

BULK WATER REMOVALS: CANADIAN LEGISLATION

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INTRODUCTION

On 10 February 1999, the then Foreign Affairs Minister, the Hon. Lloyd Axworthy, and the then Environment Minister, the Hon. Christine Stewart, announced a strategy⁽¹⁾ to prohibit the bulk removal of water, including removal for export, from major Canadian water basins. They noted that the strategy responded to Canadian concerns about the security of Canada's freshwater resources. According to the press release issued on the same date, the strategy reaffirmed the federal government's long-standing position opposing bulk water removal and was consistent with the 1993 statement by the governments of 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 a trade issue.⁽²⁾

The strategy comprised three key elements:

- proposed amendments to the *International Boundary Waters Treaty Act*;
- 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; and
- a proposed Canada-wide accord on bulk water removals.

The strategy recognized that the provinces have primary responsibility for water management and that the federal government has jurisdiction over boundary waters to the extent specified in the 1909 *Boundary Waters Treaty*.⁽³⁾ The strategy also noted that actions by territorial governments will be important as they assume greater responsibility over water resource management. The federal government stated that joint participation was essential to develop and implement a permanent Canada-wide solution to bulk water removal.⁽⁴⁾

With respect to the first part of the strategy, the federal government enacted legislation to amend the *International Boundary Waters Treaty Act*, the main effect being to prohibit the bulk removal of water out of the Canadian portion of boundary water basins between Canada and the United States, principally the Great Lakes. The amending legislation⁽⁵⁾ was enacted into law and received Royal Assent on 18 December 2001; it came into force on 9 December 2002.

The second part of the strategy included a joint Canada-U.S. reference to the IJC on consumptive uses,

obstructions and diversions of Great Lakes water. The IJC's final report(6) in February 2000 concluded that the Great Lakes require protection, especially in the light of uncertainties, pressures and cumulative impacts from removals, consumption, population, economic growth and climate change. Recommendations for action to protect the ecological integrity of the Great Lakes Basin were directed by the IJC to all levels of government in Canada and the United States. According to federal government sources, the amendments to the *International Boundary Waters Treaty Act* are consistent with and supportive of the IJC's conclusions and recommendations.

The third part of the strategy involved the federal Minister of the Environment seeking endorsement by the provinces and territories of a Canada-wide accord prohibiting bulk water removals out of Canada's major watersheds. The proposed accord was discussed at meetings of the Canadian Council of Ministers of the Environment in November 1999 and again in May 2000. Quebec and the western provinces refused to endorse the accord as presented. Federal government sources have subsequently pointed out, however, that as a result of the above initiative, all provinces have developed or are developing legislation or regulations that will accomplish this goal by prohibiting bulk water removals within their respective jurisdictions.(7)

The purpose of this paper is to outline, in chart form, the initiatives thus far taken by the federal government and each of the provinces within their respective jurisdictions in the above regard.(8) In each case, references are made to the relevant sections of the appropriate statute and/or regulations.

CANADIAN LEGISLATION/REGULATIONS REGARDING BULK WATER REMOVALS

Jurisdiction	Legislation	Approach	Exceptions
Federal	<p><i>International Boundary Waters Treaty Act</i>, R.S.C. 1985, c. I-17 as amended by <i>An Act to amend the International Boundary Waters Treaty Act</i>, S.C. 2001, c. 40 (Royal Assent 18 December 2001; in force 9 December 2002)</p> <p><i>International Boundary Waters Regulations</i>, <i>Canada Gazette</i>, Part II, vol. 136, no. 26, pp. 2839-2843</p>	<p>No person shall use or divert boundary waters by removing water from the boundary waters and taking it outside the water basin in which the boundary waters are located (section 13(1) of the Act). The prohibition against water removal applies only in respect of the water basins described in the regulations (section 13(3) of the Act), and only to the removal of boundary waters in bulk (section 6(1) of the regulations).</p> <p>The regulations, in</p>	<p>According to the regulations, the prohibition against the bulk removal of boundary waters does not apply to boundary waters used:</p> <ul style="list-style-type: none"> - in a conveyance, including a vessel, aircraft or train, (a) as ballast; (b) for the operation of the conveyance; or (c) for people, animals or goods on or in the conveyance (section 6(2) of the regulations) - in a manufactured product containing water, including

section 2(1), define the “removal of boundary waters in bulk” as follows:

In these Regulations, “removal of boundary waters in bulk” means the removal of water from boundary waters and taking the water, whether it has been treated or not, outside the water basin in which the boundary waters are located

(a) by any means of diversion, including by pipeline, canal, tunnel, aqueduct or channel; or
(b) by any other means by which more than 50,000 litres of boundary waters are taken outside the water basin per day.

The regulations, in section 5, state that the prohibition against water removals from boundary waters set out in section 13(1) of the Act applies only in respect of the Canadian portion of the following water basins:

(a) Great Lakes–St. Lawrence Basin, which is the area of land from which water drains into the Great Lakes or the St. Lawrence River;
(b) Hudson Bay Basin, which is the area of land from which water drains into Hudson

water and other beverages in bottles or packages, that is taken outside a water basin (section 2(2) of the regulations)
- in a non-commercial project on a short-term basis for firefighting or humanitarian purposes (section 6(3) of the regulations); a “non-commercial project” is defined in section 1 of the regulations to mean a project involving the removal of boundary waters in bulk in which no one is required to pay for the waters

		<p>Bay; and</p> <p>(c) Saint John– St. Croix Basin, which is the area of land from which water drains into the St. John River or the St. Croix River.</p>	
Newfoundland and Labrador	<p><i>Water Resources Act,</i> S. Nfld. and Labrador 2002, c. W-4.01</p>	<p>A person shall not remove water from the province (section 12(2)).</p> <p>The Act defines “water” for purposes of the Act to mean all water located in or derived from a “body of water” (section 2(y)). The latter is defined for purposes of the Act as follows:</p> <p>“body of water” means a surface or subterranean source of fresh or salt water within the jurisdiction of the province, whether that source usually contains liquid or frozen water or not, and includes water above the bed of the sea that is within the jurisdiction of the province, a river, stream, brook, creek, watercourse, lake, pond, spring, lagoon, ravine, gully, canal, wetland and other flowing or standing water and the land occupied by that body of water (section 2(d)).</p>	<ul style="list-style-type: none"> - water contained in containers of not more than 30 litres in volume (section 12(3)(a)) - water used in the operation of, or for the use by or consumption of persons in, a motor vehicle, vessel or aircraft (section 12(3)(b)) - water used to transport food or an industrial product out of the province (section 12(3)(c)) - water removed for a non-commercial purpose approved by the Minister of Environment, including for safety or humanitarian purposes (section 12(3)(d))

