

Negotiating Water Privately: Business as Usual?

Paula Duarte LOPES

The Brookings Institution
1775 Massachusetts Ave. NW
Washington DC 20036
plopes@brookings.edu

and

Department of Political Science
The Johns Hopkins University
3400 N. Charles Street
Baltimore, MD 21218
pdl@fe.uc.pt

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Introduction

The puzzle addressed in this paper is associated with the Canadian decision to prohibit bulk water exports¹. Private agents had developed projects, within British Columbia and the Newfoundland and Labrador provinces' legal framework, to export bulk water to the United States of America (USA). The British Columbia project initiated in the late 1980s, and the Newfoundland and Labrador one started already in the mid 1990s. Both projects were prohibited in 1996 and in 1999, respectively, by provincial legislation.

This case is striking if one takes into account Canada's commitment to a neoliberal economic framework. Canada was a signatory to the General Agreement on Trade and Tariffs (GATT, 1948) and became a member of the World Trade Organization (WTO, 1995). It joined the United States of America (USA) on a Free Trade Agreement (CUSFTA, 1989), and lately became a party to the North-American Free Trade Agreement (NAFTA, 1994). On a more substantial level, Canada's economy reflects the adoption and promotion of policies in conformity with its international trade commitments. In 2002, Canada's trade in goods as a share of its Gross Domestic Product was 67.1% (WB 2004). The United States of America is Canada's most important trade partner. The USA receives 82% of Canada's total exports and is the origin of 69% of its imports (CANSIM 2004). Moreover, the Canadian government has promoted and continues to encourage private sector participation in its economy. Consequently, its decision to prohibit bulk water exports does not seem to be consistent with Canada's economic profile.

Why was not water treated as any other natural resource? Why were the projects initially allowed to be developed? Why did Canada, through its Provinces, reverse that initial permission and prohibit any future attempts to export bulk water? This paper will answer these questions by going beyond the trade debate on whether water is an economic good or a commodity. Water is not just like any other natural resource. Its governance regime and property rights system have remained almost unaltered throughout history. Only very recently, have those governing principles been challenged. This situation has created a growing tension between public and private concepts of resource management. Different countries have addressed this tension in different ways. Canada unfolded itself in political debates and initiatives to create a unified solution to bulk water exports, without, however, re-defining water's property rights or governance regime. The unified nature of the solution is still to be tested. So far, no province has gone back on its decision to prohibit bulk water exports, but a couple has declared they will keep open-minded. On

¹ Bulk water exports are, in this paper, understood as the selling of bulk water to another country by truck tankers, ships, floating bags, pipes or canals. Inter-basin transfers, even if international, are not necessarily bulk water exports; similarly, bulk water exports are not necessarily inter-basin transfers

the other hand, water's property rights remain unaltered, and its governance regime also remains the same, albeit with a minor crucial adjustment.

The paper is divided in three sections following different frameworks of action in relation to water politics²: the hydraulic mission, the economic mission, and the institutional mission. The first section sets the stage by describing the governance system in place before the bulk water exports debate started. Following, the private bulk water exports projects are outlined. A third section provides an analysis of the dynamics underlying the Canadian decision to prohibit bulk water exports, at both federal and provincial levels. Finally, Canada's decision is analyzed based on the federal and provincial water status and governance regime.

Hydraulic Mission Framework

The industrial, agricultural, and demographic revolutions together determined a drastic increase in water consumption, and large complex water diversions had to be constructed to assure a stable water supply to all these competing uses. This first period is best described as a framework of action dominated by a hydraulic mission. This mission implied a supply-side approach, where water was taken where it was needed. It was a period of major infrastructure building – big dams, water diversions, hydropower plants, irrigation schemes. Supply relied on two basic strategies: storage and piping.

Canada's water landscape undeniably reflects this hydraulic mission. Policy makers and engineers have managed to stretch Canada's surface water by constructing dams and diversions, in order to assure supply when and where it is most needed (Day and Quinn 1992: 9). In 1992, the 54 diversions identified by J. C. Day and Frank Quinn exceeded in volume those of any other country in the world (1992: 3). An overwhelming majority of these were for hydroelectric power generation. During the 1960s mega diversion schemes were proposed to expand this hydraulic mission into the United States of America (USA). The two most publicized ones were the North American Water and Power Alliance (NAWAPA) with storage in the Rocky Mountain Trench, and the Great Recycling and Northern Development (GRAND) Canal with storage in James Bay and the Great Lakes. These mega diversions were highly contested, especially on the Canadian side, and eventually their interest died off.

