provisions discussed above deal with "goods" and "products". Thus, a distinction needs to be made between water in commerce (ie., water in containers or bottles), and water in its "natural state" (i.e., water in a lake). Currently, water in its natural state is considered not to be a good. This intention was confirmed by the NAFTA parties in a joint, albeit non-binding, statement in 1993:

> Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.[11]

While the federal government remains of the view that water in its natural state is not a good, recent cases from the European Court of Justice have interpreted the term "good" to include anything capable of monetary valuation and of being the object of a commercial transaction.[12] This has meant that the term "good" is given a fairly broad definition in the European common market; there is potential uncertainty as to how a "good" may be defined should the issue be forced by any government under the NAFTA or the WTO.

What transforms water in its natural state to a good is not entirely clear. The federal government considers that "whether the extraction of water for municipal, industrial or agricultural uses transforms that water into a good is a complicated question. It can really only be answered on the basis of the specific factual and legal circumstances under which that particular water is removed from its natural state."[13] Thus, there is a recognition that there are a number of different ways that Canadian fresh water could become subject to international trade rules. The Department of Foreign Affairs and International Trade has acknowledged this point, stating that "as long as regulations governing the extraction of water from its natural state do not discriminate among NAFTA investors … such regulations will be consistent with the national treatment obligation of Chapter 11 of the NAFTA."[14]

As well, Chapter 11 provisions are not limited to trade in goods, therefore, whether water is considered a good or not, Chapter 11 applies to transactions involving water (see discussion of Sun Belt and Seymour Reservoir cases below).

---

[11] A copy of this joint statement was downloaded from the CCME website in 1999.

[12] See *Commission v. Italy* (Case 7/68) and *Commission v. Ireland Re Dundalk Water Supply* (Case 45/87).

[13] Government of Canada, *Questions and Answers: International Boundary Waters Amendment Act*, personal fax communication.

[14] DFAIT, *Bulk Water Removal and International Trade Considerations* (16 November 1999).

GOVERNMENTAL RESPONSES AND STRATEGIES

FEDERAL GOVERNMENT

In February 1999, the House of Commons adopted a motion on water security, voting in favour of a federal ban on water exports. Then Foreign Affairs Minister Lloyd Axworthy and Environment Minister Christine Stewart, announced a federal strategy to prohibit bulk water removal and bulk water export from Canada. The federal strategy includes:

- amendments to the International Boundary Waters Treaty Act;
- a joint reference, with the US, to the International Joint Commission; and
- the development of Canada-wide Accord with provinces and territories on bulk water removals.

According to the Department of Foreign Affairs and International Trade (DFAIT), the strategy recognizes that the provinces have the primary responsibility for water management and that the federal government has responsibilities under the Boundary Waters Treaty for waters on the Canada-US border. The federal government is also of the view that the strategy respects Canada's trade obligations since it focuses on water in its natural state. As mentioned earlier, the federal government takes the position that water in its natural state is not subject to either the NAFTA or the GATT. According to DFAIT, neither agreement obliges Canada to exploit its water for commercial use or to begin exporting water in any form.[15]

INTERNATIONAL BOUNDARY WATERS TREATY ACT

The Boundary Waters Treaty, 1909, is primarily concerned with water quantity and quality along the Canada-US border. In Canada, the treaty is implemented through the *International Boundary Waters Treaty Act* (IBWTA).[16]

In February 2001, the Government of Canada introduced Bill C-6, amendments to the IBWTA to prohibit bulk removal from the Canadian portions of boundary waters.[17] The federal government's proposed amendments will give the Minister of Foreign Affairs authority over projects that potentially affect levels and flows of boundary water, particularly the Great Lakes. Bill C-6 establishes water export permits under the discretion of the Minister of Foreign Affairs for the "use, obstruction or diversion of waters". While the Bill prohibits the export of water from boundary drainage basins it also provides for exceptions at the discretion of the Minister of Foreign Affairs. The export prohibition only applies to boundary water bodies, thus north-south running rivers would be subject to the licensing scheme.

