BULK WATER REMOVALS, WATER EXPORTS AND THE NAFTA

Prepared by:
David Johansen
Law and Government Division
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INTRODUCTION

Canada is the largest single owner of fresh water resources in the world. This vast abundance of water has prompted some to advocate its export to water-poor regions, primarily the southwestern region of the United States. The debate over whether to export water from Canada has continued over the past three decades. Although the federal government's policy officially opposing large-scale exports has been in place since 1987, public fears nevertheless continue. These fears have been heightened by concerns of critics over the North American Free Trade Agreement (NAFTA) and its predecessor, the Canada-United States Free Trade Agreement (FTA), which were not in place when the debate over water exports began.

Clashes continue over whether surface and ground water in its natural state (for example, in lakes and rivers) is subject to NAFTA obligations. Some argue that this is the case. At the same time, however, the governments of Canada, the United States and Mexico have expressly stated that the NAFTA does not apply to water in its natural state.

Critics of the *status quo* have called on the federal government to take action to deal with what they perceive to be a serious threat to our water resources. They contend that, not only should there be federal legislation placing an outright ban on large-scale water exports, but that there should also be an explicit amendment to the NAFTA exempting water in its natural state from the obligations of the treaty, although the U.S. might not agree to this.

On 10 February 1999, in response to mounting calls from the Council of Canadians and others that the issue be dealt with, the federal government announced that it would develop a strategy – in consultation with all the provinces and territories – to prohibit the bulk removal of water from Canadian watersheds, whether for domestic purposes or for export. The announcement stressed that the strategy would focus on the protection of water in its natural state as a water management and environmental issue, rather than as a trade issue.

This paper will trace a number of major developments that have taken place in Canada in the past few years with respect to large-scale water exports and, more recently, with respect to bulk water removals, both within Canada and for export. The paper will also examine the issue of whether water is subject to international trade agreements such as the NAFTA.

CONSTITUTIONAL FRAMEWORK

Under the Canadian Constitution, jurisdiction over water is divided between the federal and provincial governments, with some overlapping. The Constitution does not specifically mention water; however, it does deal with some water uses, such as navigation, fisheries and, more recently, electrical energy generation. Most questions of jurisdiction must be inferred from the Constitution's treatment of other issues such as property rights, foreign relations, and international trade. Because the use of water resources has both national and provincial implications, both levels of government may lay claim to legislative competence within their respective spheres.

The provinces generally have authority over the natural resources within their boundaries. Their jurisdiction over water derives from specific clauses in the Constitution that assign them jurisdiction over such matters as property and civil rights within the province (section 92(13)); the management and sale of public lands (section 92(5)); and matters of a local and private nature (section 92(16)). A 1982 amendment to the *Constitution Act, 1867* specifies that the provinces also have some jurisdiction over electricity-generating works (section 92A(1)(c)).

Although water is a natural resource, the provinces' considerable jurisdiction is limited by specific powers assigned exclusively to the federal government. Examples are federal authority over fisheries (section 91(12)); navigation and shipping (section 91(10)); the regulation of trade and commerce (section 91(2)); federal lands (section 91(1A)); Indians and lands reserved for Indians (section 91(24)); interprovincial works and undertakings (s. 92(10)(a)); works "for the general Advantage of Canada" (section 92(10)(c)); and "Peace, Order and good Government" (section 91 opening paragraph). The federal government also has responsibilities for boundary and transboundary waters.

As a result of the constitutional division of powers, a water export scheme would succeed only with the support and cooperation of both levels of government. Except with respect to federally owned or administered lands, the provinces possess a proprietary interest in the water resources within their boundaries and thus have both legislative and proprietary rights to deal with them. These rights are subject to federal authority in certain specified areas, however. For example, an emergency or national interest would justify federal

intervention on the basis of the residual power granted by the "Peace, Order and good Government" clause of the federal declaratory power. Where water is exported from a province, the federal government necessarily becomes involved.

FEDERAL WATER POLICY OF 1987

The then federal Minister of the Environment, the Hon. Tom McMillan, stated the federal government's position on water exports when its water policy was announced in November 1987.(1)

The Minister noted that, although Canadians have an abundance of water, most of it is not in the populated areas of the country, where it is needed and, in those populated areas where it is plentiful, water is fast becoming polluted and unusable. The overall problem is compounded by drought in certain regions of Canada. This is why the Minister stressed that the Government of Canada was emphatically opposed to large-scale exports of our water. Moreover, he pointed out that the inter-basin transfers necessary for such exports would inflict enormous harm on both the environment and society, especially in the North, where the ecology is delicate and where the effects on native cultures would be devastating.

The federal water policy states that, insofar as water exports are concerned, the federal government will take all possible measures within the limits of its constitutional authority to prohibit the export of water by inter-basin diversions, and strengthen federal legislation to the extent necessary to implement this policy fully.(2) This federal water policy continues to apply at the current time.

BILL C-156: CANADA WATER PRESERVATION ACT

On 25 August 1988, the then Minister of the Environment, the Hon. Tom McMillan, tabled in the House of Commons Bill C-156, the Canada Water Preservation Act.(3) The Minister stated that he was tabling the bill to give legal force to the federal government's commitment, expressed in its water policy announced in November 1987, that it would oppose large-scale water exports from Canada. Within weeks of its introduction and before it could be considered by a parliamentary committee, the bill died on the *Order Paper* when Parliament was dissolved on 1 October 1988 on the call for an election.

Had it been enacted into law, Bill C-156 would have prohibited the export from Canada of outright large-scale freshwater exports, such as those involving inter-basin transfers between river systems, and strictly regulated small-scale exports, such as those involving shipments by tanker or pipeline. Very small-scale exports, such as water used in manufactured goods and bottled or packaged

water, would not have been affected by the legislation.

The bill, which would have been binding on not only the private sector but all levels of government, would have provided for the creation of federal-provincial agreements for licensing small-scale exports. The Governor in Council would have been granted broad regulation-making powers respecting licences, such as:

- the procedure to be followed in applying for and issuing licences;
- their duration, renewal, revocation and suspension;
- fees;
- the criteria to be used in deciding whether to issue or renew licences; and
- public hearings and disclosure of information in connection with the issuance, renewal, revocation or suspension of licences.

The Governor in Council would also have been granted the power to exempt from the licensing requirement, by order, "the exportation or diversion of water in the circumstances set out in the order." The above provision would have allowed very small exports to be exempt from regulation, but would in no way have sidestepped the prohibition on large-scale exports.

No export licence would have been granted under the bill without a thorough environmental assessment.

The bill also contained detailed enforcement proposals and would have provided for penalties of up to $1 million and three months in jail for violators.

INTERNATIONAL TRADE CONSIDERATIONS

The issue of whether water is subject to international trade agreements such as the North American Free Trade Agreement (NAFTA) and the World Trade Organization's (WTO) Agreements, for example, the General Agreement on Tariffs and Trade (GATT), has been raised on a number of occasions. The Department of Foreign Affairs and International Trade, in a paper entitled *Bulk Water Removal and International Trade Considerations*,(4) has identified three separate but related issues that arise from that question. They are as follows: whether these trade agreements apply to water; whether allowing the removal and export of some water creates a precedent, compelling Canada or a province to allow the removal and export of all water; and the relationship between bulk water removal and chapter 11 (investment) of the NAFTA. Each of these issues will be examined in turn.