This framework of action started around the Industrial Revolution until the 1970s-1980s. Environmental negative impacts associated with diversions and dams, as well as growing voiced human costs, and consequent increased financial expenditures, implied a decline in long-distance water diversion's interest. This was most noticeable in developed countries. Many developing countries continue to operate within the hydraulic mission framework of action, where water is a major means of production and development. It should be noted that the hydraulic mission, even for the countries that have moved on, still lingers, as engineers, visionaries, industrialists, entrepreneurs, and regular citizens claim the right to a regular water supply wherever they decide to locate themselves.

² This conceptual division was inspired by J. A. Allan's article (2004).

The hydraulic mission period was essentially carried out by the states (or some level of government). They, and only they, had the authority to allow these projects to be implemented and to actually implement them. Historically, water has been essentially a public good, under some level of government's jurisdiction. Moreover, for the longest time, water has been excluded from the economic sphere. Water was considered to be 'God given' or a 'gift from nature', just like air, consequently not suitable to individual appropriation. In addition, the natural and renewable character of water created a perception of abundance, which excluded its management from developing within a market framework. The combination of this primordial feeling and water's perceptual abundance precluded it from being treated as an economic good. As a result, more often than not, water has been considered a public good by society, and, therefore, predominantly managed by the state.

Internationally

Internationally, this has meant that water resources have been a prerogative of states' negotiations and, consequently, have been governed by international treaties among riparians. These negotiations and treaties have been influenced by some principles which gained early consensus through practice. First, only riparian states, as far as no agreement to the contrary existed, have had any legal rights to use the waters of a transboundary body, such as a river, lake or aquifer. And second, downstream countries have been entitled to a share of transboundary waters. This last principle consigned a sort of 'natural right' to the lower riparian to a minimum quantity of water needed for its survival and development. The recognition of this 'natural right' implied that lower riparians did not have to compensate the upper riparians for the water flowing into their territory. This point is corroborated by an extensive research and analysis on side-payments conducted by Dinar (2004) on international water treaties. The public nature of water internationally goes beyond political definitions. The two most important issues on riparian agendas are water flows and quality, which constitute economic public goods. Consequently, the states' involvement in transboundary waters management is uncontested by private and public agents alike.

Canada's relation with the USA reflects exactly this riparian cooperation. Since 1909, the Boundary Waters Treaty has governed these countries transboundary water relations. The International Joint Commission (IJC) – a bi-national organization – was created by this treaty to assist both governments in solving and finding solutions to issues arising from the use and management of "the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the [USA and Canada] passes" (USA and Canada 1909: Preliminary Article). And, within this cooperative framework, both the USA and Canada have shared and managed jointly their transboundary waters. The USA has never compensated Canada for the water flowing downstream, and the flows are directly negotiated between the two governments based on the reviews and recommendations of the IJC. Although water relations between the two countries are within their government's responsibilities, both countries have opened their decision-making processes to the public, especially to riparian citizens.

Domestically

Domestically, the state has not only been the designated but also the default actor governing water resources. “For a variety of reasons, society has not chosen the use of markets to balance water supply and demand or to allocate supplies.” (Gibbons 1986: 2). The state has had that mandate, and the terms of its mandate have basically depended on the national legal system of water resources. Despite the diversity of the existing legal systems, “there has been an evident tendency towards [the] socialization of water resources of general interest” (Popov 2001: 2). European countries have been greatly influenced by the water principles and institutions of ancient Rome, and so have the countries whose legal systems they have influenced. In the case of civil law legal systems, most water has been defined as public, either owned by the state or by a public institution³. Under the common law system, water has maintained the *res communes* nature defined by the Romans. As far as they were concerned, “[t]here [could] be no private ownership right in the running water of a stream, river or natural channel, as such water [was] regarded as transient and fugitive.” (Caponera 2001: 3) Water’s public or communitarian nature is also part of several other legal systems, such as the Chinese, the Muslim or the former-Soviet one.