---

15 *Backgrounder: A Strategy to Protect Canadian Water*, online: Department of Foreign Affairs and International Trade <www.dfait-maeci.gc.ca/english/news/press_releases/99_press/99_023-e.htm> (date accessed: 13 August 2001).

16 R.S.C. 1985, c. I-17.

17 See legislative summary of Bill C-6, downloadable from <www.parl.gc.ca/commons/Bills>.

The amendments would not stop the US from bulk water removal of the US portions of boundary waters, such as the Great Lakes. Critics of the Bill point out that the act only applies to a limited number of water bodies: the Great Lakes, Lake of the Woods, portions of the St. Lawrence, Upper St. John and St. Croix rivers.[18] As well, the use of a licensing system could make the amendments vulnerable to NAFTA provisions regarding goods and investment.

REFERENCE TO THE INTERNATIONAL JOINT COMMISSION

The International Joint Commission (IJC) was established under the Boundary Waters Treaty. In 1999, Canada and the US submitted a reference request to the IJC, concerning protection of water of the Great Lakes in response to the Nora case discussed below. In March 2000, after extensive consultation, the IJC released its *Final Report on Protection of Waters of the Great Lakes*.[19] The report outlines a plan for protecting waters of the Great Lakes Basin from potential impacts of water removals and consumptive uses.

A key recommendation of the IJC report is that Canadian and US federal, provincial and state governments should not permit the removal of water from the Great Lakes Basin, unless the proponent can demonstrate that the removal will not endanger the integrity of the Great Lakes ecosystem. The IJC recommends that any proponent for water removal would have to demonstrate that there are no practical alternatives to the removal; that sound planning has been applied; that cumulative impacts have been considered; that conservation practices are implemented; that the removal results in no net loss of waters to the area where it is taken from; and that all water is returned in a condition that protects the quality and prevents the introduction of alien species into the waters of the Great Lakes Basin.[20] According to Environment Canada, application of these criteria would effectively prevent any large-scale removal of water from the Great Lakes Basin.

The IJC also recommended that governments collect more water use data and implement comprehensive monitoring programs to detect threats to the ecosystem. The recommendations should be implemented through existing institutions and governments should develop standards and procedures for removals and new or increased water uses.

The report recommends the use of specific conservation measures to improve the efficiency of water use, including setting water prices at a level that encourages conservation. The IJC concludes that the international trade law obligations of NAFTA and the GATT do not prevent Canada and the US from taking measures to protect their water resources and preserve the integrity of the basin as long as there is no discrimination against foreign individuals in the application of the measures. In other words, the IJC is of the view that NAFTA and GATT would apply should bulk water removal be permitted.

---

18 Internet communication from Wendy R. Holm, (6 July 2001).

19 *Protection of the Waters of Great Lakes, Final Report to the Governments of Canada and the United States*, (22 February 2000), online: International Joint Commission <www.ijc.org/boards/cde/finalreport/finalreport.html>.

20 International Joint Commission, Media Release "IJC recommends comprehensive measures to governments for protecting waters of Great Lakes Basin" (15 March 2000), online: International Joint Commission <www.ijc.org/news/wurpr2.html>.

CANADA-WIDE ACCORD

In November 1999, the Canadian Council of Ministers of the Environment (CCME) developed the proposed Canada-Wide Accord. All jurisdictions, except Quebec, agreed to the common objective of prohibiting bulk water removals from major drainage basins in Canada. If signed, the *Accord for the Prohibition of Bulk Water Removal from Drainage Basins* would be a voluntary, non-binding agreement between the federal, provincial and territorial governments. It would have no real weight other than a statement of the governments' commitment to prohibit bulk water exports.

