



SUSTAINABLE DEVELOPMENT BRIEFING NOTE

Is Water a Tradable Commodity?

Highlights

- Many have argued that trade agreements limit Canada's ability to prevent bulk water exports; though water is generally not a commodity in Canada, it may sometimes be in the United States.
- A Canada-US-Mexico joint statement excluded water from NAFTA, but this statement may have no legal force.
- The Boundary Waters Treaty of 1909 may confer some protection against bulk export.
- While it is probably not subject to existing trade agreements, until it is tested in a court or tribunal, the status of water under trade agreements remains uncertain.

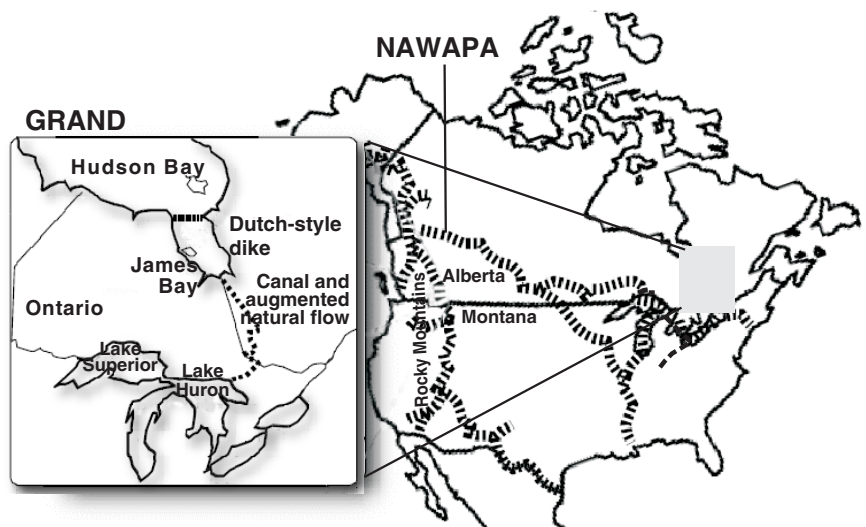
I predict that the United States will be coming after our fresh water aggressively in three to five years. We must prepare, to ensure that we aren't trapped in an ill advised response.

Peter Lougheed, former Premier of Alberta

The Globe and Mail (November 11, 2005).

Background

Many Canadians fear that international agreements, such as the North American Free Trade Agreement (NAFTA), may force Canada to allow the sale of our water to the United States. However, trade agreements apply to goods, services, and commodities. Water is not a service, although it may be used to provide services. In small quantities, it may be described as a good; but we are not concerned with small quantities. The question therefore arises: is bulk water a commodity? If not, then the



NAWAPA *The Great Recycling and Northern Development (GRAND) Canal and The North American Water and Power Alliance (NAWAPA) distribution network are well known examples of bulk water export schemes proposed in the 1960s that would involve the diversion of hundreds of cubic kilometers of water from Canada to the United States each year.*

agreements do not apply; if it is a commodity, is Canada's ability to control its export limited by NAFTA or other agreements?

This briefing note¹ explores whether water is a commodity. Given the lack of precedents in common law, it approaches the question through economic theories, provincial policies and the evolution of water law in Western Canada.

Water, Trade, and Canada

Historically, and still today, Canada's economy has been heavily dependent on trade in natural resources, from beaver pelts to lumber, oil, and diamonds. Unlike other natural resources, water literally falls from the sky, and is essential to all life forms - a property that, to many, makes water a priceless resource. On the other hand, water is used for economic purposes in our energy, manufacturing, and agricultural sectors, and could therefore be priced according to supply and demand. As a country that is perceived to be water wealthy,² many feel Canada is in a position to profit by exporting its water to thirsty markets south of the border. The outcome of these opposing views has been a heated debate over the trade of a resource to which Canadians have an emotional and cultural attachment. A significant part of the debate is the question of whether water is a commodity.³

Economic Theories

A commodity is an economic good, tradable good, product or article of commerce; something for which there is an established market where the commodity can be bought and sold in commercial transactions between willing buyers and sellers. It is not clear if this definition applies to water. Market fundamentalists might argue that water must be a commodity, because the market is the only mechanism for allocating scarce resources. Other economists argue that water is a public good and that it should remain a public sector responsibility.

In support of the public good interpretation, quality of life and health care depend on reliable supplies of high quality water for diet and hygiene. The uneven success of privatization schemes indicates that the market cannot always manage water effectively, further bolstering the public good argument. On the other hand, water pricing is often promoted as an important tool for demand management. However, equity concerns arise when pricing systems, which might make sense for industries that profit from the use of water, are applied to water as an essential service.

Water is not currently traded on any commodity exchange, which is a compelling argument that it is not a commodity.

Provincial Policies

As owners of the resource, Canadian provinces have tried to find a balance between the essential services water provides and its value as an economic input. Current legislation in some provinces appears to allow for the commoditization of water under certain circumstances, marking an evolution from riparian rights,⁴ to prior allocation,⁵ to management of a scarce resource. Some provinces allow access to water in rural areas for domestic use and family agriculture without the need for a licence, as an essential service. However, licences are usually required for larger volumes for industry and agriculture. In British Columbia, an annual fee for water is paid, determined by purpose and volume; in Alberta, water use licences can be traded, giving water some of the characteristics of a commodity.

