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Water Diversion, Export, and Canada-U.S. Relations: A Brief History

Frank Quinn
Consultant

M C I S B R I E F I N G S

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and Canada-U.S. Relations:
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PROGRAM ON WATER ISSUES

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Preface

The Program On Water Issues is pleased to offer the following paper written by Dr. Frank Quinn in the Munk Centre for International Studies Briefings series. The paper has been prepared on behalf of the Canadian Water Issues Council (CWIC), which was formed in 2007 to conduct policy research in a neutral university setting on transboundary water issues. It is being released on September 10, 2007, to coincide with the Munk Centre's Conference on Water, Energy and North American Integration. It is hoped that Dr. Quinn's paper – *Water Diversions, Export, and Canada-U.S. Relations: A Brief History* – will make an important contribution to the literature on Canadian water policy.

Dr. Quinn has had a long and distinguished career in the Canadian Federal Department of the Environment, and in many ways has been front and centre in the water export issue. The topic of his paper is particularly timely, given current concerns about the possible implications on Canadian freshwater of deeper continental integration. Since 1960, the topic of water export has come to the fore on several occasions: when proposals for several water export megaprojects first surfaced in the 1960s, when the GRAND Canal proposal was promoted in the early 1980s, when the Free Trade Agreement with the U.S. was negotiated in the mid-1980s, and again when the North American Free Trade Agreement was negotiated in the early 1990s. On each of those occasions, the Canadian public reacted negatively to what they perceived as threats to Canada's water sovereignty posed by proposals to export of our water. The potential for water to be included in trilateral Security and Prosperity Partnership discussions reminds us that the issue of trade in Canada's water has not gone away, and may in fact, be more important than ever.

This paper is a companion to, and is intended to be complementary to, the main conference report prepared by lead author, Andrew Nikiforuk. The main conference paper, *On the Table: Water, Energy and North American Integration*, explores recent events relating to water export, including increasing water supply problems in the U.S. and Mexico, recent activities in Canada and the U.S. that promote the export of water from Canada, the myths of water abundance in Canada, the Security and Prosperity Partnership, and the water-energy nexus in a continental context. Dr. Quinn's paper complements *On the Table* by presenting an in-depth historical analysis of the water export issue, including the many complex factors that have led us to today's unsettled legal and policy regime.

Adèle M. Hurley, *Director, Program On Water Issues*

Water Diversion, Export, and Canada-U.S. Relations: A Brief History

Frank Quinn

Frank Quinn received his BA in Geography from the University of Toronto and his PhD from the University of Washington, Seattle. He has lectured at universities in both countries and has over 30 years of water planning and policy experience with the Government of Canada. In 1984-1985 he was Research Director for the Inquiry on Federal Water Policy. In 1999-2000, he was Special Advisor to the International Joint Commission, which had received a Reference from the Governments of Canada and the United States to investigate the issues of consumption and removal of Great Lakes waters. His major areas of interest are federal water policy, water diversion and export, and Canada-U.S. boundary water issues. Recently retired from government, he is consulting part-time. He can be reached at f_dquinn@yahoo.ca.

The focus of this paper is upon the interbasin and possible export of Canada's freshwater resources, a subject of growing speculation on both sides of the international boundary. As such, it encompasses waters distant from, as well as those flowing across, that boundary.

Provocations

In recent years, there have been many articles in magazines and newspapers predicting that before long, the United States would be running out of water and looking northward to Canada as the solution to their problems. In 2005, a writer at *Macleans* claimed that Canadians could make lots of money in a continental water pact, akin to the energy pact currently enriching Alberta (Maich 2005). The same year, former Alberta Premier, Peter Lougheed predicted that the U.S. would raise the export issue with us within

The author is indebted to Charles Caccia, former federal Minister of the Environment, for pointing out that investigations of the extent of federal jurisdiction vis-à-vis the provinces are less crucial than the political courage required to act upon them.

three to five years, and that we should be prepared to justify our position if we weren't prepared to make a deal (Lougheed 2005). This year, at the release of the long-awaited International Panel on Climate Change report on the catastrophic implications of climate change for various countries, a Canadian academic announced "We need to start having policy discussions about how we're going to get fresh water to the U.S. How do we do that before they say to us 'we want it and we're coming to get it?'" (Weaver 2007) Many find these comments disturbing. Should we rush to the aid of a government that continues to exacerbate resource and environmental problems around the world? Canadians need to think the water issue through, to appreciate fully the range of choices available.

There may be some urgency to start this exercise sooner rather than later, as part of an open public process in Canada, before governments and their corporate beneficiaries try to settle the matter behind closed doors. Water export may soon become one of the issues, joining energy, on the agenda of the Security and Prosperity Partnership (SPP), a trilateral initiative to increase the economic integration of Canada, the United States, and Mexico. Speculation to this effect emerged earlier this year after a report from a Washington-based think tank, linked directly or indirectly with the SPP, was leaked to the media. The report argues in favour of "creative solutions beyond the current transboundary arrangements," including such measures as "artificial diversions of fresh water" (Center for Strategic and International Studies 2007).