A. Water in its Natural State; Water as a Good

A contentious issue that continues to be debated is whether the United States is entitled under the NAFTA (and was previously under the FTA, which contained similar provisions) to a share of Canada's fresh water supply. The NAFTA generally prohibits restrictions on the exportation of goods. Much of the controversy therefore centres on whether water in its natural state is a "good" under the terms of the agreement. It appears that there has never been any doubt that the NAFTA applies to water in containers such as bottles or water used in manufacturing a product such as a soft drink, because in those cases the water has clearly been transformed into a "good."

Article 201 (definitions of general application) of the NAFTA defines "goods of a Party" as follows:

> **goods of a party** means domestic products as these are understood in the *General Agreement on Tariffs and Trade* or such goods as the Parties may agree, and includes originating goods of that Party.

The FTA similarly defined "goods of a Party" as meaning "domestic products as these are understood in the *General Agreement on Tariffs and Trade*" (GATT), which categorizes its products in its Harmonized Commodity Description and Coding System. The system contains a tariff item for water, which reads as follows:

> 22.01 waters, including natural or artificial waters and aerated waters, not containing added sugar or other sweetening matter nor flavouring; ice and snow.

An explanatory note states that the heading item covers "ordinary natural water of all kinds (other than sea water). Such water remains in this heading whether or not it is clarified or purified."

On the above basis, critics such as Wendy Holm (an agricultural economist who has written numerous articles on water and free trade) and the Council of Canadians (a citizens' watchdog organization founded in 1985 which came to prominence in its fight against free trade) argue that all natural water other than sea water is treated as a "good" under the NAFTA. Ms. Holm contends that, based on the above definition, the United States (and possibly Mexico) has "unprecedented and irrevocable access rights to Canada's water resources in perpetuity."(5)

The above position is, however, contrary to that taken by the federal

government and a number of others. For example, Jon Johnson, the author of *The North American Free Trade Agreement: A Comprehensive Guide*,(6) in referring to the NAFTA article setting out relevant definitions and certain other articles respecting national treatment, import and export restrictions, and export taxes, states:

> The key to determining the scope of these provisions is the use of the word "product." As the GATT does not define "product," the meaning of this word is its ordinary meaning, which is "something that is produced." For a thing to be produced, something must be done to it. It must be extracted, harvested, collected, stored, graded, transported, refined, processed, assembled, packaged, or somehow transformed into an article of commerce. Unexploited resources such as oil or gas in the ground or water in lakes, rivers or aquifers are not "products" and therefore are not subject to these or any other NAFTA provisions. There is nothing in NAFTA by which a NAFTA country can be compelled to exploit and sell a resource. The governments of the NAFTA countries expressly confirmed this point with respect to water in a joint declaration issued in December 1993. Once a resource is exploited by being extracted or collected, it becomes a product and is subject to these and other NAFTA provisions.(7)

In a 1993 article, Sophie Dufour presented a detailed analysis of the legal impact of the NAFTA's predecessor, the FTA, on Canadian water exports.(8) Ms. Dufour maintained that under the FTA, which contained a similar definition of a "good" for purposes of that agreement, natural water could become a "product" within the meaning of that definition only "by being collected, stored, bottled, or otherwise packaged and so on." Conversely, she maintained that water in a natural river, lake or in the ground, has not been "produced" within the literal meaning of that word and therefore, "does not constitute a 'product' under the GATT nor a 'good' for the purpose of the definition section in the FTA." Ms. Dufour noted that this interpretation was clearly confirmed when considered in the context of the GATT as a whole. She pointed out that, in this regard, while water as a beverage has long been covered by international trading rules (including those stipulated in the GATT and to which Canada itself subscribes), water in its free-flowing state "has never been contemplated and there is no indication at the present time that it ever will."(9)

The federal government has consistently taken the position that the NAFTA

does not apply to water in its natural state. In August 1992, it released *The NAFTA Manual* to provide an overview of the then proposed NAFTA. The document contained the following statement on the subject of water resources:

> CANADA'S WATER RESOURCES – A SUMMARY
>
> Like the Canada-U.S. Free Trade Agreement (FTA), the NAFTA does not apply to large-scale exports of water.
>
> As in the FTA, only water packaged as a beverage or in tanks is covered in the NAFTA.
>
> Water was not discussed during the NAFTA negotiations with the United States and Mexico.
>
> Large-scale exports of water, either by inter-basin transfer or diversion, are contrary to the 1987 federal water policy.
>
> THE NAFTA WILL NOT AFFECT WATER EXPORTS
>
> Canada's legislation to implement the FTA already states clearly that the FTA does not apply to water, except in the case of water packaged as a beverage or in tanks. Similar provisions will be included in the NAFTA implementing legislation.
>
> There never has been, nor will there be, any negotiation or provision for large-scale exports of water to another country.

In his appearance in 1993 before the House of Commons Legislative Committee on Bill C-115 (NAFTA implementation), Mr. Konrad von Finkenstein, then the Assistant Deputy Attorney General, Department of Justice, stated in part:

> … if you trade water in its natural state you put in tanks, or bottles, or something and sell me fresh water that you've taken out of a well or something like that, then you are indeed trading in water and it's then a good and is covered by the GATT, by the FTA, or by the NAFTA. But that's a good you're trading…
>
> Water is no different from any other resource. Take a

> forest, for instance. There's nothing in the NAFTA, the FTA, or the GATT that forces us to cut our trees down, etc. – you have to play by the rules. You can't protect your domestic industry, etc. And the same applies with water, you don't have to trade or anything with it."(10)

A provision similar to that in the *Canada-United States Free Trade Agreement Implementation Act*(11) was included in the *North American Free Trade Agreement Implementation Act*.(12) The latter provides in section 7 that:

> 7. (1) For greater certainty, nothing in this Act or the Agreement, except Article 302 of the Agreement, applies to water.
>
> (2) In this section, "water" means natural surface and ground water in liquid, gaseous or solid state, but does not include water packaged as a beverage or in tanks.

In other words, according to Canada's domestic legislation implementing the NAFTA in Canada, none of the NAFTA provisions, other than Article 302 (tariff elimination), applies to natural surface or ground water.

Critics such as Wendy Holm and the Council of Canadians contend that section 7 of the implementing legislation is insufficient protection without an amendment to the NAFTA itself and that only such an explicit exemption can protect Canada's water resources from U.S. interests. These critics claim that the domestic legislation is not binding on NAFTA panels and that currently the Agreement itself would be given precedence over domestic legislation.

On 3 and 4 April 1993, the Victoria *Times-Colonist* devoted its lead weekend editorials to the NAFTA and water resources. It stated that the testimony of Ms. Holm in her appearances before the House of Commons Subcommittee on International Trade and the British Columbia Select Standing Committee on Economic Development, Science, Labour, Training and Technology, "shows clearly that under NAFTA, water will be treated as a 'good,' subject to the same rules as the other 'goods and services' under the FTA and the NAFTA." The newspaper quoted Ms. Holm as stating that an earlier statement by then Trade Minister Michael Wilson had been "untrue and misleading" in claiming that water had been specifically removed from the NAFTA. With respect to how Canada could "retain sovereignty over its water resources," the newspaper noted that Ms. Holm had suggested that:

> First, Canada negotiate an explicit NAFTA(13) exemption for water in "other than bottled form."…

> Second, Canada enter into a Memo of Understanding with the U.S. that specifically limits the terms of the FTA to only "bottled water."
>
> Third, the Canadian Water Preservation Act [Bill C-156] shelved by the Conservatives in 1987 must be reintroduced and passed to, as Holm puts it, "establish a framework for a sound and sovereign water policy."

The newspaper urged Canadians to "let their M.P.s know, emphatically, that Canada must retain control over this precious resource."