Under the Accord, governments would agree to prohibit the removal of water from the Canadian portions of major drainage basins with each jurisdiction determining its own approach. The Accord recognizes conservation and an integrated approach to water management as crucial. Under the Accord, management regimes are envisioned for Canada's five major drainage basins that drain into the Atlantic, Arctic and Pacific Oceans, Hudson Bay and the Gulf of Mexico. Bulk water removal is defined as the "withdrawal and transfer of water out of its basin in quantities which individually or cumulatively could result in damage to the ecological integrity of the system." Exemptions are listed as possibly including water used in the production of foods and other products such as bottled water; water used in transportation; water to meet short-term safety, security or humanitarian needs; and other purposes determined by individual jurisdictions to meet environmental and management needs consistent with the objective of the Accord.

COMMENTS ON THE FEDERAL RESPONSE

The federal government presents its strategy to prohibit bulk water export as a watershed approach that recognizes the linkages of the water systems and the need to manage water within drainage basins. While it maintains that the strategy respects Canada's trade obligations because it focuses on water in its "natural state", the proposals are not leakproof; if bulk water export is allowed, the government may not be able to control where our water goes, and to what purpose it is used, as a result of international trade rules.[21] Among the concerns are that even if bulk water is not considered a good, it could still be subject to the investment and service provisions of NAFTA. As well, the federal strategy does not provide any trade protection for licenses that have already been issued for commercial use and human consumption. Finally, despite assurances that the federal government has no plans to allow bulk water exports, it recently called for bids on its electronic tendering system, with the intention of setting a dollar value on Canada's water.

Critics have called on the federal government to enact strong federal legislation to ban bulk water exports and for Canada to directly negotiate international measures to protect domestic water export issues from trade and investor disputes. The federal perspective is that a legislated export ban would not focus on the conservation dimension, that it has possible constitutional limitations and may be subject to a challenge under trade laws. Further, a

---

[21] For a detailed critique of the federal government's strategy, see Steven Shrybman, *Why is the Federal Government so Reluctant to Protect Canadian Water Resources?* (West Coast Environmental Law, September 1999); Shrybman, *The Accord to Prohibit Bulk Water Removal — Will It Actually Hold Water?* (BC Freshwater Workshop, 9 May 2000); Shrybman, *A Legal Opinion Concerning Water Export Controls and Canadian Obligations Under NAFTA and the WTO* (West Coast Environmental Law, Occasional Paper Series 25:01 September 1999).

blanket prohibition on water export as a good, including bottled water and water in tankers, could also be vulnerable to trade challenges.

With respect to the Accord, critics argue that it too would not bind provinces to banning bulk water export. Recent developments in Newfoundland are an illustration of how a change in political leadership can affect earlier conservation commitments. Provinces will also be free to develop their own implementation approach to the Accord, thereby setting up a patchwork of regulations and policies.

PROVINCIAL AND TERRITORIAL GOVERNMENTS

According to DFAIT, all provinces and territories have developed or are developing legislation to ban bulk water export from waters within their jurisdictions. The federal government has responsibilities for water management in the north, and has committed to working with the three territorial governments to implement the export ban for waters in the north.

As we have seen with the Nova Group example, the *Ontario Water Resources Act* requires water taking permits for any water taking above 50,000 litres per day. The Ontario government is generally opposed to proposals to divert water. Similarly, Newfoundland currently prohibits bulk water removal, and despite recent reconsideration, it appears that this prohibition will be intact for the next while.

Saskatchewan has recently amended its *Water Corporation Act* to prohibit taking water out of a watershed.[22] Alberta already has legislation banning bulk water exports. At the Western Premiers' Conference on May 30 to June 1, 2001, the Premiers discussed the issue of bulk water removals. They all firmly opposed the bulk removal of water for export and, any transfers inter-provincially or internationally.[23]

Finally, BC's new liberal government has stated that it will continue to prohibit bulk water exports from British Columbia. Under the *Water Protection Act,*[24] only licensed registrants or registered unlicensed registrants under certain conditions can remove water from BC. Large-scale transfers of water between major watersheds is prohibited under section 6 of the *Act*. Under section 7, despite the *Water Act* and associated regulations, licences, approvals or permits may not be issued that allow removal, diversion or extraction of water from BC to an area outside BC. This section includes a ban on large-scale projects capable of transferring water from one major watershed to another major watershed.