This paper has two premises: first, that the United States has a number of options to address its water issues for the next few decades and that its situation should therefore not be considered desperate anytime soon; and, secondly, that Canadians deserve a federal government that can take charge of what is obviously a national issue and respond effectively to their concerns, without first having to enroll the support of every provincial and territorial government in the country.

Canada-United States Comparisons

There is a widespread misconception in both countries that Canada is much wealthier in freshwater resources than its closest neighbor. Partly, this is because of a failure to distinguish the portion of water that is annually renewable from the total non-renewable volume in

lakes, rivers, glaciers, and groundwater. The myth of Canada's abundance of water also reflects a tendency of our human-centric society to reduce water needs to per capita availability, as though no other forms of life or ecological needs mattered. In truth, the Canadian and American shares of global renewable freshwater are not much different, at roughly 7 percent and 6.5 percent, respectively (Gleick 2006). This is not out of line, considering that Canada is slightly larger than the United States.

So while it is fair to say that both Canada and the U.S. have a fair supply of freshwater, it must also be acknowledged that this water is not always found in the optimum location. This is why both countries have spent significant money and effort to build dams to store water and diversions to redistribute it throughout the 20th century to correct this "imbalance."

Over the last 40 years, much of the discussion on water diversions and exports has focused on a few "mega projects." Since the mid-1960s, a few private-sector promoters in both countries have done their best to make their large-scale water redistribution pipedreams come to life, but without success. Parsons' NAWAPA scheme, Kierans' GRAND Canal project, and others of their genre were big on ideas, but short on engineering, economic, and environmental details. Such megaprojects have never been supported by any government in either country, and are basically nothing more than lines on a map (Day and Quinn 1992).

What may be more relevant to the issue of water diversions and exports is the pattern of interbasin diversions that already exists within the two countries (see Figure 1). ("Interbasin diversion" refers to the removal of water from a watershed so that it is not then available for in-basin use). The pattern of interbasin diversions in Canada and the U.S. has not changed significantly in the last two decades. Over the last century, scores of interbasin diversions have been made, for hydroelectric power generation, for irrigation, for urban water supplies and other reasons. It is important to note that these projects have invariably taken place within political boundaries – provincial, state, and national – and not across them. In Canada, provincial hydroelectric commissions are responsible for almost all (i.e., 97 percent) of the volume, if not the number, of interbasin flow diversions and these diversions transmit electricity, not water, to markets (including U.S. markets). In contrast, interbasin diversions in

the United States have served primarily for irrigation in the western states and for municipal water supply throughout the country.

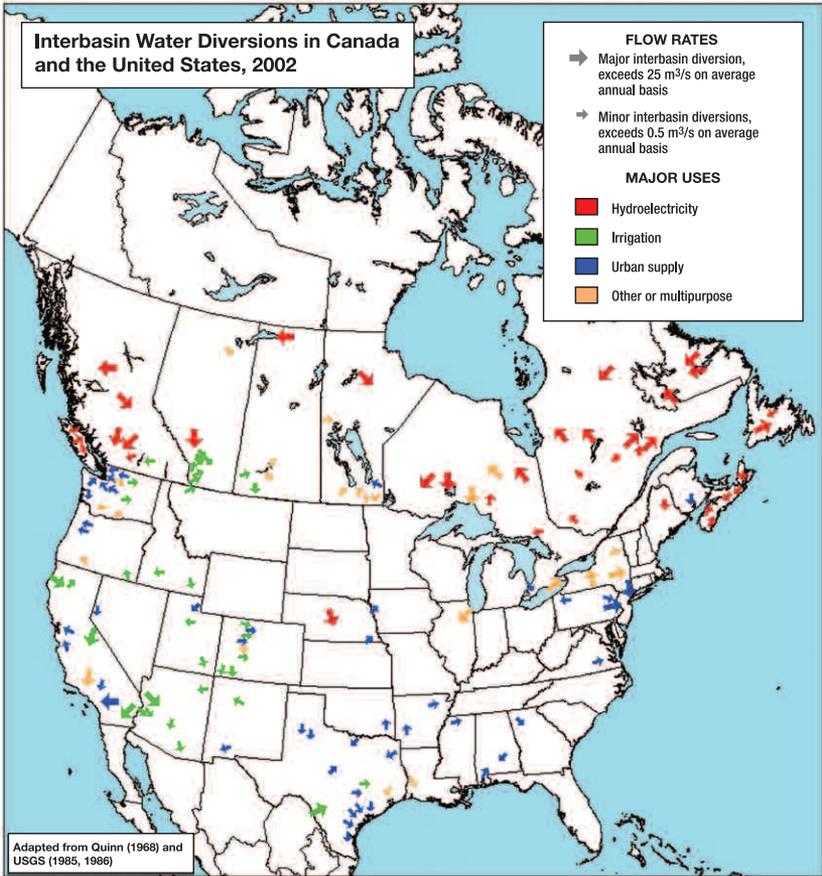


Figure 1

Fortunately, Canada has not yet begun to export freshwater in bulk to the United States, or anywhere else. Not overland by pipeline or tanker truck, nor by marine transport. There are in fact only two pairs of neighbouring boundary communities – Coutts, Alberta with Sweetgrass, Montana, and Vancouver, B.C., with Point Roberts, Washington – that share relatively small volumes of treated water as a matter of local accommodation. And the trade in bottled water, while raising justifiable questions about local ecological and community impacts, has little more significance nationally than the export of beer or soft drinks (Hidell-Eyster International 2000).