Nova Scotia	<i>Water Resources Protection Act</i> , S.N.S. 2000, c. 10	<p>No person shall be granted an approval to and no person shall</p> <p>(a) drill for, divert, extract, take or store water for removal;</p> <p>(b) sell or otherwise dispose of water to a person for removal;</p> <p>(c) convey or transport water for removal; or</p> <p>(d) remove water from the portion of the Atlantic Drainage Basin that is located within the Province (section 4).</p> <p>The Act defines “water” for purposes of the Act to mean all surface water or groundwater and, for greater certainty, to include such water in the form of ice (section 2(c)). The Act defines “Atlantic Drainage Basin” to mean the geographic area that drains into the Atlantic Ocean and, for greater certainty, to include all of the province (section 2(a)).</p>	<ul style="list-style-type: none"> - water packaged in the Province in a container of not more than 25 litres or such maximum capacity as is prescribed by the regulations (section 5(1)(a)) - water transported in a motor vehicle, vessel or aircraft and that is necessary for the operation of the motor vehicle, vessel or aircraft or is intended for the use of animals or persons in or on those forms of transport (section 5(1)(b)) - water used to transport fish or any other product (section 5(1)(c)) - water used for a non-commercial purpose approved by the Minister of the Environment, including meeting short-term safety, security, fire-fighting or humanitarian needs (section 5(1)(d)) - water included in manufactured, produced or packaged foods or other products (section 5(1)(e)); potable or other
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			<p>water is not a manufactured or produced product (section 5(2))</p> <ul style="list-style-type: none"> - water removed under such other circumstances as are prescribed by the regulations (section 5(1)(f)); no regulations have been made pursuant to the Act as of the date of this paper
<p>Prince Edward Island</p>	<p><i>Environmental Protection Act</i>, R.S.P.E.I. 1988, c. E-9 as amended</p>	<p>No person shall drill for, extract, take or use groundwater for the purpose of transfer or removal from the Province (section 12.1(1)).</p> <p>No person shall extract, remove or withdraw water from any water basin, watercourse or other surface water body in the Province for the purpose of transfer or removal from the Province (section 12.1(2)).</p> <p>For purposes of the Act, water includes liquid and frozen surface and groundwater (section 1(r)).</p>	<ul style="list-style-type: none"> - water used for drinking purposes and packaged in Prince Edward Island in containers having a capacity of not more than 25 litres (section 12.1(3)(a)) - water in a vehicle, vessel, or aircraft used by persons or animals while they are being transported in it (section 12.1(3)(b)) or for the ordinary operation of the vehicle, vessel or aircraft or the transport of food or products in it (section 12.1(4)(a)) - water removed, with the written permission of the Minister of Fisheries, Aquaculture and Environment, to

			meet short-term safety, security or humanitarian needs (section 12.1(4)(b))
New Brunswick		Officials in the Department of the Environment and Local Government point out that, although there is currently no legislation regarding the matter, a prohibition on water removal is to be included as part of a broader review of water allocation and management, in consultation with the public.	
Quebec	<i>Water Resources Preservation Act</i> , S.Q. 1999, c. 63 as amended by S.Q. 2001, c. 48	No water taken in Quebec may be transferred outside Quebec (section 2). The Act applies to surface water and groundwater (section 1).	<ul style="list-style-type: none"> - water taken to produce electric power (section 2(1)) - water to be marketed as water intended for human consumption, insofar as the water is packaged in Quebec in containers of 20 litres capacity or less (section 2(2)) - water taken to supply potable water to establishments or dwellings situated in a bordering zone (section 2(3)) - water taken to supply vehicles, vessels or aircraft, whether for the needs of the persons or animals being transported or for

			<p>ballast or other needs related to the operation of the vehicles (section 2(4))</p> <ul style="list-style-type: none"> - subject to the provisions of the <i>Environment Quality Act</i>, the Quebec government may, on the grounds of urgency, for humanitarian or other reasons considered to be in the public interest, lift the prohibition against water taken in Quebec being transferred outside Quebec; the prohibition may be lifted in relation to one specific case or several cases and the government's decision to lift it must describe the situation that warrants the lifting (section 3)
<p>Ontario</p>	<p><i>Water Taking and Transfer Regulation</i>, Ontario Regulation 285/99 made under the authority of the <i>Ontario Water Resources Act</i>, R.S.O. 1990, c. O-40 as amended</p>	<p>No person shall use water by transferring it out of a water basin (section 3(2)).</p> <p>For purposes of the above provision, Ontario is divided into the following three water basins:</p> <ol style="list-style-type: none"> 1. The Great Lakes–St. Lawrence Basin, which consists of Lake Ontario, Lake Erie, 	<ul style="list-style-type: none"> - water packaged in a container having a volume of 20 litres or less (section 3(6)) - water used in the water basin to manufacture or produce a product that is then transferred out of the water basin (section 3(3)); for the purposes of this

Lake Huron, Lake Superior, the St. Lawrence River and the part of Ontario the water of which drains into any of them, including the Ottawa River and the part of Ontario the water of which drains into the Ottawa River;