Canada’s water is under an intricate web of jurisdictions – federal and provincial – and of legal traditions – common law in the eastern provinces, civil law in Québec, and prior appropriation doctrine in the western provinces. The Canadian constitution lays out the division of powers between the federal and provincial governments with respect to water management. The Federal state has legislative authority over navigation, shipping and fisheries, and the implementation of international treaties, such as the Boundary Waters Treaty. Provincial authority derives from other constitutional legislative headings, such as the management and sale of public lands or of local and private matters⁴. The federal government also has jurisdiction, similar to what happens in the USA, to manage water resources shared by two or more provinces. This legislative area has, however, never been actively exploited. The federal government has issued policy documents – Canada Water Act (1970) and Federal Water Policy (1987) – in an attempt to better define its role on water management, but there has been no concrete follow-up or implications. Even so, the 1987 document laid down the federal government’s philosophy and goals for the nation’s freshwater resources. And, with respect to interbasin transfers, the federal government declared it would “take all possible measures within the limits of its constitutional authority to prohibit the export of Canadian water by interbasin diversions” (Environment Canada 1987: 24), which unequivocally ends the hydraulic mission phase in Canada.

³ Civil law legal systems also define water as being private in the case of wells, closed lakes or ponds, or groundwater associated with one’s land. This definition created significant constraints on the states’ attempt to manage water resources. As a result, in recent years, countries, such as France, Spain and Italy, have operated legislative reforms to bring all water resources under state ownership and made their use subject to administrative grant (Caponera 2001: 3).

⁴ Additional legislative powers were given to the provinces regarding non-renewable resources in 1982.

Constitutional proprietary rights also define the authority sharing between the provincial and the federal governments. The Constitution states that the public lands and resources brought by the provinces when they entered the Confederation of Canada remain provincial. These include water resources. The federal government has authority over public lands and works (and their associated water resources) anywhere in Canada, as well as over the public lands and resources of the Northwest Territories, where the federal Crown is still the dominant owner⁵. One last level of government authority should be mentioned – the municipalities. They are not constitutionally recognized, but they are usually responsible for water services.

Water management is further affected by the fact that the legal traditions influencing each province and the federal government differ. The eastern provinces, with the exception of Québec, and the federal government follow a common law riparian doctrine. Water resources are public property, they under the Crown's jurisdiction. In Québec, the French inheritance has dictated a civil law influence over its legal system. Consequently, water resources are mainly state property, but there are some instances where private property is possible. Finally, the western provinces, similarly to the western American states, have adopted a prior appropriation doctrine. Prior appropriation implies that water allocation is dependent not only on the existing provincial criteria, but also, and more importantly, on the consent of already existing water rights holders⁶.

The influence of these different doctrines can be observed in the distinct provincial legislative frameworks developed for water resources management. So, for instances, although water resources property is vested in provincial governments, in both Newfoundland and Labrador (Newfoundland and Labrador 2002: Art. 9(1)) and British Columbia (British Columbia 1996: Art. 2(1)), their permit issuing systems are different. In Newfoundland and Labrador, new water permits can only be issued if they do not cause an "adverse effect on water" (Newfoundland and Labrador 2002: Art. 9(3)), irrespective of existing water permits. Additionally, the type of water use also contributes to the issuing decision. For example, a water permit for domestic use has priority over a new or existing permit for agricultural use. In British Columbia, on the other hand, due to the prior appropriation doctrine, each new water permit has to take into account the existing water rights. A new water permit, for whatever purpose⁷, cannot be issued, if it may damage the rights inherent to existing water permits. British Columbia gives all property owners equal access to water, but on a first come, first served basis. The system in British Columbia requires keeping an accurate and updated registry of rights'

⁵ It should be noted that significant authority has been and continues to be devolved to territorial governments and to structures set up as the result of land claims agreements with aboriginal peoples. As a result Nunavut and Yukon have gained provincial status in 1999 and 2004, respectively. Therefore, these two new provinces are now proprietors of their public lands and resources, including water.

⁶ The application of the prior appropriation doctrine seems to be stronger in the western American states than in their Canadian counterparts.

⁷ If two water permits are submitted or issued on the same date, British Columbia, similar to Newfoundland and Labrador, also has a ranking list of water uses, where, for example, domestic use comes before irrigation and irrigation before conservation. These criteria are always applied in addition to the prior appropriation doctrine.

precedence. Consequently, British Columbia was one of the first provinces in Canada to have a cohesive and structured water permits issuing system.

Despite these doctrinal differences, water resources are firmly under public jurisdiction in Canada. Water rights are inherently associated with land property, and every province has a water permit issuing system of some kind.