One of the great accomplishments of the bilateral relationship between Canada and the United States in the past century has been the cooperative management of the many lakes and rivers that flow along and across our common boundary. In contrast, there is little record of Canada-United States discussions on the water export issue, although officials apparently took water into account, if only belatedly, in negotiating the Canada-U.S. and North American Free Trade Agreements. In retrospect, it appears that the Mulroney and Chrétien governments both missed opportunities to clarify the status of Canada's freshwater legally in those agreements. More on that later.

Options for the United States

It is instructive to consider the situation in the United States, a country which has less than 5 percent of the world's population but which consumes 25 percent of its natural resources.

U.S. population continues to migrate southward and westward, particularly to coastal regions (south Atlantic, Gulf, and Pacific) and other parts of Texas and California, as well as to the arid southwestern states such as Arizona, Nevada, and Utah (McLeman 2007). This shift in population puts citizens on a collision course with the storms, rising sea levels, and extended droughts that are associated with climate warming. In Canada, water-poor Alberta has begun to experience a similar effect, attracting migrants from other provinces while its glaciers shrink, river flows decrease, and oil and gas operations deplete and contaminate scarce surface and groundwater resources (Schindler and Donahue 2006).

What can the United States do about water in the coming years, beyond making a determined long-term effort to reduce its addiction to fossil fuels to slow the rate of climate warming? There are a number of promising options available for increasing water efficiency, reducing water demand, and improving water management. Some of these are being pursued vigorously in the U.S., more so in fact than in Canada.

According to the U.S. Geological Survey, which publishes estimates every five years, water use for the nation as a whole peaked in 1980 and has since settled below that level (USGS 2004). As a nation, Americans have succeeded in breaking the link between population/economy and water use. Canadians have been complaining for years that the U.S. should stop wasting its water and looking elsewhere for relief. It now appears that the shoe may be on

the other foot. Nation-wide, we have been slow to improve our own conservation practices. The Organization for Economic Cooperation and Development has been critical of Canada's performance in water management, and notes that Canada charges the lowest prices charged for water of all countries in the industrialized world (OECD 2000).

Because they have fewer opportunities for developing new sources of water, Americans are being forced to stretch existing supplies, and to use them more efficiently. The shift from supply-side management (finding new sources of water) to demand-side management (increasing the efficiency of water use and maximizing the value of water that is used), is providing both economic and environmental benefits. The last twenty-five years have seen many Americans embrace conservation pricing, conjunctive use of ground and surface water, wastewater recycling, drip irrigation, low flow appliances, leak reductions, xeriscaping, and rainwater harvesting ... the possibilities keep expanding. For example, the City of San Antonio in Texas, by offering rebates to its homeowners for a range of conservation practices, has lowered its per capita water use by 40 percent since 1980 (McLemore 2007). The State of California has managed to hold the volume of water used almost constant since 1970, even though its population has more than doubled to 37 million in this period. Perhaps the most significant water management event was a recent agreement reached by California with the U.S. Secretary of the Interior to reduce the state's overuse of the Colorado River and to reallocate a significant part of the state's remaining apportionment from the Imperial and Coachella irrigation districts to higher-valued urban uses. This agreement put into effect the largest transfer of water from farms to cities yet seen in North America (Murphy 2003).

This kind of change needs to spread to other western U.S. states as well, where agriculture still consumes over 80 percent of water supplies and governments continue to subsidize both the water used by farmers and the crops grown. Unfortunately, Washington has recently introduced another subsidy that has led to a massive shift on the southern high plains from growing cotton to growing corn to produce ethanol for gasoline. This change has boosted irrigation needs in Texas alone by the equivalent of a "large lake." (USDA data suggest that it takes 2500 units of water to produce 1 unit of ethanol.) Incentives for water management reform in the arid southwest are growing, nonetheless, with a consensus among scientists that warmer

temperatures and drought are likely to hit harder here than anywhere else in the United States.

Two decades from now, the United States may find few remaining opportunities to improve water use efficiencies. In the meantime, however, desalination is gradually gaining a foothold on the Gulf and Pacific coasts with governments experimenting with new hybrid technologies and brine disposal methods. A number of rapidly growing coastal cities are actively exploring desalination of sea water as a supplementary municipal water supply option, twenty in the state of California alone (*Contra Costa Times* 2007). Even inland states are considering desalination to treat brackish groundwater.