2. The Nelson Basin, which consists of the part of Ontario the water of which drains into the Nelson River; and

3. The Hudson Bay Basin, which consists of the part of Ontario, not included in the Nelson Basin, the water of which drains into Hudson Bay or James Bay (section 3(1)).

provision, potable or other water is not a manufactured or produced product (section 3(4))

- water that is being transported and is necessary for the operation of the vehicle, vessel or other form of transport it is being transported in, including water that is for the use of people or livestock in or on the vehicle, vessel or other form of transport (section 3(5))
- an undertaking commenced before 1 January 1998 if the amount of water transferred out of a water basin by the undertaking in any calendar year after 1997 does not exceed the highest amount of water transferred out of the water basin by the undertaking in any calendar year after 1960 and before 1998 (section 3(7))
- water taken pursuant to the Order of the Lieutenant Governor in Council dated 2 October 1913 respecting the Greater Winnipeg

			Water District (section 3(8))
Manitoba	<p><i>The Water Resources Conservation and Protection Act</i>, S.M. 2000, c. 11; also found at C.C.S.M., c. W72</p>	<p>No person shall</p> <p>(a) drill for, divert, extract, take or store water for removal;</p> <p>(b) sell or otherwise dispose of water to a person for removal;</p> <p>(c) convey or transport water for removal; or</p> <p>(d) remove water; from a water basin or sub-water basin (section 2).</p> <p>The Act, in section 1, defines “water” to mean all surface or ground water, whether in liquid or solid form. A “water basin” is defined to mean the Manitoba portion of the Hudson Bay drainage basin. A “sub-water basin” is defined to mean a part of the water basin that is designated as a sub-water basin in the regulations (at the time of writing, there are no regulations under the Act).</p>	<ul style="list-style-type: none"> - water packaged in Manitoba in a container of not more than 25 litres, or any other maximum capacity prescribed in the regulations (section 3(1)(a)) - water used in the ordinary operation of a vehicle, vessel or aircraft or for the use of persons or animals or the transportation of food or products on such forms of transport (section 3(1)(b) and (c)) - water removed to meet short-term safety, security or humanitarian needs with the approval of the Minister (section 3(1)(d)) - water used in Manitoba to manufacture or produce a product (section 3(1)(e)); for purposes of this provision, potable or other water is not a manufactured or produced product (section 3(2)) - further exceptions may be made by the Lieutenant Governor in Council in

			regulations (section 3(3)); at the time of writing, there are no regulations under the Act
Saskatchewan	<i>Saskatchewan Watershed Authority Act</i> , S.S. 2002, c. S-35.02	<p>Notwithstanding any other provision in <i>The Saskatchewan Watershed Authority Act</i> or any other Act, the Saskatchewan Watershed Authority shall not grant</p> <p>(a) any licence or approval to construct or operate works for the purposes of transferring water out of a watershed; or</p> <p>(b) any licence or approval to transfer water out of a watershed (section 43).</p> <p>The Act defines “water” to be ground water or surface water (section 2(o)); “ground water” is defined to mean water beneath the surface of land (section 2(i)); “surface water” is defined to mean water above the surface of land and being in a river, stream, lake, creek, spring, ravine, coulee, canyon, lagoon, swamp, marsh or other watercourse or water body (section 2(n)).</p>	<p>-water packaged in containers that have a capacity that is less than the maximum capacity prescribed in the regulations (section 44(b)); at the time of writing, no relevant regulation has been made in this regard</p> <p>-water transferred or taken for the purpose of transfer between watersheds, or portions of watersheds, within Saskatchewan (section 44(a))</p> <p>-water used for the ordinary operation of a vehicle, vessel or aircraft, or for the use of persons or animals or for the transportation of food or products on such forms of transport (sections 44(c) and (d))</p> <p>-water that is of a class prescribed in the regulations or that is removed in a manner or purpose prescribed in the regulations (section 44(e)); at the time of writing, these matters have</p>