---

22 "Saskatchewan prohibits taking of water from watersheds" (August 2001) 12:8 Canadian Environmental Regulation and Compliance News 2069.

23 Online: Canadian Intergovernmental Conference Secretariat (CICS) Homepage <www.scics.gc.ca/cinfo01/850082016_e.html> (date accessed: 13 August 2001).

24 R.S.B.C. 1996, c. 484.

CASE STUDIES

The above information reveals that there is real uncertainty as to how the issue of bulk water export may be characterized and addressed in the context of international trade rules. However, to date, the issue remains academic. While Canada routinely exports bottled water, bulk water exports have not yet become a reality. This section will provide an overview of recent situations that have moved this issue onto the public agenda.

NOVA GROUP, ONTARIO

The Nova Group case was the first to raise the issue of bulk water exports, and the potential implications for Canada. It provoked an immediate public and governmental response. On March 31, 1998, the Ontario Ministry of the Environment issued a five year "water taking" permit to a private company, the Nova Group of Sault Ste. Marie, allowing for the withdrawal by tanker of up to 600 million litres a year of water from Lake Superior. The *Ontario Water Resources Act* (*OWRA)* requires water taking permits for any water taking above 50,000 litres per day. The permit issued would have allowed the Nova Group to take water for free from Lake Superior and market the water for overseas export.

The public consultation prior to permit issuance was limited to posting a notice on the province's Environmental Registry, a computer bulletin board. Due to immediate negative reaction to the permit, the Ontario government sought public comment on a proposal to cancel the permit. The government then adopted a policy on Surface Water Transfers that recognized the need to preserve water quantity to sustain ecosystem integrity, and confirmed that the Ontario government was generally opposed to proposals to divert water. Since Nova Group had not begun taking water, the policy was applied and the permit cancelled. Nova Group originally challenged the decision to the Ontario Environmental Appeal Board, but abandoned the appeal before the case was heard.

This permit would not have been covered by NAFTA since the Nova Group was not a foreign interest and intended to ship the water to Asia and not the US or Mexico. However, the GATT would have applied in this case.

GISBORNE LAKE, NEWFOUNDLAND

In 1999, then Premier of Newfoundland, Brian Tobin, introduced a law to ban bulk water exports. In March 2001, Premier Roger Grimes announced plans to allow a private operator to export water from Gisborne Lake overseas. Gisborne Lake drains into Fortune Bay and Premier Grimes has been quoted as saying that "We're just letting it spill into the ocean." While this may be the case, reducing the amount of freshwater discharging into the ocean could have serious effects on the ecosystem as a whole, including, the fragile fish and shellfish habitat.

McCurdy Enterprises, a Newfoundland real estate and construction firm is proposing to build a five-mile pipeline to carry the water from the lake to Newfoundland's southern coast, where it would be pumped into tanker ships. Each tanker has the capacity to carry 66 million gallons and water would be shipped twice a week. The company estimates that it would cost less than one cent a gallon to take water from the lake to potential, unnamed, buyers in the

southern US and elsewhere. Bulk water in the US currently sells for approximately 2 cents per gallon. The company considers that there are huge potential profits attached to the proposal. However, the Newfoundland government recently admitted that an internal study has concluded that bulk water export would offer no great economic value.[25]

While this recent development is promising, and means that this proposal appears to be shelved for the time being, if the market value of freshwater was to increase, the economic viability and opportunities of such a proposal would likely be revisited.

SUN BELT WATER, INC., BRITISH COLUMBIA

This case represents perhaps the most significant threat to Canadian water so far. In 1998, a US company, Sun Belt Water, filed an intent to submit a claim to arbitration under NAFTA Chapter 11 against Canada. In its submission, Sun Belt maintains that the BC government's actions from July 1996 to November 1998 violated Articles 1102, 1103, 1104 and 1105 of the NAFTA; and that earlier actions from 1989 to 1995 violated Articles 105, 407 and 1602 of the Canada US Free Trade Agreement, Article XI of the GATT, and the BC *Water Act*.[26]

Sun Belt argues that the BC government had made promises to the company regarding the development of the bulk water export market, and encouraged the company to develop a market for bulk water, and then the same government later imposed a moratorium on the issuance of new or expanded water licences. Sun Belt also claims that the government gave them false advice regarding its relationship with another company, Western Canada Water Enterprises (WCW).