If the day ever arrives when water conservation and efficient allocation are no longer sufficient to meet the nation's water needs, the U.S. could still return to the low tech option of long-distance importation of water. The largest and least complicated source to draw upon could well be Alaska. Why bother negotiating for Canadian water when Alaska can be accessed easily, at least for the benefit of the Pacific coastal states and possibly adjoining regions in Mexico? Wetter than Canada's north, Alaska is credited by the USGS with having fully one-third of the total U.S. renewable water supply. Moreover, it is the sole jurisdiction in North America that is currently open to bidding for its freshwater resources. Water from Alaska could be carried south by ships (even those with single hulls) or, more ambitiously, by an undersea pipeline paralleling the Pacific shoreline (Hickel 2007). Despite a decade of trying to get into the water export business, Alaska has yet to attract its first customer. Its time has not yet come.

The seven states that share the Colorado River basin might prefer to choose a shorter route than the Alaska run. For them it might make more sense to draw water from the lower Columbia River between Oregon and Washington and bring its "surplus" flows overland into the southwest. Attempts to do just this through a series of bills tabled in Congress between 1964 and 1968 that directed the U.S. Secretary of the Interior to investigate this possibility were soundly defeated by the Columbia basin states and environmental groups (Quinn 1973). The Colorado basin states might be reluctant to risk another political defeat there.

Some Americans believe that the resolution of their developing water scarcity problems may be as simple as paying Canada for the right to

draw water from just across the international boundary. Unfortunately, there is no surplus of water in this zone. Fully three-quarters of the Canadian population is concentrated within 160 kilometers (100 miles) of the Canada-U.S. border, and most of this inhabited area drains into boundary and transboundary waters that are already shared by the two countries under various treaties. Farther from the international boundary there is less pressure on Canada's water resources, but these rivers flow predominantly northward into the distant Arctic. Turning them around would be an expensive proposition and one that would cause consternation among indigenous peoples.

That brings us to the last, and possibly most troublesome, option, for both the United States and Canada. Should the U.S. find itself in desperate need for water in the future and should Canada refuse to enter into a water export agreement, what would prevent the U.S. from simply taking a disproportionate share of waters along the international boundary, specifically from the largest surface pool of freshwater on the continent, the Great Lakes? This would not even require encroachment on Canadian territory, only the enlargement of a canal in Illinois – the Chicago Diversion – that has been in place for over a century.

In that respect, the Chicago Diversion poses a long-term threat to Canada's water resources. The international boundary does not pass through Lake Michigan. Because of this, it is the one Great Lake which is generally considered "tributary to a boundary water," not a boundary water itself, under the terms of the *Boundary Waters Treaty* of 1909. Over the years, Canada has consistently opposed any increase in diversion volumes from Lake Michigan to the Mississippi River basin beyond what is already permitted under a 1967 U.S. Supreme Court order. It is moreover uncertain whether the U.S. government would ever pursue this option, as most residents on the U.S. side of the Great Lakes are just as determined as their Canadian neighbours to protect their shared waters from external demands. This became abundantly clear during recent IJC public hearings and subsequent negotiations among the two provinces and eight states regarding withdrawals and diversions from the Great Lakes. These negotiations culminated in two non-binding agreements – the 2005 Great Lakes-St. Lawrence River Basin Water Resources Compact and the Great Lakes-St. Lawrence River Basin Water Resources Agreement – that, among other things,

leave no room for Illinois to divert additional water out of the basin at Chicago. However, the Compact will become U.S. Law only if it is ratified by the legislatures of all Great Lakes States and approved by Congress (Annin 2006). We may not know the outcome of this laborious legislative process for several years. In the meantime, the Chicago Diversion remains Canada's "Achilles heel," (see Figure 2).



Figure 2. Editorial cartoon, *Toronto Sun*, July 23, 1988 (pg. 10)

To further complicate the situation, there is almost unanimous agreement among climate scientists that Great Lakes levels will fall in the coming decades as a result of greater evaporation due to climate change, regardless of attempts by governments to reduce greenhouse gas emissions. If the U.S. were to move unilaterally to lower Great Lakes levels even more by increasing the diversion from the Lakes at Chicago, that might leave Canada with little choice except to increase its own diversions into the Lakes from northern Ontario, to replace whatever water is lost from the Lakes. This would protect existing Great Lakes uses on both sides of the boundary, but would be, at best, a mixed blessing north of the border.

In summary, over the next twenty years, the United States is expected to intensify ongoing efforts to conserve freshwater in all sectors. If and

when these measures are not enough, even where they can be supplemented by desalination and other technologies, then importation of freshwater from elsewhere may well become again the favoured option. The west might look for water first from Alaska to be transported by tanker or undersea pipeline. The Colorado basin states might look first to the lower Columbia River with the water to be transported by pipeline overland. States in the American midwest and south (via the Mississippi River) would look to the Great Lakes as the target of choice.