In a column in the same newspaper on 2 May 1993, the Trade Minister responded as follows to the newspaper's editorials on the NAFTA and water resources:

> Your April 3 editorial, "NAFTA and Water (1): basic resource at risk," lends credence to fundamental misinterpretations of the NAFTA and the GATT that your newspaper should clear up for its readers as a much needed public service.
>
> The argumentation of Wendy Holm and others turns on a false premise: that natural water of all kinds is a "good" and hence subject to the national treatment obligations of the NAFTA. This is a fundamental misreading of the agreement. No matter how many detailed provisions from the NAFTA and the GATT are quoted out of their treaty context, it doesn't change the facts. (To take one example: because something is indexed in the GATT Harmonized Commodity Coding System itself imposes no obligations whatsoever respecting purchase or sale, import or export.)…
>
> Water in its natural state is not covered by the NAFTA, the FTA, the GATT, or any other trade agreement. Lakes, rivers, or aquifers are simply not goods or products, any more than are the fish swimming in them or the oil and gas trapped under them.
>
> Trade agreements only cover water as a "good," that is, only when water has entered into commerce as a product. Canada's growing exports of water products benefits from such coverage.

> And there is absolutely nothing in the NAFTA or any other trade agreement that forces Canada to either exploit its water for commercial use, or to export its water.
>
> . . .
>
> Why did we not dispel any lingering doubt by simply exempting water from the agreement? The answer is plain. There is no exemption for water in the NAFTA because it is not necessary to insert an exemption from obligations that do not exist. To do so would throw into doubt whether obligations exist for other natural resources in their natural state, such as trees in the ground, where clearly no such obligations exist either.
>
> The bottom line is that Canadian governments, both now and under the NAFTA, have the freedom of action required to regulate the exploitation of our water resources. And until it is exploited and entered into commerce as a good, water is not covered by the NAFTA or any other trade agreement.

Following the federal election and the coming into power of the new Liberal government in October 1993, Prime Minister Chrétien announced on 2 December 1993 that the government had secured significant improvements in various areas with respect to the NAFTA and was now prepared to proceed with implementing the agreement on 1 January 1994. In response to concerns that the NAFTA could force Canada to export water, the Prime Minister then announced the following Canada-United States-Mexico declaration on water:

> <u>STATEMENT BY THE GOVERNMENTS OF CANADA, MEXICO AND THE UNITED STATES</u>
>
> The governments of Canada, Mexico and the United States, in order to correct false interpretations, have agreed to state the following jointly and publicly as Parties to the North American Free Trade Agreement (NAFTA):
>
> - 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, waterbasins and the like is not a good or product, is not traded, and therefore is not and has never been subject to the terms of any trade agreement.

- International rights and obligations respecting water in its natural state are contained in separate treaties and agreements negotiated for that purpose. Examples are the United States-Canada Boundary Waters Treaty of 1909 and the 1944 Boundary Waters Treaty between Mexico and the United States.

According to the press release from the Prime Minister's Office, the statement by the three governments made it clear that, contrary to earlier concerns, the NAFTA could not force Canada to export water.(14)

More recently, in November 1999, the Department of Foreign Affairs and International Trade addressed this issue in its paper on bulk water removal and international trade considerations to which reference was earlier made:

> Some observers have suggested that, because Canada's . … tariff schedule includes "natural waters" as a tariff heading, this means that all water must be considered to be a good. This is a mistaken view of the tariff schedule. The tariff schedule does not define what is a good; it merely provides an organizational structure for the purposes of tariff negotiations and customs administration. In other words, it does not tell us if and when water is a good; it only tells us that when water is classified as a good, it falls under a particular tariff heading.
>
> Water in its natural state can be equated with other natural resources, such as trees in the forest, fish in the sea, or minerals in the ground. While all of these things can be transformed into saleable commodities through harvesting or extraction, until that crucial step is taken they remain natural resources and outside the scope of

trade agreements.

The department pointed out that the NAFTA countries had reinforced this viewpoint in their December 1993 joint statement noted above and that furthermore, the International Joint Commission (IJC) stated in its report on the protection of the waters of the Great Lakes that, "it would appear unlikely that water in its natural state (e.g., in a lake, river, or aquifer) is included within the scope of these trade agreements since it is not a product or a good…"

In short, there continues to be a great deal of controversy about whether water in its natural state is considered a "good" for purposes of the NAFTA and is therefore covered under the agreement. According to the government and a number of other observers, water does not become a good under the NAFTA and other international trade agreements until it is removed from its natural state and transformed into a saleable commodity, such as bottled water or water that has been used as an ingredient in manufacturing a product. However, as seen above, a number of critics disagree.

B. Exports of Water as a Precedent

The Department of Foreign Affairs and International Trade (in its paper on bulk water removal and trade considerations) identified a second issue as arising from the question of whether water is subject to international trade agreements, such as the NAFTA and the GATT. This second issue is whether allowing some water to be extracted from lakes, rivers, etc., and to be put into commerce as a good, including for export, would create a precedent requiring that all other requests to extract water and transform it into a good for commercial purposes, including for export, be granted anywhere in Canada. In other words, if one project for the bulk export of water were allowed, would this open the floodgates of water generally? Could we "turn off the tap?"

According to the department,(15) nothing in Canada's international trade obligations would require that future projects for the removal of water for bulk exports be given approval, just because other projects had been approved. The department points out that Canadian governments, federal and provincial, retain full sovereignty over the management of Canadian water in its natural state. The department notes that any possible precedent from a water export project would be limited to the jurisdiction involved and would arise from the particular legislation that permitted removal for export, and not from trade agreements.

The department maintains that the NAFTA does not require all provinces to adopt the same regulatory regime. It merely requires that each province, within its regulatory regime, not treat foreign goods or investors less favourably than it treats its own goods or investors. Hence, according to the department, if one

province's legislation permitted removal of water and a project were to be approved, other provinces could still have legislation that prohibited removal of water without running afoul of national treatment obligations.(16)

The department further notes that within a province that did permit removal of water, future applications for approval to remove water would still have to be considered in light of the legislation (including environmental assessment requirements in the particular province), and in accordance with principles of administrative law, such as fairness and reasonableness, and without discriminating between applicants on the basis of nationality.

In short, because it contends that water in its natural state is not a good for the purposes of the NAFTA or other international trade agreements, the Department of Foreign Affairs and International Trade maintains that, from the standpoint of trade obligations, the fact that a government in Canada has allowed the extraction and transformation of some water into a good, including for export, does not mean it (or another government within Canada) must allow the extraction and transformation of other water into a good in the future.

The above view is reinforced by legal opinions of trade experts received by the International Joint Commission during its study on the protection of the waters of the Great Lakes. In its final report,(17) the Commission summarized the thrust of those opinions in part as follows:

> The provisions of the NAFTA and the WTO agreements do not prevent Canada and the United States from taking measures to protect their water resources and preserve the integrity of the Great Lakes Basin ecosystem where there is no discrimination by decision-makers against individuals from other countries in the application of those measures.
>
> NAFTA and the WTO agreements do not constrain or affect the right of a government to decide whether or not it will allow natural resources within its jurisdiction to be exploited and, if a natural resource is allowed to be exploited, the pace and manner of such exploitation.
>
> Moreover, even if there were sales or diversions of water from the Great Lakes Basin in the past, governments could still decide not to allow new and additional sales or diversions in the future.(18)

Nevertheless, certain observers who contend that the NAFTA applies to water

in its natural state in lakes, rivers, etc., argue otherwise. For example, the Council of Canadians, in its *Fact Sheet # 1: Trade*, states in part:

> How the Rules of NAFTA Apply to Water:
>
> National Treatment means that American and Mexican companies must be treated like Canadian companies in access to goods and markets. Trading water cannot be limited to Canadian companies nor can we place limits on how it is traded, how much is traded or with whom it is traded.
>
> Proportionality means that as long as there is a drop of water left we can never end water exports regardless of the environmental effects in Canada or the needs of Canadians.
>
> Investor-State suits allow investors from outside Canada to sue the Canadian government should we pass a law that interferes with its ability to make profits now or in the future. The process is secret and companies could even sue if they were considering investing in an enterprise affected by new legislation.
>
> …….
>
> …and once the tap is turned on, we won't be able to turn it off – no matter what other environmental consequences we discover down the road.
>
> ……
>
> The federal government has asked the provinces to declare a temporary ban on exporting water. If even one province gives in to corporate promises, all of Canada is committed to trade water.