In 1990, Sun Belt formed a joint partnership with Snowcap Waters Ltd., a BC company, to develop opportunities in the bulk water industry. At the time, Snowcap held one of six existing bulk water export licences. Sun Belt alleges that the government delayed processing their application for the expansion of the licence held by Snowcap. Due to the delay, Sun Belt maintains that it lost a bid to supply a southern Californian city with water. As well, when Sun Belt won a contract to supply the District of Goleta, California with water on March 14, 1991, the BC government is alleged to have told Goleta and Sun Belt that they could only access water if it was supplied by WCW. On March 18, 1991, the government imposed a temporary moratorium on the issuance and expansion of water export licences that was eventually made permanent.

In January 1993, Snowcap and Sun Belt filed a lawsuit for damages against the BC government. By July 1996, a cash settlement was reached with Snowcap. Sun Belt submits that they were not given fair or equitable treatment by the government to reach a settlement with them. Sun Belt is seeking between $105 million to $10.5 billion US in damages.

There has been no recent activity on this case. It is factually complex, and it is questionable whether this claim should have been submitted under NAFTA in the first place – sun Belt's claim arises from a contractual arrangement it had with Snowcap, the Canadian company that actually held the permit. Nonetheless, the threat posed by this case is real, and the

---

[25] "Bulk fresh-water exports offer few gains, study says", *Globe and Mail*, 13 October 2001, p. A14.

[26] The information for this section is based on Sun Belt's *Notice of Intent to Submit a Claim to Arbitration*, (27 November 1998), signed by John F. Carten, Counsel for Sun Belt Water, Inc.

possibility of panel requiring that compensation be paid to Sun Belt is also real as long as this dispute remains unresolved.

GREATER VANCOUVER REGIONAL DISTRICT — SEYMOUR RESERVOIR, BRITISH COLUMBIA

Although not a bulk water export issue, the cancellation of a plan by the Greater Vancouver Regional District (GVRD) earlier this year to not allow a private company to operate a water treatment plant is illustrative of the extent of public concern and uncertainty around water and trade issues. In November 2000, the GVRD received bids from six companies to design, build and operate a filtration plant at the Seymour reservoir. Five of the bids were from foreign-owned consortiums; one was Canadian.[27]

The proposal was to create a partnership with the private sector to design, build and operate (DBO) a water treatment plant. The plant was to be operated through a 20 year operating contract with GVRD staff still responsible for water quality monitoring. While it is not uncommon for municipalities to contract out the design and construction of significant infrastructure projects, this proposal would have seen the operation of a major drinking water supply facility to be done by a private sector company for up to 20 years.

Although the DBO approach was considered at five meetings open to the public from 1995 to 1998, the public was not consulted on the final DBO contracting decision. In public meetings held on June 13 and 14, after the proposal was approved, more than 1000 people turned out to opposed the plans. Critics of the proposal, and in particular, the Canadian Union of Public Employees argued that once a foreign company operated a treatment system in Canada, it could go to an international trade panel to argue against subsequent regulations that might affect its profits. The company could also have a claim under Chapter 11 of the NAFTA if regulations changed to the extent that a case for expropriation could be made. Shortly thereafter, GVRD Water Committee Chair Marvin Hunt announced that the plans to privatize the filtration system were dropped due to public concern.

In this proposal, the contract would have provided fair and equitable costs to the company in the case of future changes in regulations, and public access to information on the operation and management of the plant would have only been through a GVRD audit process. According to the Canadian Environmental Law Association (CELA), some private companies running water and sewage treatment plants have applied to Revenue Canada for "municipal status" to gain GST and HST exemptions. If these applications are granted the line between private companies and democratically-elected municipalities will be significantly blurred.[28] In Britain after water privatization 10 years ago, price hikes ranged from 84 per cent to 142 per cent. By 1998, the ten private water companies in Britain had made more than $33 billion in profit. Over the same period less than three per cent of the sewer infrastructure was renovated or replaced.