			not been addressed in regulations
Alberta	<p><i>Water Act</i>, R.S.A. 2000, c. W-3 as amended</p> <p><i>Water (Ministerial) Regulation</i>, Alta. Reg. 205/98 as amended</p>	<p>For the purpose of promoting the conservation and management of water, including the wise allocation and use of water, a licence shall not be issued for the purpose of transporting water from the Province outside Canada by any means, unless the licence is authorized by a special Act of the Legislature (section 46(2)).</p> <p>A licence shall not be issued that authorizes the transfer of water between major river basins in the province unless the licence is specifically authorized by a special Act of the Legislature (section 47).</p> <p>The Act defines a “major river basin” in section 1(1)(ff) to mean</p> <ul style="list-style-type: none"> (i) the Peace/Slave River Basin, (ii) the Athabaska River Basin, (iii) the North Saskatchewan River Basin, (iv) the South Saskatchewan River Basin, (v) the Milk River Basin, 	<p>- prohibition against transferring water from the Province outside Canada by any means (set out in section 46(2)) does not apply to “municipal water” and “processed water” as defined in the regulations (sections 46(1) and (3)). The relevant regulation, the <i>Water (Ministerial) Regulation</i>, defines “municipal water” and “processed water” in sections 1(3)(c) and (e) respectively for purposes of the <i>Water Act</i> as follows:</p> <p>“municipal water” means water under a deemed licence that is processed through a treatment plant of a local authority in Alberta, where water under the deemed licence is transferred from within the Province to a location outside of Canada on the date the Act comes into force.</p> <p>“processed water” means</p>

		<p>(vi) the Beaver River Basin, and (vii) the Hay River Basin, with boundaries as specified in the regulations. (The boundaries of the river basins are set out in section 10(1) of the <i>Water (Ministerial) Regulation</i>.)</p> <p>The Act defines “water” in section 1(1) (ff) to mean all water on or under the surface of the ground, whether in liquid or solid state.</p> <p>Before a bill to amend section 46 or 47 or to enact a special Act described in those sections is introduced into the Legislative Assembly, the Minister responsible for the <i>Water Act</i> must consult with the public, in a form and manner satisfactory to the Minister, with respect to such a bill (section 48).</p>	<p>(i) water that is packaged in Alberta as a beverage, including but not limited to bottled or canned water, and (ii) water used in the processing of a food or industrial product if the water is a component of or used to transport the food or industrial product.</p>
British Columbia	<i>Water Protection Act</i> , R.S.B.C. 1996, c. 484 as amended	A person must not remove water from British Columbia (section 5).	-water packaged in British Columbia in containers of 20 litres capacity or less (section 5(c)) -a person who is a “licensed registrant” (defined in section 1(1) of the Act) under a

A person must not construct or operate a large-scale project capable of transferring water from one major watershed to another (section (6(1))).

The Act, in section 1(1), defines a “large scale project” to mean a project to divert or extract a peak instantaneous flow of 10 cubic metres or more a second, but does not include a project that on 20 June 1995 was complete or in operation, or for which on that date site preparation had begun or the construction, installation or supply of buildings, equipment, machinery or other facilities had begun.

A “major watershed” is defined to mean any of the following nine regions in British Columbia:
(a) the Fraser Watershed, comprising the area that drains into

“registered licence” (defined in section 1(1) of the Act) that remains in effect and who complies with the registered licence (section 5(b))
-a person who is registered as an “unlicensed registrant” (defined in section 1(1) of the Act), under a registration that remains in effect, and complies with the applicable conditions (set out in section 16 of the Act) of that registration (section 5(b))
-water carried in vehicles, vessels or aircraft for the use of persons or animals while they are being transported in those forms of transport (section 8)