Negotiating Water Privately: Economic Mission Framework

The transition in the late 1970s from embedded liberalism (Ruggie 1981) to a neoliberal economic phase affected all areas of policy, including water. The thrust for privatization and liberalization set the tone of this new phase. Economic objectives, standards, methods and theories became the conceptual framework for policy making in most developed countries⁸. The water sector problems – waste, shortages, and infrastructure – became explained in terms of public versus private sector. Many economists believe that the public sector is inefficient and that the world, on average, would be better off, if only the state would keep out from economic activities and let the market manage resource allocation. Following this logic, then, having water services under public hands was a major part of the problem. And the solution, therefore, consisted in private sector participation and market-based instruments, such as water charges. This change in policy would not only bring a more efficient water allocation based on prices, addressing waste and shortages, but it would also implement a cost-recovery principle, which would address the lack of funds to renovate and construct new infrastructure.

Although this change of framework did affect Canada's water sector (several water companies were opened to private sector participation), it did not shape the water export cases to be analyzed in this section. It did nevertheless set the spirit for discussions on economic issues. The 1980s and the 1990s were characterized by privatization and liberalization policies around the world. Moreover, these decades were especially marked by free trade debates on several fronts in Canada: the CUSFTA (1989), the NAFTA (1994) and the WTO (1995). And, in that sense, this economic mission framework did, first, create the mindset for water exports, and then second, fueled the debate over water exports.

Federal Government

Water exports understood as large-scale diversions have been a subject that has engaged Canadians in a number of occasions, starting in the 1960s as mentioned above. "These proposals have waxed and waned, depending upon the vagaries of politics and weather". (Saunders 2003: 92) And although the 1987 Federal Water Policy document did define the government's position against Canadian water exports by interbasin diversions, the issue did resurface, nevertheless, during the free trade negotiations between Canada and the USA. In effect, in 1988, during the federal election campaign, water exports were discussed within the CUSFTA negotiations. And the same debate took place during the

⁸ Developing countries were pushed and recommended to adopt the same framework as a condition for international aid.

subsequent NAFTA negotiations. In this second instance, Canada insisted on explicitly leaving water out of the NAFTA. And for that effect, a joint statement by the governments of Canada, the USA and Mexico was issued in 1993 clarifying water's standing within the free trade agreement.

The NAFTA creates no rights to the natural water resources of any Party to the Agreement.

Unless water, in any form, has entered into commerce and become 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. (Statement by the Governments of Canada, Mexico and the United States 1993)

Interpretations, nevertheless, differ. Some defend this statement clarifies the spirit of NAFTA's application towards water resources, and should leave no doubts as to water resources' standing within the agreement. Others, on the contrary, accuse the joint statement of not being binding and point out the fact that, according to them, the joint agreement actually places water resources under NAFTA, and any trade agreement, if and when it starts being traded. Consequently, the possibility for water exports was left on an ambiguous note.

Provinces

This was clearly visible at the provincial level. Several Canadian entrepreneurs in various provinces actively sought foreign markets for fresh water. These projects usually entailed small volumes of bulk water (when compared to the large-scale projects of the 1960s). Since the water was to be exported by ship tankers, the transfers were easily interruptible if needs be. Consequently, some provinces allowed for the possibility of water export permits. The underlying reasons were jobs and revenues (business). Looking back, three specific projects were of utmost importance to the debate and subsequent decisions taken both at the provincial and federal levels.

The first one took place in British Columbia. This province was the only one which approved and established a regulatory process for fresh water exports by marine transportation (Day and Quinn 1992: 36, note a). In 1990, Sun Belt Water Inc. from Santa Barbara, California (USA) and Snowcap Waters Ltd. from Fanny Bay, British Columbia "formed a joint venture partnership to develop opportunities in the emerging bulk water industry." (Sun Belt Water Inc. 1998: 8.) Snowcap held one of the six water export projects already licensed (many more applications had been submitted). In 1991, Sun Belt and Snowcap won the international tender to supply fresh water by tanker to the Goleta Water District in California.

The second project had the Great Lakes as the epicenter. In 1998, Ontario granted an export permit to the Nova Group from Sault St. Marie to ship water from the Lake Superior to Asia (Edit Hansard Number 145 1998: 1830).