In the same *Fact Sheet*, the Council of Canadians argues, among other things, that the government must "enact legislation prohibiting large-scale water exports" as well as "open negotiations to exempt water from NAFTA or, preferably, sink the deal."

C. Bulk Water Removal and NAFTA Chapter 11

A third issue identified by the Department of Foreign Affairs and International

Trade as arising from the question of whether water is subject to the NAFTA is the relationship between bulk water removal and chapter 11 of the Agreement. Chapter 11 applies to measures adopted or maintained by a NAFTA country relating to investors, and investments of investors, of another NAFTA country in its territory. As well, chapter 11 provides a mechanism for dealing with investor-state disputes relating to a NAFTA country's alleged breach of obligations under chapter 11. The department has identified two principal obligations of chapter 11 most often cited as being relevant to bulk water removals: providing national treatment; and paying compensation in cases of expropriation.

The national treatment obligation of the NAFTA (Article 1102) requires that any measure adopted by Canada, relating to an investor of another NAFTA country, must accord treatment no less favourable than it accords, in like circumstances, to its own domestic investors. The same applies to investments of an investor of another NAFTA country. It is the department's view that a regulatory measure relating to an investor of another NAFTA country (or an investment of an investor of such a country) would be consistent with the national treatment obligation if it prohibited the bulk removal of water from water basins in a manner that did not discriminate between investors, in like circumstances, on the basis of nationality. The department therefore contends that Canada's proposed strategy to prohibit the bulk removal of water from Canadian watersheds, whether for domestic purposes or export, is in keeping with the above obligation. The strategy is discussed subsequently in this paper.

The NAFTA also provides, in section 1110, that no Party to the agreement may directly or indirectly nationalize or expropriate an investment of an investor of another Party, or take measures tantamount to expropriation, unless it meets certain criteria, including the payment of compensation. A claim for compensation could, however, only arise where there was an investment that had been expropriated. The department maintains that a regulatory measure designed to conserve and manage water resources, such as outlined in the government's strategy to prohibit the bulk removal of water from Canadian watersheds, should not constitute an expropriation. According to the department, "Any claim for compensation would have to be examined in light of the details of the individual case."

It is in the context of chapter 11 of the NAFTA that a U.S. firm – Sun Belt Corporation – has launched an action against the Canadian government. The background of the case has been described elsewhere(19) as follows. In 1986, the British Columbia government decided to allow entrepreneurs to export fresh water from its coastal streams by marine tanker, but not diversion from its interior rivers. Several applicants received licences (mostly for small water volumes) and proceeded to seek foreign markets. When the first of these,

Snowcap, joined forces with the Sun Belt Corporation to supply water to the tiny California town of Goleta, the province found itself embroiled in controversy. Environmentalists were concerned because a flood of new export applications resulted from the apparent success of Snowcap/Sun Belt, many wanting to extract water from the same coastal inlet. The possible precedent and cumulative effect led to the province in 1991 placing a moratorium on all new or expanded licensing for export. This resulted in Snowcap/Sun Belt being unable to sign its contract with the town of Goleta. Four years later, the new B.C. government enacted legislation in the form of the B.C. *Water Protection Act* making the prohibition permanent, both for bulk removal from the province and for diversion between the province's major watersheds. Subsequently, Sun Belt lodged a complaint under the NAFTA that Canada violated its rights, on the basis that the province had settled on compensation with its Canadian partner (Snowcap) but not with itself.

The case has been pending since 1999 and arbitration has not yet started. The Canadian government – which takes the position that the Sun Belt Corporation has not satisfied the prerequisites for triggering the arbitral process – says that it cannot speculate on Sun Belt's next steps.(20)

MOTIONS, PRIVATE MEMBERS' BILLS AND QUESTIONS IN THE HOUSE OF COMMONS ON THE SUBJECT OF WATER EXPORTS

Issues concerning water exports have been raised on numerous occasions in the House of Commons. A number of examples are presented below.

In several Parliaments, Mr. Nelson Riis, M.P., introduced a Private Member's bill to prohibit the export of water by inter-basin transfers. The most recent of these, Bill C-249, the Canada Water Export Prohibition Act, was introduced in the House of Commons on 19 October 1999. The bill died on the *Order Paper* with the dissolution of Parliament.(21)

Had the bill been enacted into law, no person would have been permitted to export water from Canada by inter-basin transfers. The Minister of the Environment would have been required to take such measures as would have been necessary to prevent the export of water by inter-basin transfers. For the purpose of facilitating the formulation of policies and programs with respect to inter-basin transfers within Canada, the Minister could – with the approval of the Governor in Council – have entered into an arrangement with one or more provincial or territorial governments:

> (a) to conduct research on the effects of inter-basin transfers;

(b) to maintain continuing consultation on inter-basin transfers; and

(c) to formulate and coordinate the implementation of inter-basin transfer policies and programs.

As well, any person could have applied for judicial review of the Minister's exercise or non-exercise of any power or fulfilment or non-fulfilment of any duty conferred or imposed on the Minister by the bill, whether or not the person applying for it was affected or had suffered damages.

A similar bill, Bill C-205, the Canada Water Export Prohibition Act, was introduced in the House of Commons on 2 February 2001 by Mr. Pat Martin, M.P.(22)

In both sessions of the Thirty-sixth Parliament, Mr. Clifford Lincoln, M.P., introduced a Private Member's bill in the House of Commons on the subject of water exports. The most recent of these was Bill C-410, the Canada Water Export Prohibition Act, which received first reading on 16 December 1999; the bill subsequently died on the *Order Paper* with the dissolution of Parliament.(23) For purposes of the bill, "water" meant surface and ground water, but did not include water packaged as a beverage. Had the bill been enacted into law, it would have provided that, despite any other Act of Parliament, no person would have been permitted to export water from Canada by pipeline, railway tank car, tank truck, tanker or inter-basin transfers. Every person who contravened the bill would have been guilty of an offence and liable: (a) on summary conviction, to a fine not exceeding $75,000; or (b) on conviction on indictment, to a fine not exceeding $250,000.

On 8 February 1995, Mr. Bill Gilmour, M.P., introduced the following motion which was debated in the House of Commons:

That, in the opinion of this House, the government should support a policy that Canada's fresh water, ice and snow will be protected so that at all times and in all circumstances Canada's sovereignty over water is preserved and protected.