		<p>the Fraser River and its tributaries;</p> <p>(b) the MacKenzie Watershed, comprising the area that drains into the MacKenzie River and its tributaries;</p> <p>(c) the Columbia Watershed, comprising the area that drains into the Columbia River and its tributaries;</p> <p>(d) the Skeena Watershed, comprising the area that drains into the Skeena River and its tributaries;</p> <p>(e) the Nass Watershed, comprising the area that drains into the Nass River and its tributaries;</p> <p>(f) the Stikine Watershed, comprising the area that drains into the Stikine River and its tributaries;</p> <p>(g) the Taku Watershed, comprising the area that drains into the Taku River and its tributaries;</p> <p>(h) the Yukon Watershed, comprising the area that drains into the Yukon River and its tributaries;</p> <p>(i) the Coastal Watershed, comprising the rest of British Columbia.</p>	
<p>Yukon Northwest</p>		<p>The federal government is currently responsible for all aspects of water management in the</p>	

Territories

Nunavut

Territories. The jurisdiction is exercised under the following four federal Acts:

(1) *Yukon Waters Act*, S.C. 1992, c. 40 as amended (Note: This federal Act will be repealed and replaced by a statute enacted by the Yukon Territory once the new *Yukon Act*, S.C. 2002, c. 7 (assented to 27 March 2002) is proclaimed in force. See below.)

(2) *Northwest Territories Waters Act*, S.C. 1992, c. 39 as amended

(3) *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 as amended

(4) *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10

Each of the above Acts sets up a water licensing board; any major diversion or use of water requires the issuance of a licence by the appropriate licensing board and approval by the federal Minister of Indian Affairs and Northern Development.

The federal Minister has written to the

premiers of each of the territories, who have stated that they also are in favour of a ban on bulk water removals. The federal Department of Indian Affairs and Northern Development is currently working on a joint statement with each of the three territorial governments to indicate to the public that the federal Minister will not approve bulk water removals from major water basins in the territory. The joint statements will reflect the current position because at present the Minister will not approve such water removals in the territories in any event, in light of the federal government's policy position on this matter.

The federal government entered into the Yukon Northern Affairs Program Devolution Transfer Agreement with the Yukon government on 29 October 2001. By virtue of this agreement, the federal government agreed to replace the current *Yukon Act* with a new *Yukon Act* (S.C. 2002, c. 7) which, when proclaimed in force (expected date of 1 April 2003), will give

		<p>the Yukon provincial-type management responsibilities in relation to water in the territory. The Yukon may then legislate as it wishes with respect to bulk water removals from water basins in the territory.</p> <p>In the case of the Northwest Territories and Nunavut, there are, as yet, no such devolution transfer agreements, so it will probably be some time before those two territories will have provincial-type management responsibilities in relation to water in those territories.</p>	

(1) 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. Along with the press release, the department released two backgrounders, one entitled *Water Facts*, and the other entitled *A Strategy to Protect Canadian Water*, on the same date.

(2) For further information concerning these and other issues relating to bulk water removals and water exports, see David Johansen, [Bulk Water Removals, Water Exports and the NAFTA](#), PRB 00-41E, Parliamentary Research Branch, Library of Parliament, 20 February 2001; see also David Johansen, [Bulk Water Removals and the NAFTA](#), TIPS-20E, Parliamentary Research Branch, Library of Parliament, 13 February 2002.

(3) The Treaty appears as a schedule to the *International Boundary Waters Treaty Act*, R.S.C. 1985, c. 1-17 as amended.

(4) Department of Foreign Affairs and International Trade, *A Strategy to Protect Canadian Water*, Backgrounder, 10 February 1999.

(5) *An Act to amend the International Boundary Waters Treaty Act*, S.C. 2001, c. 40. For background information on – and an analysis of – the legislation when it was at the bill stage (Bill C-6, 1st Session,

37th Parliament), see [Legislative Summary LS-383E](#), prepared by David Johansen, Parliamentary Research Branch, Library of Parliament, 4 February 2002.

(6) 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 been released in August 1999.

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

(8) The writer acknowledges the assistance of the officials in the Water Policy Branch of the federal Department of the Environment, who were helpful in providing references to most of the relevant statutory provisions.