Canada's Insecurity

It is more difficult to assess Canada's situation with respect to exporting water than that of the United States, with its plethora of options and abundance of time to weigh them and make necessary adjustments. Canadian governments have made almost no progress on this issue over the past four decades, having for the most part simply reacted to events, but cautiously, so as not to offend their powerful neighbours to the south.

Controversy about water exports in Canada can be traced back to two widely separated events. In 1963, a decision of the U.S. Supreme Court in *Arizona v. California et al.* failed to resolve interstate conflict over the meagre flow of the Colorado River. It led, instead, to speculation in the southwest about more distant sources of available water. At about the same time, droughts and low-water levels were creating problems for navigation and hydropower interests on the Great Lakes and for municipal water systems along the Atlantic Seaboard. These events triggered a flurry of schemes from the private sector, including several of international proportions. The largest of these were given hearings in the U.S. Congress (1964) and in Canada's Parliament (Canada 1960, 1965). These private sector schemes received a rough ride from the Canadian public, which rejected any suggestion that their water resources were "continental" rather than Canadian.

A number of variations on the theme of water export have appeared since the first schemes four decades ago, but the one constant is the hostility with which each has been received by an overwhelming majority of Canadians, usually in the neighborhood of 70 per cent.

Arguments in favour of water export normally come down to monetary gains, the boosting of development in source regions, and

sometimes the provision of humanitarian aid. The opposing view acknowledges that water is an economic good, but insists it is so much more than that: It is the basis for all life, not just human. It is integral to the health and beauty of Canada's landscape. It is the key to our past and our future. If this, the last and greatest natural resource still in Canadian hands, is traded away, we will be a lesser people, sovereign in name only.

How well have Canadian governments performed, in protecting our sovereignty over freshwater? That's worth a closer look.

When public opinion in this country rejected proposals for continental water megaprojects in the mid-1960s, governments were quick to join the chorus of disapproval. Interestingly, however, the engineering fraternity in our federal and provincial governments apparently read the public response as a signal to substitute interbasin diversions *within* Canada for those aiming to divert water *outside* the country. Thus, in 1965 the annual report of the Alberta Water Resources Branch ridiculed the private sector NAWAPA scheme and announced PRIME, the Branch's own elaborate plan for diverting northern rivers into the southern part of the province. At the same time, the federal and Ontario governments began to explore further regulation of James Bay drainage, including the potential for diverting more of it southward into the Great Lakes. In 1967, the Government of Canada came to an agreement with the three Prairie provinces to investigate various combinations of dams and diversions that could augment water supply in the Saskatchewan-Nelson basin from northern sources. The Province of British Columbia began to investigate the possibility of diverting "surplus" flows from the Shuswap Lakes system to the Okanagan River. In all cases, governments set aside social and environmental concerns so that basic hydrologic and engineering potential could first be established (Day and Quinn 1992). All of these governmental initiatives for interbasin diversions badly misread the public mood. Within a few years, they were all shelved, except for diversions for hydropower that were subsequently developed in northern Manitoba and Quebec.

The tendency of Canadian governments to dismiss international water diversion proposals as wild pipe dreams failed to calm public fears for long, however. By avoiding systematic reviews and by failing to choose a policy course, Canadian governments appeared to be keeping their future options open. At the federal level, opposition to export

proposals was less than convincing, in that it consisted of defensive responses by a series of federal ministers responsible for water resources, rather than an official policy that carried the endorsement of the government as a whole.

At one point in 1978, a small brochure that described existing federal water policies was tabled in the House of Commons (Environment Canada 1978). Inexplicably, it failed to even mention the issue of water exports. Bureaucratic fears had apparently developed after the first draft, mainly from staff at Foreign Affairs and at Energy, Mines and Resources. Bureaucrats feared that a simple statement opposing water export might irritate the United States (which at this point had not even pressed Canada formally on the issue) and jeopardize existing access for Canadian oil and gas to U.S. markets and the potential to expand further. As clarification, officials were told that a federal policy against export was to continue, but that it should be used “only on a responsive basis.” Ottawa preferred to let the issue drift in hope that the U.S. would never ask for access to our water and risk embarrassment to both sides.

Several years later, interbasin diversions and the export of water were among the leading issues raised at the cross-Canada hearings of the Inquiry on Federal Water Policy. Indeed, the hearings confirmed that there was widespread public opposition to major export of water. In the Inquiry’s final report to the new Mulroney government (Pearse et al. 1985), it did not come down on one side or the other on the issue (one of its three members was a protégée of the Premier of Quebec who favored resource exports). However, the final report did distinguish between small exports, such as containerized shipments of water or transboundary arrangements between neighboring communities, and large-scale exports with their more serious economic, social, and environmental implications. The Inquiry also recognized the importance of creating legislation that could prohibit water export or regulate it through a licensing system. And so, after two decades of simply denying interest in water export and hoping that the problem would go away, the federal government began to explore legislative possibilities along the lines recommended by the Inquiry.