Finally, the third project was developed in Newfoundland and Labrador. Canada Water Incorporated (McCurdy Group) from Gander, Newfoundland and Labrador, proposed to export water from Lake Gisborne to a New York based bottling company. The project had been developed within the policy guidelines for the sale and export of water issued by the Department of Environment and Labour in 1996 (W.R. 96-05). The sources of water for the purposes of sale in the province and export outside the province included lakes, ponds, streams, rivers, springs, groundwater and any bodies of water defined in the Environment Act (1995). It also included municipal water supply systems and icebergs within the jurisdiction of the province. The McCurdy Group, consequently, developed its project, following the criteria and procedures set out by the province. In 1999, the Newfoundland and Labrador government, under the provincial Environmental Assessment Act, issued a regulation releasing the Gisborne Lake Water Export Undertaking from further environmental assessment subject to obtaining all the federal and provincial licenses and documents necessary to implement the project (Newfoundland and Labrador 1999: 2. and 3.). The project has basically been approved.

Institutional Mission Framework: Business as Usual?

The Canadian water export projects and their related debates triggered a phase of unprecedented political and institutional dynamics concerning water resources: public hearings were held, negotiations took place between federal and provincial governments, joint declarations were publicized, and legislation was enacted.

Probably the most publicized case was the British Columbia one. Although British Columbia was one of the first provinces to have a regulatory system allowing water exports, it was also the first province to pass legislation prohibiting it. Sun Belt and Snowcap had arguably met all the requirements for the license to come in effect. The government of British Columbia, however, facing a public outcry and a fierce opposition from anti-free trade non-governmental organizations, besides Ottawa's frowning, decided in 1991 to issue a moratorium on the issuance of new or expanded water export licenses. After having won the tender for supplying the Goleta Water District in California, Sun Belt and Snowcap applied for an expansion of the water export license, which Snowcap already had. This moratorium suspended the whole process, and Sun Belt and Snowcap were left with a contract, but without enough water to execute it. The moratorium was later extended and then made permanent. In 1996 came in effect British Columbia's Water Protection Act, where water exports are explicitly and clearly addressed and their policy is reversed (British Columbia 1996). It is prohibited to remove bulk water from the province of British Columbia. Bulk water is defined as water removed in containers bigger than 20 liters. Old licenses, however, were not revoked, but new or extensions of old licenses were barred. Consequently, Sun Belt and Snowcap lost their contract with Goleta Water District.

This is probably the most publicized case in Canada, because, in 1993, Sun Belt and Snowcap sued the British Columbia government for damages. In 1996, British Columbia settled with Snowcap for \$218,000. Sun Belt, however, did not reach a settlement and brought an arbitration claim against Canada, demanding compensation for losses of profit, and restricted market access and access to resources. In 1999, Sun Belt filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA⁹, with the United Nations Commission on International Trade Law (UNCITRAL) (Cornell University n/a). Besides compensation, Sun Belt requests that British Columbia reverses the prohibition on bulk water exports. Based on the information available, this case has not proceeded to arbitration thus far. Nevertheless, the prospect of having it analyzed under a trade regime creates the possibility for water in its natural state to be considered a matter of international trade and, consequently, a commodity.

The Nova Group case although less publicized, essentially because it was practically 'silenced before it could talk', is possibly the most crucial one for Canada's water resources management policy. Despite the water debates witnessed through the 1988 election campaign and the CUSFTA and NAFTA negotiations, the federal government had kept itself insulated from the political dynamics associated with the water exports issue. Water resources were a matter of provincial jurisdiction and there didn't seem to be anything to be concerned about. It was the Nova Group water export permit, which catapulted the issue all the way to the heart of the federal government. Promptly, damage control was done and the permit was annulled. Nevertheless, the federal government went into a political frenzy in Ottawa and with the provincial governments, in order to find a definite solution to the problem. But why were bulk water exports a problem? Since legal opinions differed on the applicability of Canadian international trade commitments, Ottawa did not want the issue to resurface every time an individual applied to a water export permit. Moreover, if someone managed to obtain and exercise it under the radar, starting to internationally trade bulk water, then the joint declaration issued in 1993 would have not effect. The Canadian federal government needed a definite but safe way out.