---

27 Charlie Smith, "GVRD Water Deal Reviewed" (30 November – 7 December 2000) online: The Georgia Straight <www.waterfight.ca/news_nov30_dec7.html> (date accessed: 23 August 2001).

28 *Selling Our Water — Water Taking in Lake Superior*, Intervenor, Volume 23, No. 2 (April – June 1998) at 12, online: Canadian Environmental Law Association < www.cela.ca/Intervenor/23_2/23_2selling.htm> (date accessed 17 August 2001).

THE METALCLAD CASE

The Metalclad case is of particular interest in BC as this NAFTA panel decision was challenged in BC Supreme Court. In this case, Mexico challenged an arbitration award issued on August 30, 2000 by a NAFTA panel in favour of Metalclad Corporation, a US company. Metalclad purchased a Mexican company that had obtained state and federal permits for the construction of a hazardous waste landfill. After construction of the facility was completed, the municipality refused to issue a permit for the operation of the site, and then passed an ecological decree forbidding development, and declaring the area to be environmentally sensitive.

Metalclad commenced a claim under NAFTA Chapter 11. The tribunal held that Mexico's tolerance of the conduct of the municipality where the landfill was located was tantamount to expropriation and constituted a violation of the expropriation provisions in Article 1110. The tribunal also found that Mexico had failed to ensure a "transparent and predictable framework for Metalclad's investment" and therefore breached the minimum standard of treatment requirements in Article 1105. The Tribunal ordered that Mexico pay $US16.7 million to Metalclad.

The case was heard by the BC Supreme Court in February and March, and the decision was released in May 2001. Mr. Justice Tysoe found that the tribunal had exceeded its jurisdiction in some respects, but the Chapter 11 award was partially upheld by the court. Mexico did not prove that there was an excess of jurisdiction with respect to the Tribunal's finding that the ecological decree violated the expropriation provisions of Chapter 11. The Tribunal had held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner of whole or significant part of the use or "*reasonably-to-be expected economic benefit of property*."[29] [author's emphasis]

Again, while this issue does not directly address the issue of bulk water exports, it nonetheless has significant implications for the regulatory authority of subnational governments, as it may well have a chilling effect on environmental or other forms of regulation. Appeal of this decision to the BC Court of Appeal is being considered.

---

29 *The United Mexican States v. Metalclad Corporation* (2001 BCSC 664) at 99.

CONCLUSION

There is no question that water security is extremely important to Canadians, and that the possibility of granting Americans unlimited access to our freshwater is of real concern. Recent polls indicate that British Columbians are very worried about just such access, and this concern is likely to increase, not decrease, as global water resources become more scarce.

To date, much of the debate about the trade status of Canadian freshwater has been academic; no challenges have been played out at either the governmental or at the trade panel level. The Sun Belt case represents the most significant opportunity or threat, depending on one's perspective, for this issue to be addressed; yet this claim appears to be inactive at this time. What is clear is that in the event that Canada were to permit large-scale bulk water export, it would be subject to the provisions of both NAFTA and the GATT. Should this occur, it is an open question as to whether any measures designed to ensure the conservation of Canadian freshwater could survive the scrutiny of international trade rules. However, the prospect for conservation measures being upheld as justifiable exemptions to trade rules does not look promising.

Finally, recent case developments, such as the Sun Belt Claim and the Metalclad decision, make clear that threats to Canadian water, and any efforts by governments to regulate to protect water are very real, although much will depend on the factual circumstances in each situation.

Given that Canada possesses nearly one-tenth of the world's available freshwater, there may come a time when water sharing, not water trading, becomes a reality. Until then, the federal government would be well advised to be cautious in framing or considering proposals that would allow any diversion or transport of water from Canada.

I:\Publicat\BRIEFS\2001\Security or Scarcity.doc