Free Trade and Water

The response of the federal government to the water export recommendations of the Pearse Inquiry hung in the balance for some

time. What eventually forced its hand was growing suspicion about the relationship between a private sector proponent of bulk water export (the GRAND Canal Company) and Premier Robert Bourassa of Quebec, and public concern about aggressive fundraising attempts by the company and its multinational engineering partners. The federal Interdepartmental Committee on Water Grants blocked grants totaling \$763,000 from two federal agencies from going to the GRAND Canal Company, although the company did end up receiving \$30,000 from the Newfoundland regional office of the National Research Council (Gamble 1987).

A more sinister threat to Canada's water than the GRAND Canal Company was emerging. Although it is not widely known, it was Canada, not the U.S., that initiated the request for bilateral talks on free trade in the 1980s. Later it was discovered that Simon Reisman, appointed as chief trade negotiator by the Prime Minister, was not only a director of the GRAND Canal Company but had made a speech in which he suggested that Americans would go crazy for access to Canadian freshwater, and urged that the resource be used as bait to get the Americans to the negotiating table (Reisman 1985). In an attempt to settle the water export issue before it became entangled with the Conservative government's larger ambition of securing an agreement with the United States on trade liberalization, the federal Cabinet approved the inclusion of a statement limiting export within its new Federal Water Policy, which was tabled in the House of Commons in November 1987.

The Environment Minister's introduction to the new Federal Water Policy indicated that the "Government of Canada emphatically opposes large-scale export of our water" because of inadequacies of supply in some regions and seasons and because the required diversion projects would be harmful to the environment and to northern communities (Environment Canada 1987). An exception would be allowed, however, for small-scale exports that would be regulated closely in cooperation with provinces. To put its words into action, the government made a commitment to "strengthen federal legislation to the extent necessary to fully implement this policy."

The immediate public reaction to the federal policy statement was positive. It appeared that the only remaining task was to reinforce the policy on export with legislation. At a leisurely pace, staff began

drafting a bill to ban the export of water. In the spring of 1988, staff went into overdrive.

The reason for this acceleration of activity was mounting criticism that the language of the draft Free Trade Agreement would give the United States unprecedented access to Canadian water resources, notwithstanding assurances to the contrary in the Federal Water Policy. Although the Government of Canada repeatedly denied this charge, the heat was turned up during the summer of 1988 as widespread drought gripped the continent and 13 southern U.S. senators led an abortive effort to have the U.S. Army Corps of Engineers triple the diversion of water from the Great Lakes at Chicago to keep barges afloat on the Mississippi River (Sasser et al. 1988).

In response to these events, on August 25, 1988 the federal Minister of the Environment, quickly tabled for first reading in the House Bill C-156, to be known as the *Canada Water Preservation Act*. The bill would have prohibited, without exception, any export, or diversion into boundary waters for the purpose of export, of water above the average daily rate of one cubic metre per second or annual volume of 20,000 cubic decameters, a very conservative allowance for most parts of Canada. The bill permitted the Minister to consider licensing exports below this level, after undertaking environmental impact assessments and setting terms and conditions. His duties could be delegated to a province to carry out. The bill would not apply to bottled water (Canada 1988).

Within a few weeks of introducing this bill, and before its terms could be considered by a Parliamentary committee, the federal government called a general election. Bill C-156 died on the order paper. Although some critics had raised concerns about the ability of Bill C-156 to prevent the export of water, enough voters were reassured by the government's actions to help the Conservatives win re-election with a mandate to proceed with free trade. The government achieved what it most wanted, and the Canada-United States Free Trade Agreement took effect on January 1, 1989. The *Canada Water Preservation Act* bill, however, was never reintroduced to Parliament. Water export opponents were back to square one and, in terms of protecting Canada's water, worse was yet to come.

In 1993, the Liberals under Jean Chrétien were elected in Ottawa. Having opposed free trade with the United States when in Opposition,

the new government then abruptly reversed itself and embraced negotiations to include Mexico and to extend the scope of trading rules in a North American Free Trade Agreement (NAFTA). Like the Conservatives before them, the Liberal government declined to negotiate an exemption for freshwater in the text of the trade agreement, even though exemptions had already been negotiated for raw logs and unprocessed fish. Instead, the Prime Minister's Office issued a media release stating that the three governments were in agreement that nothing in NAFTA would oblige the water belonging to any of the parties in its natural state to be exported (Canada 1993). Unfortunately, the joint agreement appended to the media release was not signed. How such a statement would be treated in a trade panel hearing is open to question.

Provincial Complications

While the Government of Canada maintained all along that its participation in free trade negotiations was no threat to Canadian sovereignty over our water resources, it was slow to respond to related developments at the provincial level. None of the provinces had opposed the Federal Water Policy of 1987 or the provisions allowing for small-scale water export in the federal Bill C-156. Things appeared fine – that is, until four provinces began to flirt with entrepreneurs intent on shipping Canadian water to foreign markets.