This situation prompted the federal government to take an explicit position on bulk water exports. Hence, in 1999, the Canadian Foreign Affairs and the Environment Ministers announced a strategy to prohibit the bulk removal of water, including removal for export, from major Canadian water basins. The strategy included three distinct elements launched in two fronts (Johansen 2004 [2002]). Domestically, the government proposed a Canada-wide accord on bulk water removals. This strategy recognized the provincial primary responsibility for water management, but stressed the need for a coordinated and consensual position across Canada to solve the recurring bulk water exports issue. Internationally, the federal government proposed amendments to the International Boundary Waters Treaty Act¹⁰, in order to prohibit bulk water removals from the

⁹ "Chapter 11 establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal." (NAFTA Secretariat n/a)

¹⁰ The International Boundary Waters Treaty Act is the Canadian enactment of the 1909 International Boundary Waters Treaty with the United States of America.

Canadian side of the Great Lakes. Additionally, it proposed a joint Canada-United States of America reference to the International Joint Commission “to study the effects of water consumption, diversion and removal, including for export, from the Great Lakes” (Johansen 2004 [2002]: 2).

Later on that year, the Canadian Council of Ministers of the Environment (CCME)¹¹ released a Canada-wide accord for the protection of Canadian waters, by prohibiting bulk removal of surface and ground water from the Canadian portions of major drainage basins (CCME 1999). By then, only British Columbia (1996) and Alberta (1999) had legislation prohibiting bulk water removals, and Ontario (1999) was in the process of passing its own legislation. Subsequently, in the following years until 2004, one by one, each province and territory passed legislation prohibiting bulk water removals either from major basins, or from the provinces.¹² As for the Great Lakes situation, the IJC’s 2000 Report became a milestone in two aspects. First, the non-renewability of the Great Lakes water was clearly acknowledged and introduced in the water resources management equation. Although the Great Lakes hold around twenty per cent of the world’s fresh water resources, only one per cent of this water is renewed every year. Second, the Report “recommended that governments take a number of specific measures to ensure that removals of water from the basin and consumptive uses in the basin will not endanger the integrity of the Great Lakes Basin ecosystem.” (IJC 2004: 1) Finally, Canada, in tune with the IJC recommendations, passed legislation (Bill C-6, 2002) amending the International Boundary Waters Treaty Act, by prohibiting the bulk water removal of water out of the Canadian portion of boundary water basins between Canada and the United States of America.

While all these political and legislative initiatives were taking place in Ottawa and some other provinces, in Newfoundland and Labrador, the government was not thrilled with the ban or with the subsequent developments. The Gisborne Lake Water Export project was perhaps the most disputed project, in the sense that the provincial government was for the project and, at a certain moment, defied the Canada-wide accord in search for a Newfoundland and Labrador independent decision. The 1999 regulation releasing the McCurdy project from further environmental assessment was issued the same month the CCME released the Canada-wide accord for the prohibition of bulk water exports. Nevertheless, the following month, the government of Newfoundland and Labrador implemented the Water Resources Protection Act, which prohibited the export of bulk water¹³ (Ministerial Committee Examining the Export of Bulk Water 2001: 2). In 2001, a new government took office and the bulk water exports’ file was once again opened. A Ministerial Committee was set up to examine the export of bulk water from

¹¹ The Council is comprised of environment ministers from the federal, provincial and territorial governments. These 14 ministers normally meet at least once a year to discuss national environmental priorities and determine work to be carried out under the auspices of CCME. The CCME works to promote effective intergovernmental cooperation and coordinated approaches to inter-jurisdictional environmental issues. Nonetheless, each jurisdiction decides whether to adopt CCME proposals. (CCME n/a)

¹² For a complete outline of all the initiatives taken on this matter across Canada see (Johansen 2004 [2002]) and (Quinn 2004)

¹³ Bulk water exports were allowed in containers of 30 liters or less.

Newfoundland and Labrador. This examination included an economic assessment report. The objective was to decide if bulk water exports should or should not be prohibited, but based on economic, environmental and legal evidence, and not on the federal government's position. The Committee's conclusions were as follows: there is no public policy reason not to proceed with bulk water export; there is also no legal impediment to a bulk water removal project; there is no compelling environmental reason not to allow such a project to proceed; and, with respect to impacts on other jurisdictions, there are differing legal opinions. (Ministerial Committee Examining the Export of Bulk Water 2001: 12) Nevertheless, the economic assessment report concluded that the economic viability of such a project was, at that time, marginal. Consequently, the government decided not to rescind or amend the province's 1999 legislation prohibiting bulk water exports. In fact, in 2002, Newfoundland and Labrador enacted the Water Resources Act where removal of water from the province is prohibited (Newfoundland and Labrador 2002: Art. 12(2)).