Following debate, the item was dropped from the *Order Paper*.(24)

On 9 February 1999, after debate, the House of Commons adopted the following motion of Mr. Bill Blaikie, M.P., as amended:

That, in the opinion of this House, the government

> should, in co-operation with the provinces, place an immediate moratorium on the export of bulk freshwater shipments and inter-basin transfers and should introduce legislation to prohibit bulk freshwater exports and inter-basin transfers, and should not be a party to any international agreement that compels us to export freshwater against our will, in order to assert Canada's sovereign right to protect, preserve and conserve our freshwater resources for future generations.(25)

On 15 May 1998, the Hon. Charles Caccia, M.P., asked the Minister of the Environment the following question in the House of Commons:

> In view of the latest proposal in Newfoundland to export water and considering the important non-commercial role water plays within its natural watershed in the maintenance of a healthy ecosystem, could the Minister of the Environment indicate whether she plans to introduce legislation this fall banning water exports.(26)

The then Minister of the Environment, the Hon. Christine Stewart, replied that she was very concerned for the security of Canada's freshwater resources. She stated that her department was reviewing the government's freshwater policy, which had been in place since 1987, and that, as part of the review, she would be meeting with the provinces in the summer of 1998 to set the federal government's priorities. She noted that, although no federal legislation currently legislated against the export of freshwater, one of the government's priorities could be to put such legislation in place.(27)

On 16 November 1998, Mr. Caccia once again posed a question to the Environment Minister in the House of Commons. He noted that he had asked the Minister in May 1998 whether she planned to introduce legislation to ban water exports and pointed out that it was now close to the end of 1998 and that there was "broad support" for the gap to be filled. Stating that "We know we can expect proposals in future for water exports," he asked the Minister when legislation to ban water exports would be introduced.(28)

Mr. Julian Reed, the Parliamentary Secretary to the Minister of Foreign Affairs, responded in part as follows:

> …I want to go on record as saying the federal government is opposed to bulk water exports…
>
> Considerable progress has been made regarding

> consultation with provinces on options to deal with this matter. Both federal and provincial governments have a role to play in deciding the outcome. The government will lay out its strategy for a comprehensive approach to water exports later this year. I can assure my hon. friend we will proceed with the utmost caution.(29)

As noted subsequently in this paper, Mr. Caccia continued to raise the issue of water exports in the House of Commons, calling for a federal legislative ban on bulk water exports.(30)

FEDERAL GOVERNMENT STRATEGY TO PROHIBIT THE BULK REMOVAL OF WATER FROM CANADIAN WATERSHEDS

A. Background

On 10 February 1999, the day after the House of Commons had adopted the motion of Mr. Bill Blaikie, M.P., referred to above, the then Foreign Affairs Minister, the Hon. Lloyd Axworthy, and the then Environment Minister, the Hon. Christine Stewart, announced a strategy to prohibit the bulk removal of water from Canadian watersheds, both within Canada and for export.(31) They pointed out that the strategy responded to Canadian concerns about the security of Canada's freshwater resources and was consistent with the motion adopted by the House of Commons the previous day. According to a press release, the strategy reaffirmed the government's long-standing position opposing bulk water removal and was consistent with the 1993 statement by the three NAFTA countries that, "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." The strategy dealt with the protection of water in its natural state as a water management and environmental issue rather than as a trade issue.

Ms. Stewart stated:

> Canadians value their freshwater resources and want their governments to take action to protect them. That's why I have invited the provinces and territories to work with the federal government for the Canada-wide accord to prevent bulk water removal from our watersheds.

According to a government backgrounder released on the same date and entitled *A Strategy to Protect Canadian Water*:(32)

> The strategy recognizes that provinces have the primary

> responsibility for water management and that the Government of Canada has responsibilities under the Boundary Waters Treaty. Actions by territorial governments will also be important as they assume greater responsibility over water resource management. Joint participation is essential to develop and implement a permanent Canada-wide solution to bulk water removal.
>
> The strategy respects Canada's trade obligations because it focuses on water in its natural state (e.g., in rivers or lakes). Water in its natural state is not a good or product, and is not subject to international trade agreements. Nothing in the North American Free Trade Agreement or in the World Trade Organization agreements obliges Canada to exploit its water for commercial use or to begin exporting water in any form.

At the press conference announcing the strategy, the Foreign Affairs Minister was asked why, because international trade is clearly a federal responsibility, the federal government, could not, if it so wished, enact legislation banning the export of water from Canada. Mr. Axworthy responded in part as follows:

> But once you do that, once you start doing that then you make water into a tradeable commodity and it gets subject to all the trade rules going back to GATT of 1947. That to me is the anachronism of the approach that's being proposed by some other people, it's that they want to turn it into a tradeable commodity. We're saying there's a much more effective way of doing it and that is to treat it in its natural state. Therefore it's not subject to trade rules but you are still able to provide for the kind of management, prohibition and regulations that are required. That's the whole point, that's why I said I mean I think people are confusing it. The debate that took place over NAFTA was really a debate about whether we were obliged to export water… It wasn't in terms of a broad management system, it was were we obliged. The statement that was made in 1993 by the three NAFTA partners said there is no obligation for one country to export its water to another country under this agreement but the GATT rules still apply and they go back to 1947….

The federal strategy comprised three key elements:

- proposed amendments to the *International Boundary Waters Treaty Act*;
- a proposed Canada-wide accord on bulk water removals; and
- a joint Canada-United States reference to the International Joint Commission (IJC) to study the effects of water consumption, diversion and removal, including for export, from the Great Lakes.

Because the strategy specifically refers to "bulk water removal" as opposed to "water export," the obvious question is what is the difference between the two and why did the federal government adopt this particular approach? Environment Canada provided the following explanation.(33) The term "bulk water removal" broadly refers to large-scale removals of water by man-made diversions (such as canals), tanker ships or trucks, or pipelines. The water is not necessarily exported out of the country. According to the department, such removals have the potential, directly or cumulatively, to harm the health of a drainage basin. Small-scale removal, such as water in small portable containers, is not considered bulk. "Water export," on the other hand, refers to taking water and shipping it to other countries for profit – whether in bottles, by tanker or pipeline, or by man-made diversions, for example, diverting rivers and building canals. Environment Canada points out that the government uses the phrase "bulk water removal" (as opposed to "water export") in its strategy because:

> … we are taking a comprehensive approach to guarantee the security of our freshwater resources. Since the removal and transfer of water in bulk from its natural drainage basin or watershed can result in similar ecological, social and economic impacts whether the water is destined for foreign markets, or for other destinations within Canada, this includes measures to prevent the bulk removal of water from major watersheds for any reason – whether for domestic purposes or for export.

Each of the components of the federal strategy to prohibit bulk water removal from Canadian watersheds will now be examined.

B. Amendments to the *International Boundary Waters Treaty Act*

On 22 November 1999, Bill C-15, an Act to amend the International Boundary Waters Treaty Act (Second Session, Thirty-sixth Parliament),(34) was introduced in the House of Commons by the then Minister of Foreign Affairs, the Hon. Lloyd Axworthy. The bill was debated at second reading on 20

October 2000 but subsequently died on the *Order Paper* with the election call and dissolution of the Thirty-sixth Parliament on 22 October 2000. A similar bill, Bill C-6, was introduced in the new Parliament (First Session, Thirty-seventh Parliament) on 5 February 2001. Bill C-6 was debated in the House and Senate and enacted into law, having received Royal Assent on 18 December 2001.(35) It is expected that the Act will be proclaimed into force in the Spring of 2002, once the necessary regulations to implement the legislation have been promulgated.