In 1986, the Province of British Columbia (B.C.) quietly decided that it would permit entrepreneurs to export small volumes of freshwater from its coastal streams by marine tanker. One of its six licensees, Snowcap, eventually partnered with an American firm, Sun Belt, and in 1991 they found a market in Goleta, California, that was suffering from drought. Before they could sign a contract to ship water to Goleta, however, the B.C. government found itself embroiled in controversy, as the news about Snowcap triggered a flood of new export applications. These in turn alarmed environmentalists who were worried about the cumulative effects of further bulk water removals on the marine environment. In response to the public uproar, the Province placed a moratorium on new or expanded licenses. As a result, Snowcap could not obtain enough additional water to satisfy its contract and was reimbursed by the Province for its out-of-pocket expenses. However, the Province refused to recognize Sun Belt, which was not named on the license. Sun Belt's American

owner threatened to sue Canada under Article 11 of NAFTA but has since apparently given up his action. Unable to receive any assurance of federal legislation opposing bulk water exports, B.C. eventually passed its own *Water Protection Act* in 1995.

Meanwhile, entrepreneurs were scouting coastal regions in the Atlantic provinces and Quebec. One of them prevailed upon the Newfoundland government, which in 1996 agreed to adopt a policy allowing export of freshwater in bulk by ship, subject to conditions of environmental assessment and benefits to the provincial economy. The Government of Quebec was also engaged in reviewing water export opportunities and their competitive position vis-à-vis world markets. It was the Nova incident in 1998, however, that brought all of these marketing explorations to a halt.

The *Sault Ste. Marie Star* reported on April 25, 1998 that a regional office of the Ontario Ministry of the Environment had granted a permit to a local company, Nova Group, to remove 10 million litres of water a day for up to 60 days a year from Lake Superior for purposes of export to Asian markets. No other government on either side of the international boundary had been consulted about the proposal, even the Ministry's sister water agency, the Ministry of Natural Resources. The volume of water to be removed was an insignificant fraction of the lake, and the economics of the venture were dubious. The problem was the setting of precedent: governments at all levels in Canada and the United States were concerned about other entrepreneurs following suit and the much larger cumulative effect of such initiatives on the Great Lakes-St. Lawrence River system. Embarrassed, Ontario took steps to rescind the permit. Ottawa and Washington agreed on a joint Reference to be given to the International Joint Commission to investigate the implications of consumption, diversion, and export on Great Lakes waters (IJC 2000). And the Government of Canada decided it must do something to address this longstanding issue on a broader scale and for the longer term.

The federal Cabinet agreed to Foreign Affairs Minister Lloyd Axworthy's recommendation in the wake of the Nova incident that all bulk water export should be prohibited, not just large-scale export. When water officials from Environment Canada met with Foreign Affairs to discuss how to proceed, however, they were shocked to hear from trade lawyers and trade policy experts in that department that they could not adapt Bill C-156, the *Canada Water Preservation Act*, for

the purpose of legislating a prohibition on water export from Canada. The reason? Neither NAFTA nor the World Trade Organization would tolerate a country restricting water explicitly for use within national boundaries. This would be trade discrimination.

This left Environment Canada officials with little recourse other than to propose a different basis for protecting Canadian freshwater. In essence, they chose a watershed approach – to use major watersheds or drainage basins as the geographical basis for protecting Canada’s freshwater resources. Protecting water within natural rather than political boundaries – regardless of whether a proposal aims to divert water within Canada or outside of it – may well avoid the argument of discrimination that could lead to international trade challenges. But if federal legislation along these lines could satisfy international trading rules – by no means certain – would it also be acceptable to the provinces which, after all, are the primary managers of water in Canada? Federal officials thought it would probably not be acceptable to the provinces. So to provide a workable interpretation of constitutional as well as trade law, the federal government proposed a cooperative approach, in which the provinces (and territories) would enact or amend their laws or regulations to prohibit bulk water removal from watersheds within their jurisdictions, and the federal government would enact amendments to its *International Boundary Waters Treaty Act* to accomplish the same purpose within the Canadian portion of boundary waters. This strategy was announced by the Government of Canada (Canada 1999), and all senior governments except for New Brunswick (not an obvious target for water export) have since addressed the issue in one way or another, albeit reluctantly on the part of some provinces. This is where matters stand today.

Unfortunately, this cooperative approach it has not produced the desired outcome. Some of the provincial governments chose to use political, rather than watershed boundaries in their laws and regulation. Others decided to use both, probably exceeding their jurisdictional competence (Boyd 2003). Quebec decided not to prohibit interbasin diversions for hydro projects; Alberta, Manitoba, and Nova Scotia elected to enable their Cabinets to make other exceptions to the prohibition against crossing watershed boundaries; and so on. An additional vulnerability of this voluntary arrangement is that, as resource owners, any of the provinces can break ranks at any time to further their own trade interests. The Provinces of Quebec and

Newfoundland have already indicated that they might do so and have expressed interest in shipping water in bulk when global prices rise sufficiently high. All in all, this cumbersome and unstable arrangement is unlikely to hold together for long.