A critical question is whether the purchaser of a water licence can change the use, for example from agriculture to export. In some jurisdictions in the United States (such as California or Arizona), purchasers of water licences can change the use, making the water licence a commodity. In Canada, however, licences usually specify the end use, or prescribe a location of use; thus the fee paid is not for a commodity (in the sense of a tradable homogenous good) but rather for the service provided by the water.

All provinces have policies or legislation restricting the bulk export and removal of water from one basin to another, but this would not restrict the bulk export of water. It would only limit its export to adjacent states sharing the same basin. Such removals, however, would be governed by the Boundary Waters Treaty of 1909, under which neither country can engage in any work affecting the waters of the other without their approval. Although boundary waters may thus enjoy an additional protection, it is not clear that this protection would be sufficient should the United States decline to refer the matter to the International Joint Commission, as occurred in the case of the Devil's Lake diversion.⁶ The federal government has a policy against bulk water export but has not enshrined that policy in legislation.

Size Matters

Another aspect of a commodity is that it can typically be bought in bulk, thus raising the question of the volume or size of the export, particularly whether it is in containers, pipes, or open channels. Currently, small quantities of water are exported once they have been put in containers and sold. There is no restriction on the location of use of bottled water. If someone wished to export bottled water from Canada for washing cars or filling swimming pools, they might be thought of as eccentric, but it would not violate any contracts, policies, agreements, or legislation.

Should bottled water be distinguished from larger containers, such as a tanker, pipeline, or even an open canal? Commercial tanker, pipeline, and canal export projects have all been proposed, but not implemented.⁷ It is difficult to find arguments under trade law why the size of the container would allow a government to prohibit export. If a company exporting bottled water in containers up to 18.9 litres (5 US gallons, or a typical water cooler jug) decided to export by truck or tanker – or even by pipeline or canal – how would governments control the situation? The policy issue is the terms and conditions under which export is permitted regardless of container size.

No Precedent

With respect to bulk water export, the issue of commoditization has yet to be resolved as a matter of trade, despite a large volume of speculative literature. A commodity under NAFTA and the General Agreement on Tariffs and Trade (GATT) is a legally negotiated position and not necessarily dependent on the economic definition. To date there has not been a ruling by a court or trade panel on whether water is a commodity and thus the legal question of whether water is a commodity cannot yet be answered with certainty. It should be noted that Canada, the United States, and Mexico released a joint statement to the effect that water was not covered by NAFTA, but such a statement may have little legal force, even though a court might consider it to be indicative of the intent of the governments. Should water be ruled a commodity in the future, then Canada's ability to control its export may indeed be limited. Given recent Canadian experience with softwood lumber, wheat, and beef, even if there were a tribunal decision favourable to Canada, it might be difficult to enforce.

Given the complex nature of water and its attributes and uses, a tribunal or court that is asked to make a decision on water as a commodity in trade would find that decision very difficult. If governments do not want to take the chance of leaving decisions about water exports to courts or tribunals, which are not

always predictable, they must set the terms and conditions under which export of water as a commodity would be permitted.

Conclusion

The various uses of water cloud the issue of whether water is a commodity, because some uses sustain life and serve the public good whereas others allow for economic gain. Some provinces have moved toward the commoditization of water for large users while allowing access for essential services. Such policies are worrisome to many Canadians who fear any movement toward commoditization. While a previous note in this series suggested that bulk water export is not currently economically viable, Canada nevertheless needs to be prepared for a potential legal challenge regarding export, particularly of boundary waters, and ensure that the complexities of this issue are addressed appropriately through the recognition of different categories of water use.

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Notes

- 1 Other notes in this series may be found by following the “Sustainable Development” and “Publications” links at <www.policyresearch.gc.ca>, or ordered by emailing questions@prs-srp.gc.ca or by telephone at (613) 947-1437.
- 2 Canada has seven percent of the world’s freshwater, but most of it flows north to the Arctic Ocean the St. Lawrence, or the Pacific Coast and so is not easily available for export to the dry areas of the Southwestern United States.
- 3 This note does not consider the derivative export of water. The derivative export of water is the export of products that require water in their production (e.g., wheat, hydro-electricity or minivans).
- 4 The allocation of water rights according to shoreline ownership, common in Eastern Canada.
- 5 The allocation of water rights according to historic use, common in Western Canada.
- 6 The US Army Corps of Engineers has dug a drainage outlet to allow overflow from saline Devil’s Lake in North Dakota into the Lake Winnipeg drainage basin. Though Canada objected, the United States declined to refer the case to the International Joint Commission, arguing there was no likelihood of harm to Canadian waters.
- 7 Canada does export municipal water from British Columbia to Point Roberts, Washington and from Coutts, Alberta to Sweetgrass, Montana, but that is viewed as a neighbourly arrangement for the efficient delivery of municipal services rather than water export.