The *International Boundary Waters Treaty Act*(36) was originally enacted to implement in Canada the Boundary Waters Treaty (1909)(37) which established the International Joint Commission (IJC) and provides mechanisms to resolve disputes, primarily those concerning water quantity and quality, along the Canada-U.S boundary. Through the Treaty, Canada and the United States are mutually obliged to protect natural levels and flows of waters shared by the two countries. Bill C-6 amended the above Act to provide for a clearer Act and more effective implementation of the Treaty. The principal effect of the amendments are to generally prohibit the bulk removal of water out of the Canadian portion of boundary water basins between Canada and the United States. The amending Act does this by deeming that the cumulative effect of such removals alter the natural flow of water on the U.S. side of the border. The prohibition on boundary water removals applies principally to the Great Lakes but also affects other boundary waters, such as part of the St. Lawrence River, the St. Croix and Upper St. John Rivers, and the Lake of the Woods.

Although the provinces have primary responsibility for the management of water resources, the Boundary Waters Treaty gives the federal government clear jurisdiction over boundary waters to the extent stipulated in the Treaty. Only the federal government has the authority to fulfil the Treaty's obligations with respect to boundary waters.

On 23 November 1999, the day after Bill C-6's predecessor, Bill C-15, had been introduced in the House of Commons, Mr. Bill Blaikie, M.P., in the House, drew the attention of the government to his motion that had been adopted on 9 February 1999 (referred to earlier) calling on the federal government to introduce legislation to place a ban on bulk water exports. Noting that the government bill did not accurately reflect this motion, Mr. Blaikie asked the government why it was now abandoning "its commitment to a national ban on bulk water exports … which it supported only short months ago… Why are the Liberals in full denial about the fact that they cannot act the way they said they would act because of NAFTA?" (emphasis added)(38)

The then Minister of Foreign Affairs, the Hon. Lloyd Axworthy, responded in part:

> … the legislation does provide for a prohibition of bulk water removal. What it does not do is follow the recommendation of the hon. Member and some of his party on the west coast, which is to turn this into a trade issue which would result in a series of trade actions that would totally impede the capacity of Canada to protect its waters. (emphasis added)(39)

The Department of Foreign Affairs and International Trade specifically addressed this issue in its background documentation on Bill C-6, and, previously, on Bill C-15. The government publicly stated its agreement that measures needed to be taken to protect the integrity of Canada's water resources but believed that this would be best achieved by its strategy of prohibiting bulk water removal from all major drainage basins in Canada. In the department's view, such a prohibition would be better than a ban on bulk water exports because "it is more comprehensive, environmentally sound, respects constitutional responsibilities and is consistent with Canada's international trade obligations… In this way water is protected before the issue of exporting arises." Water would be regulated in its natural state, before it has become a commercial good or saleable commodity. The department views this as an environmental protection measure of general application, aimed at preserving the integrity of ecosystems. It would protect water at its source from bulk removal outside the water basin by any party, Canadian or foreign.

In response to the argument that the government should place an export ban on bulk water exports from Canada, the department claims that this apparently quick and simple solution "does not focus on the environmental dimension, has possible constitutional limitations and may be vulnerable to a trade challenge." The department maintains that an export ban "would focus on water once it has become a good and therefore subject to international trade agreements. Because these agreements limit the ability of governments to control the export of goods, a ban on exports is likely to be contrary to Canada's international trade obligations. This contrasts sharply with the federal government's approach."(40)

During second reading debate on Bill C-15 (Bill C-6's predecessor) in the House of Commons, Mr. Blaikie, M.P., once again referred to his motion adopted by the House on 9 February 1999 calling on the federal government to place a ban on bulk water exports. Mr. Blaikie stated in part:

> This is a bill which aims to prohibit bulk water removals from boundary water basins only. This is a retreat from banning bulk water exports and this retreat is clearly, although the government will not say so, because of the

> North American Free Trade Agreement. The very language of removal tells the story. The Liberals refuse to use the word export because if they talked about water exports as opposed to water removal, then they would have a test case with respect to NAFTA because NAFTA deals with exports. (emphasis added)(41)

As noted elsewhere in this paper, the Hon. Charles Caccia, M.P., also continued to press the government in the House of Commons for a federal legislative ban on bulk water exports.

Mr. Deepak Obhrai, M.P., speaking on behalf of the Canadian Alliance during the second reading debate of Bill C-15, stated his party's position on the bill as follows:

> The Canadian Alliance believes that Canadians should retain control over our water resources and supports exempting water from our international agreements, including NAFTA. An outright ban would run contrary to our NAFTA commitment because water was not exempt from that agreement.
>
> A side agreement would have to be negotiated that would exempt water from NAFTA before a ban on water exports could even be considered. Until an exemption is achieved, we encourage the provinces to place a moratorium on commercial water licensing so that water in bulk form never becomes a good governed by NAFTA rules.
>
> ……
>
> In the absence of exempting water from NAFTA, the Canadian Alliance will support the proposed bill as it represents the only viable approach that the federal government can take and the only constitutionally valid NAFTA compatible ban on bulk water export. However, I would like to see the government propose real answers on this issue and show some leadership in exempting water from our trade agreements.(42)

Mr. Obhrai reiterated those comments during the second reading debate of Bill C-6.(43)

C. Proposed Canada-wide Accord on Bulk Water Removals

As part of its strategy on bulk water removals from Canadian watersheds, the federal government proposed a Canada-wide accord between the federal and provincial-territorial levels of government to prohibit bulk water removal, whether for domestic purposes or for export, from Canadian water basins. As an interim measure, the government urged the provinces and territories to institute a moratorium preventing bulk water removal from watersheds until such time as the accord was in place.

Environment Canada explained the need for a joint approach because of shared jurisdiction over water:

> Water is a shared responsibility between the federal and provincial, and territorial governments, and each have an important role to play in protecting Canada's freshwater resources. The strategy recognizes that provinces have the primary responsibility for water management and that the Government of Canada has certain legislative authorities in the areas of navigation, fisheries, federal land, and shared water resources with the U.S. Actions by territorial governments are also becoming increasingly important as they assume greater responsibility over water resource management. All governments have an important role to play in achieving a permanent, Canada-wide solution for the prohibition of bulk water removal, including removal for export purposes. (emphasis added) (44)

The proposed accord would represent a commitment by the federal government, provinces and territories to prohibit bulk water removal from bodies of water over which they have jurisdiction through legislation or regulations. The proposed accord was discussed at meetings of the Canadian Council of Ministers of the Environment in November 1999 and again in May 2000. Although Quebec and the western provinces refused to endorse the accord as presented, nevertheless, federal government officials point out that as a result of the above initiative, all provinces either currently have in place or are in the process of developing legislation or regulations to effectively prohibit bulk water removal (whether for domestic purposes or export) from water basins over which they have jurisdiction. According to Environment Canada officials, this provides solid assurance that bulk water removals and exports will not proceed in the near future.(45)

Because the federal government is of the view that water in its natural state is

not a good, and is therefore outside the scope of the trade agreements, including the NAFTA, it maintains that any federal or provincial measure regulating the extraction of water in its natural state would not be subject to international obligations concerning trade in goods. As noted earlier, this point was also reinforced by the legal opinions the International Joint Commission received from trade experts during the preparation of its report on the protection of the waters of the Great Lakes.