Business as Usual? – No.

Canada is an extremely interesting case because if, on the one hand, it decided to impede private business from exporting bulk water, on the other hand, the debate did not result in any explicit legislative change in terms of water resources property or governance regime. And it is water's property rights system and governance regime, which directly influence any government decision to open water services (or any other sector for that matter) to private sector participation and, most importantly, which determine the terms of that 'opening'.

In Canada, water resources are the Crown's property. Consequently, water resources are public property, meaning water is a "special form of property that includes property authorizations and surveillance right[s] reserved to government bodies" (Popov 2001: 3). Government agencies control the purpose for which water is used, but they cannot dispose of the water property rights. The private projects did not challenge or undermine this system. The debate ensued, legislation was enacted, policies reversed, but water's property rights system across Canada remained unaltered.

Canadian water has been, and still is, under a public governance regime. Again, the projects did not question the nature of the governance regime. They did, however, push the boundaries of that public governance regime to its limits. In economic terms, water is a private good (rival and excludable), which creates a propensity for private agents to act in a market-based framework, disregarding or minimizing water's political public nature. At the same time, government agencies, and often legislators, get easily caught between the economic rationale of water exploitation and management and the public nature of the resource. In many countries, bulk water exports, as well as private sector participation, are new possibilities never faced before. Consequently, these new economic initiatives end up testing the limits of the governance regime in effect.

A public governance regime means water is under government's management. The government defines what can and cannot be done with water, when, how and for how

long. Property rights are, in fact, a bundle of rights (Ostrom 2002), which are disaggregated into different elements, allowing more or less private participation. In Canada, water's bundle of rights allowed for private participation in all of the different components – rights of access, withdrawal/extraction, exclusion, qualified transfer – within a pre-defined time frame and purpose of use. The issue with bulk water exports was rooted in the actual physical water being transported outside Canada. Consequently, the provinces which issued licenses for water exports, in reality, were granting the licensee an extra degree of ownership, which went beyond the public governance regime in effect until that time. Most of water governance regimes assume that water permits granting rights will be exercised in the country and not abroad. So, when bulk water exports or private sector participation projects are implemented, some of these assumptions are strained. The definition of roles, obligations and responsibilities, suddenly becomes ambiguous.

In the Canadian case, the possibility of defining water as a commodity further exacerbated the urgency of taking a decision, a unified federal and provincial decision. The trade commitments Canada has with CUSFTA, NAFTA and the WTO could create a situation, where Canada could not longer maintain the public nature of water and its governance regime. Interestingly enough, Canada decided strategically not to address the trade issue or to decide on the bulk water exports projects from a trade perspective. In order not to raise any trade concerns, Canada chose an environmental approach to the problem. All legislation passed prohibits bulk water removals either from a major basin or from the province, based on environmental concerns and pre-empting any possibility for national treatment breaches or discriminatory complaints. Canadians as well as any other economic agents have to comply with these new rules. Consequently, the government re-stated its authority in terms of water management, re-defining or defining for the first time some of the limits inherent to water rights. This (re-)definition added a new element to the bundle of rights: a geographical limitation, outside which the other elements cannot be exercised. So, in this sense, Canadian water's governance regime was adjusted, although not drastically altered.

Canada's decision to prohibit bulk water exports within an economic neoliberal framework is better explained once one investigates the legal and governing frameworks allowing the projects and then reversing their decision. In France, for instances, the public nature of water resources and its public governance regime is established beyond any doubts, to the point that private sector agents do not even consider the possibility of water exports. Their reasoning for international water transfers is based on solidarity, which is implemented by the expansion of their water services provision, and not business.

The international implications of Canada's decision are significant, since bulk water exports would challenge the two international governing principles in effect to date. First, bulk water exports would allow water from a basin to be accessed and consumed by non-riparians. And second, communities in the downstream country would start paying for extra water from the upper riparian. Despite one's position on these matters, the implications of bulk water exports to international water relations are enormous. If

allowed, bulk water exports would turn every individual, company or country a stakeholder in each country's water management policy. Canada decided not to be the one opening that door. Consequently, for now, international water markets are still very much a subject of discussion and prospective plans.

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