Experience over the past two decades suggests that the Government of Canada has placed so much emphasis on trying to persuade Canadians that they still have sovereign control over their water resources (regardless of the rules of NAFTA and the World Trade Organization), that it has lost sight of what is now emerging as a more important question: Can the Government of Canada overrule provincial governments that decide to act independently in their own interests, on a matter of national importance and public will?

The Government of Canada has seldom challenged the way provinces manage their water resources. Even in the case of interjurisdictional waters, federal leadership in resolving conflicts is less apparent than in the past. From a constitutional perspective, according to some legal experts, Parliament can pass legislation regulating the export of water from Canada pursuant to its jurisdiction over international trade, just as it regulates energy exports under the *National Energy Board Act* (Boyd 2003). In a matter of national concern, for “peace, order and good government,” the federal government may have authority to overrule the rights of provinces to exploit their water resources as they see fit (Saunders and Wenig 2007). But under what circumstances would the federal government actually move to do this? This is a legal question only in part. Pursuing this course of action for the sake of protecting Canadian waters from bulk export would take political determination, for which Ottawa has demonstrated neither the capacity nor the interest.

After years of deferring to provincial water management, and downplaying its own responsibilities with respect to interprovincial and international waters, external trade and commerce, fisheries, navigation, aboriginal peoples, and federal lands, the Government of Canada seems almost to have drifted into irrelevance on the water file, sitting on the sidelines as each province plays its own cards and the public waits in vain for any sign of leadership at the national level. The continuing failure to resolve the water export issue is attributable, unfortunately, not just to timidity but also to outright deception on the part of successive federal governments.

For both the Mulroney and Chrétien governments, the opportunity to substantially increase trade in resources and manufactured goods with the United States was clearly worth the risk to Canada's freshwater resources. There is no reason to think that the current government sees it any differently, considering how strongly it supports U.S. positions on a wide range of international issues. As recently as this spring, a Government member of the Standing Committee on International Trade complained that an Opposition motion to have a formal letter of agreement with the U.S. and Mexico to exclude bulk water from NAFTA "would put \$600 billion in trade at risk" (*Ottawa Citizen* 2007). So much for the Conservative Party's 2006 election promise to ban interbasin water diversions.

There is no longer much doubt that the Government of Canada has, for the last two decades, looked at the water export issue very differently than the Canadian public. For Ottawa, it has not been about exchanging water for revenue, but using water as a lever to gain access to the huge U.S. market for Canadian producers. Alberta's energy resources had been used in the same way decades earlier, without public deception. Seen in this light, it becomes clear why Ottawa refused public demands to negotiate an exemption for water resources in both the Canada-United States and North American Free Trade Agreements, despite its excuses that it was "too late in the negotiation process" and anyway it was "unnecessary" to do so to protect Canadian sovereignty over water. Ensuring that water would not be on the negotiating table was not worth the risk of losing the main prize – increased trade. The government was also understandably wary of risking its political future by admitting where its priorities lay. Ambiguity became its refuge. For its part, the United States has long been aware of sensitivities on this issue in Canada and has refrained from joining in the debate.

It is something of a miracle that none of the export proposals to date, from inside or outside the country, has actually resulted in bulk water movements beyond Canada's borders. Most of the credit must go to environmental organizations and to a vigilant public, some to the unconvincing economics of bulk water export proposals, but none to Canada's senior governments. This fortuitous situation, and the absence of precedents for exporting water, will not last indefinitely. While it is likely that one or more of the provincial governments may move first to allow the export of water, over the long term, the United States is more likely to force an accommodation from Canada.

North American Integration

When NAFTA came into effect in 1994, it set in motion a process for the three countries to develop common standards in a number of areas, including natural resources. This process broadened with the creation in 2005 of the Security and Prosperity Partnership (SPP). The SPP agenda focuses on six critical categories; labour mobility, competitiveness, energy, environment, security, and border infrastructure and logistics. The environment category includes fresh water.

Precisely what has been discussed behind closed doors at SPP meetings attended by high-level government and corporate interests is not clear. Government officials insist that water is not on the table for SPP negotiations, and that is probably true, at least in the short term, because of the intense opposition this has already encountered in Canada.

The concept of integration, however, raises questions where three countries are equal in name, but one is at the centre geographically, and is far more powerful than either of its neighbours. It is relatively easy to imagine increased integration of Canadian resources and Mexican labour into the American market. It is easy, too, to believe that the harmonization of standards and regulations for goods and services would tend to converge toward those of the dominant partner and its transnational corporations. The transition to a more integrated North America is largely complete for Canada's energy: we have already committed more than 50 percent of our oil and gas production to U.S. markets. Water may be next on the agenda.

Before much longer, Canadians will have to decide. How much do we value our water, and, more than that, our sovereignty? We can only hope that the next time Canadians go to the polls, voters will be better informed by the Government of Canada than they were in the last "free trade" election.

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