The Hon. Charles Caccia, M.P., among others was critical of the above approach, and continued to press in the House of Commons for a federal legislative ban on bulk water exports. On 22 November 1999, the day Bill C-15 (Bill C-6's predecessor) was introduced in the House, Mr. Caccia, noting that the bill was restricted in its application in that it would place a ban on bulk water removals in boundary waters only, expressed his concerns about both the bill and the proposed accord. He stated in part:

> First, the proposed voluntary accord would be just that, voluntary. It would not legally bind any province to protect our water resources.
>
> Second, the proposed accord would do nothing to prohibit export initiatives undertaken by municipalities, crown agencies, corporations or even private parties. Even if the provinces wanted to ban water removals and exports, it is the federal government that has the constitutional authority to regulate trade.
>
> Understandably, the federal government hopes that a province by province voluntary ban would treat water protection strictly as an environmental issue and that trade lawyers will not see the disguise.
>
> .....
>
> The proposed accord will lead to a patchwork of provincial initiatives, thus making Canada more vulnerable to trade challenges. The legislation tabled today is, it seems to me, too limited in scope to provide protection to most of our water bodies.
>
> It seems quite clear, that a meaningful protection of our water resources requires the federal government to face the reality of international trade agreements, in search of the most effective strategy to protect our water resources

> from exports. I would recommend: first, to enact federal legislation designed specifically for the purpose of banning bulk transboundary water removals from Canada; and second, to renegotiate international trade agreements to seek an exclusion or waiver of water from such agreements.(46)

On 3 April 2000, Mr. Caccia once again reiterated his views on this issue in the House:

> Now the federal government plans to make reliance on provincial goodwill as a formal policy through a voluntary accord. It is time the federal government acts where it has jurisdiction because in light of our international trade agreements, a patchwork of provincial initiatives is inadequate. What we need now is a watertight federal ban on water exports.(47)

As noted earlier, a number of observers, such as the Council of Canadians, are also critical of the federal government's approach. Immediately following the announcement of the federal strategy to prohibit bulk water removal from Canadian watersheds (February 1999), the National Chairperson of the Council of Canadians, Maude Barlow, and its Executive Director, Peter Bleyer, held a press conference to respond to it. Ms. Barlow stated that although the Council of Canadians was "pleased that the government knows that it has to do something," it was not satisfied with the government's proposed treatment of "water exports." Noting that the moratorium on bulk water removals would not be binding on the provinces, she suggested that if one province decided not to adhere to it, the whole plan would be placed in jeopardy. She went on to claim that the strategy was not trade-proof. In her view, if one province were to allow the export of water for commercial purposes, all of the provincial bans across the country would be put at risk "because only federal legislation exempting us from NAFTA can pertain to this issue." According to her, "This has been very clearly spelled out by many, many trade lawyers and by Mr. Axworthy himself when he was in Opposition." She also stated that "by not having the guts to deal with water as a trade issue, but only through environmental legislation, …. the federal government is leaving us open to further challenges by foreign companies seeking lost profits."(48)

Subsequently, in an essay entitled "Ottawa's Leaky Water Policy," published in *The Globe and Mail* on 18 November 1999, days before the Canadian Council of Ministers of the Environment was to meet to discuss the proposed accord, Ms. Barlow urged the provinces "not [to] sign this document if they care about protecting Canada's water from commercial export." She stated in part:

> The federal government is trying to pass the buck on its responsibility. A voluntary accord would be just that – voluntary – and would not bind any province in a meaningful way to protect its water resources now or in the future.

As noted earlier in this paper, the Council of Canadians has published a *Fact Sheet # 1: Trade* in which it argues, among other things, that the federal government needs to enact legislation prohibiting large-scale water exports, as well as "open negotiations to exempt water from the NAFTA or, preferably, sink the deal."

D. Reference to the International Joint Commission

The federal strategy to prohibit the bulk removal of water from Canadian watersheds (10 February 1999) also provided for a reference made jointly by Canada and the United States to the International Joint Commission (IJC) to study the effects of water consumption, diversion and removal, including for export, from the Great Lakes. On 15 March 2000, the IJC released its final report entitled *Protection of the Waters of the Great Lakes*.(49) The IJC's conclusions and recommendations were generally consistent with and supportive of the broad environmental approach adopted by Canada. The IJC recommended that the governments "should not permit any new proposal for the removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that the removal would not endanger the integrity of the ecosystem of the Great Lakes Basin." The Commission recommended that strict criteria should be applied, including giving full consideration to the "potential cumulative impacts of the proposed removal, taking into account the possibility of similar proposals in the foreseeable future;" and that there be "no net loss" to the area from which the water was taken and that the water be returned in a condition that protects the quality of and prevents the introduction of alien invasive species into the waters of the Great Lakes. According to federal government sources, application of these criteria would effectively prevent any large-scale or long-distance removal of water from the Great Lakes.(50)

As noted earlier in this paper, the IJC, in conducting its study, also looked at the issue of whether international trade agreements such as the NAFTA and the GATT might affect water management in the Great Lakes. The Commission noted that after issuing its interim report it had received a letter dated 24 November 1999 from the Deputy United States Trade Representative on the subject. The letter stated in part as follows:

> …. in the report the IJC issued an interim

> recommendation that federal, state and provincial governments not authorize or permit any new bulk sales or removals of surface water or groundwater from the Great Lakes Basin. In our view, the implementation of this recommendation would not run afoul of the obligations imposed by international trade agreements to which the United States and Canada are parties.
>
> … the WTO has nothing to say regarding the basic decision by governments on whether to permit the extraction of water from lakes and rivers in their territory.(51)

The Commission also referred to the document entitled *Bulk Water Removal and International Trade Considerations* from the Department of Foreign Affairs and International Trade (and referred to earlier in this paper). The IJC noted that these submissions were generally consistent with the Commission's views regarding the effects of international trade law on the two countries' ability to protect the water resources of the Great Lakes Basin. As well, the Commission noted that it had received legal opinions from several trade experts that were similar to the views expressed by the Canadian and U.S. governments on the issue.(52)

On 15 March 2000, the same day the IJC's final report on the protection of the waters of the Great Lakes was released to the public, the Council of Canadians issued a press release in which it criticized the report. It expressed "deep disappointment that in its final report … the International Joint Commission squandered an historic opportunity to speak for the citizens of Canada and the United States." Jamie Dunn, Water Campaigner for the Council, stated in part:

> The IJC has joined the company of Brian Mulroney, John Crosbie and federal Environment Minister David Anderson in trying to convince Canadians that trade agreements don't threaten Canada's water sovereignty. Since 1988, Canadians have heard an ever-changing story about water and trade deals. Not only has the IJC now joined the federal government in clouding the issue, it has proposed that exporting water can be okay despite clear statements from the public rejecting bulk water exports for profit. What we predicted would happen to water under free trade in 1988 is slowly happening.(53)

CONCLUSION

As noted earlier, the three NAFTA countries clearly stated in their joint declaration of December 1993 that the NAFTA does not apply to water in its natural state in lakes, rivers, etc., because the water has not at that point "entered into commerce and become a good" for purposes of the NAFTA. The federal government has consistently taken this position with respect to the NAFTA and its predecessor, the FTA. Nevertheless, critics of the government position remain adamant that water in its natural state is covered by the NAFTA and that nothing short of an amendment to the agreement, accompanied by federal legislation banning large-scale water exports, will protect our water resources adequately. Hence, the concerns of critics were not appeased by the federal government's announcement of a strategy in February 1999 for seeking a commitment from all jurisdictions across Canada to prohibit the bulk removal of water, including water for export, from Canadian watersheds. Thus, the debate concerning bulk water removals, water exports and the NAFTA continues.

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(1) Canada, Environment Canada, *Federal Water Policy*, 1987.

(2) *Ibid.*, p. 24.

(3) Bill C-156, the Canada Water Preservation Act (Second Session, Thirty-third Parliament).

(4) Canada, Department of Foreign Affairs and International Trade, *Bulk Water Removal and International Trade Considerations*, 16 November 1999.

(5) For particulars regarding Ms. Holm's arguments contending that Canadian control of water resources is compromised by the terms of the NAFTA, see: Wendy Holm, "Water and Free Trade," Chapter 1 (p. 1-27) in *NAFTA and Water Exports*, Canadian Environmental Law Association, October 1993. See also, Barry Appleton, Chapter 25, "Frequently-Raised Concerns on the NAFTA," *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement*, Carswell, 1994; Mr. Appleton also is of the view that the NAFTA applies to ground and surface fresh water in its natural state. In a specific heading entitled "Water," Mr. Appleton discusses what he considers to be the effects of the NAFTA on our water resources (p. 201-205). As well, see West Coast Environmental Law, *Legal Opinion commissioned by the Council of Canadians re: Water Export Controls and Canadian International Trade Obligations*, 17 August 1999.

(6) Jon R. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, Canada Law Book Inc., 1995.

(7) *Ibid.*, p. 109-110.

(8) Sophie Dufour, "The Legal Impact of the *Canada-United States Free Trade Agreement* on Canadian Water Exports," (1993), 34 *Les Cahiers de Droit* 705. After analyzing at length the legal effects of the FTA on Canadian water resources, Ms. Dufour concluded that there was nothing in the deal to suggest that Canada had in any way conceded future access to its water resources to the United States.

(9) *Ibid.*, p. 742.

(10) Canada, House of Commons, Legislative Committee on Bill C-115 (Third Session, Thirty-fourth Parliament), *Minutes of Proceedings and Evidence*, 5 May 1993, Issue No. 6, p. 15-16.

(11) S.C. 1988, c. 65.

(12) S.C. 1993, c. 44.

(13) The NAFTA was not yet in force at that time.

(14) Government of Canada, Office of the Prime Minister, "Prime Minister Announces NAFTA Improvements; Canada to Proceed with Agreement," Press Release, 2 December 1993.

(15) The following information concerning the federal government's position on the issue is taken from: Canada, Department of Foreign Affairs and International Trade, *Questions and Answers (Trade)*. These questions and answers were prepared as part of a package of materials on Bill C-6, an Act to amend the International Boundary Waters Treaty Act (First Session, Thirty-seventh Parliament), 2001.

(16) On the issue of national treatment under the NAFTA, see the subsequent discussion in this paper under the heading entitled "Bulk Water Removal and NAFTA Chapter 11."

(17) International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*, 22 February 2000. Pages 32-34 of the report deal with trade issues.

(18) *Ibid.*, p. 33.

(19) As described in: Frank Quinn and Jeff Edstrom, "Great Lakes Diversions and Other Removals," *Canadian Water Resources Journal*, Volume 25, p. 125-151 at 140 (June 2000).

(20) Canada, Department of Foreign Affairs and International Trade, *Questions and Answers (Trade),* Materials prepared in relation to Bill C-6, An Act to amend the International Boundary Waters Treaty Act (First Session, Thirty-seventh Parliament), 2001.

(21) Bill C-249, the Canada Water Export Prohibition Act, First Reading 19 October 1999 (Second Session, Thirty-sixth Parliament). Other similar bills introduced by Mr. Riis in earlier Parliaments include Bill C-202 (First Session, Thirty-fifth Parliament); Bill C-232 (Second Session, Thirty-fifth Parliament); Bill C-404 (First Session, Thirty-sixth Parliament).

(22) Bill C-205, the Canada Water Export Prohibition Act, First Reading 2 February 2001 (First Session, Thirty-seventh Parliament).

(23) Bill C-410, the Canada Water Export Prohibition Act, First Reading 16 December 1999 (Second Session, Thirty-sixth Parliament). Mr. Lincoln's other similar bill on the subject was Bill C-485 (First Session, Thirty-sixth Parliament).

(24) For the debate regarding Mr. Gilmour's motion, see: Canada, House of Commons, *Hansard*, 8 February 1995 (First Session, Thirty-fifth Parliament), p. 9355-9362.

(25) For the debate regarding Mr. Blaikie's motion, see: Canada, House of Commons, *Hansard*, 9 February 1999 (First Session, Thirty-sixth Parliament), p. 11607-11637, 11652-11675.

(26) Canada, House of Commons, *Hansard*, 15 May 1998 (First Session, Thirty-sixth Parliament), p. 7062.

(27) *Ibid.*

(28) Canada, House of Commons, *Hansard*, 16 November 1998 (First Session, Thirty-sixth Parliament), p. 10052.

(29) *Ibid.*, p. 10052-10053.

(30) For example, see: Canada, House of Commons, *Hansard*, 3 November 1999 (Second Session, Thirty-sixth Parliament), p. 1049; see also *Hansard*, 22 November 1999, p. 1591-1592; 1 March 2000, p. 4210; 3 April 2000, p. 5619-5620.

(31) Canada, Department of Foreign Affairs and International Trade, "Strategy Launched to Prohibit the Bulk Removal of Canadian Water, including Water for Export," Press Release, 10 February 1999.

(32) Canada, Department of Foreign Affairs and International Trade, *A Strategy to Protect Canadian Water*, backgrounder, 10 February 1999. Another backgrounder, entitled *Water Facts*, was released by the department on the same date.

(33) Canada, Environment Canada, *Background Information on Bulk Water Removal and Water Export*, and *Bulk Water Removals and Water Export – Frequently Asked Questions*, 2001.

(34) For background information on, and an analysis of, Bill C-15, see Canada, Library of Parliament, Parliamentary Research Branch, LS-353E.

(35) For background information on – and an analysis of – Bill C-6, see Canada, Library of Parliament, Parliamentary Research Branch, LS-383E. Bill C-6, *an Act to amend the International Boundary Waters Treaty Act* appears as S.C. 2001, c. 40.

(36) R.S.C. 1985, c. I-17 as amended.

(37) The Treaty appears as a schedule to the *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17 as amended.

(38) Canada, House of Commons, *Hansard*, 23 November 1999 (Second Session, Thirty-sixth Parliament), p. 1635.

(39) *Ibid.*

(40) Canada, Department of Foreign Affairs and International Trade, *Backgrounder: Amendments to the International Boundary Waters Treaty Act (IBWTA).*

(41) Canada, House of Commons, *Hansard*, 20 October 2000 (Second Session, Thirty-sixth Parliament), p. 9329.

(42) *Ibid.*, p. 9329.

(43) Canada, House of Commons, *Hansard*, 26 April 2001 (First Session, Thirty-seventh Parliament), p. 3223.

(44) Canada, Environment Canada, *Background Information on Bulk Water Removal and Water Export*, 2001.

(45) *Ibid.*

(46) Canada, House of Commons, *Hansard*, 22 November 1999 (Second

Session, Thirty-sixth Parliament), p. 1591.

(47) *Ibid.*, 3 April 2000, p. 5620.

(48) Council of Canadians, Press Conference, *A Plan Full of Holes*, 10 February 1999. See also West Coast Environmental Law, *Legal Opinion commissioned by the Council of Canadians re: Water Export Controls and Canadian Environmental Trade Obligations*, 17 August 1999.

(49) International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*, 22 February 2000. The report was released to the public on 15 March 2000. An interim report had earlier been released in August 1999.

(50) Canada, Environment Canada, *Bulk Water Removals and Water Export – Frequently Asked Questions*, Question 3, 2001.

(51) International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* (22 February 2000), Appendix 8.

(52) *Ibid.*, p. 33.

(53) Council of Canadians, "International Joint Commission Fails Canadians and Opens Door to Bulk Water Exports," Press Release, 15 March 2000.