

**AN ASSESSMENT OF THE EFFECTIVENESS OF  
CANADA'S BULK WATER EXPORT POLICY USING  
BRITISH COLUMBIA AS A CASE STUDY**

by

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## Abstract

A potential global water crisis is looming. While exporting Canada's water may appear to offer help to thirsty regions, water export could have serious negative consequences, including potential environmental impacts and the potential that Canada's sovereign management of its water could be compromised by its obligations under international trade agreements. In this paper, I assess the effectiveness of Canada's current bulk water export policy, the *Accord for the Prohibition of Bulk Water Removal From Drainage Basins* (the Accord), using an in depth Multiple Streams analysis of British Columbia's policy making process and a comparison of water export policies across Canada. The results of this analysis show that a uniform and ongoing commitment to the prohibition of water export is lacking and that the Accord is not likely to achieve its goal of prohibiting the bulk removal of water from the Canadian portions of major drainage basins.

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## List of Abbreviations

dam	Decametre
DFAIT	Department of Foreign Affairs and International Trade
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
IBWTA	International Boundary Waters Treaty Act
IJC	International Joint Commission
NAFTA	North American Free Trade Agreement
NDP	New Democratic Party
WPA	Water Protection Act



government” (POGG) to the federal government (Canadian Environmental Law Association, accessed 2004; *Constitution Act 1867*). As a result, the federal government has been reluctant to impose a bulk water export policy that could create a constitutional conflict. The North American Free Trade Agreement (NAFTA) also limits Canada’s ability to regulate bulk water exports. Under NAFTA, restrictions to trade may only be imposed if they are for legitimate purposes recognized by NAFTA, and not disguised trade barriers. It is up to the federal government to prove that any restriction on the export of bulk water falls under an existing trade exemption of NAFTA; in this case, environmental conservation.

In 1999, the federal government announced a three-pronged strategy to deal with potential bulk water export. The first component of the strategy is a joint reference with the United States (US) to the International Joint Commission (IJC) regarding the potential environmental impacts and possible implications of international trade agreements on the export of bulk water. The second is an amendment to the *Canadian International Boundary Waters Treaty Act* (IBWTA) limiting export of water from the Great Lakes and boundary waters. The *Accord for the Prohibition of Bulk Water Removal from Drainage Basins* (the Accord) is the third component. The Accord is a voluntary agreement among the provinces and territories of Canada to prohibit the export of bulk water. Its stated goal is:

To establish a Canada-wide approach for the protection of Canadian waters, by prohibiting bulk removal of surface and ground water from the Canadian portions of major drainage basins (Environment Canada 1999a).

As each province or territory signs the Accord, they indicate their intent to enact a policy that prohibits bulk water removal from the drainage basins in their respective jurisdictions. The federal government states that “all governments have an important role

to play in achieving a permanent, Canada-wide solution” to the issue of bulk water exports, recognizing the importance of each jurisdiction’s policy in achieving the goal of the Accord (Environment Canada 2004).

The Accord is an attempt by the federal government to create a permanent policy on bulk water export from Canada while at the same time respecting jurisdictional uncertainty within Canada and uncertainty about the implications of Canada’s obligations under NAFTA. As then Minister of Foreign Affairs Lloyd Axworthy described it, the Accord is part of “a comprehensive, long-term approach...that protects our water resources and respects federal/provincial/territorial jurisdictions” (Department of Foreign Affairs and International Trade 1999). Environment Canada also emphasises that the Accord respects Canada’s obligations under NAFTA as it is intended to protect the ecological integrity of Canada’s ecosystems (Environment Canada 2004).

The Accord defines bulk removal of water as “the withdrawal and transfer of water out of its basin in quantities which individually or cumulatively could result in damage to the ecological integrity of the system” (Environment Canada 1999a). The Accord defines the five major water basins in Canada to which it applies: the Atlantic, Arctic, Pacific, Hudson Bay and the Gulf of Mexico (Environment Canada 1999a). Of these five basins, all but the Arctic drainage basin straddle the Canada-US border. It is therefore conceivable that the Accord would in fact permit the export of water across the Canada-US border provided that the water transfer occurred within a drainage basin. Therefore, in order for the bulk export of water to be clearly captured by policies that meet the requirements of the Accord, the water in question would need to be transferred

out of its basin of origin and would need to be shown to have the potential to cause damage to the ecological integrity of the system.

Despite the federal government's efforts to create a policy within the domestic and international constraints placed on its legislative authority, the Accord may not effectively achieve its goals. To date, five years after the Accord was introduced, five provinces have not signed on. Only nine of thirteen jurisdictions in Canada have a prohibition on bulk water exports, calling into question the Canada-wide approach called for in the Accord. Heinmiller (2003) argues, however, that a Canada-wide approach to bulk water exports has been reached despite the mixed response to the Accord. He claims that even though not all jurisdictions have signed the Accord, fairly uniform policy responses have emerged from those jurisdictions that have prohibited export. He argues that a nationwide approach has been achieved by "harmonization through emulation", not adherence to the Accord, and that the existing policies constitute a nationwide regulatory regime for bulk water exports (Heinmiller 2003 p. 21).

While nine of thirteen jurisdictions have bulk water export policies and while there is some similarity between the policies as Heinmiller (2003) suggests, none of these jurisdictions is under any federally controlled obligation to remain committed to its policies. The Accord is non-binding, encouraging commitment from signatories solely through moral suasion. Despite being a signatory, Newfoundland underwent a review process of its bulk water export prohibition in 2001. It chose to retain its prohibition, citing unfavourable economic conditions, but made no mention of its commitment to the Accord as a factor in its decision (Government of Newfoundland and Labrador 2001). For those jurisdictions that have not signed, there is even less reason to remain

committed. Québec, a non-signatory, intends to reopen the possibility of bulk water export by the spring of 2005 (Madigan 2004). Further, many of the policies currently allow amendments by cabinets and administrators without legislative consultation: amendments that include the redefinition of acceptable water export.

It is important to note that if all provinces signed the Accord and enacted policies in accordance with its objective to prohibit the removal of water from the Canadian portions of major drainage basins that could damage the ecological integrity of the system in question, the federal government would succeed at protecting Canada's water from some forms of bulk export. Whether it would succeed at prohibiting all forms of export is a matter of debate. This analysis assesses whether or not the goal of the Accord has been or is likely to be met. The appropriateness or effectiveness of the goal will be addressed in the discussion section.

In this paper, I argue that future policy decisions in each jurisdiction about whether to impose or continue a prohibition on bulk water exports will depend on complex interactions among a variety of environmental, economic and socio-political factors specific to each jurisdiction, in which the Accord may only play a minor, and perhaps insignificant, role. I use British Columbia (BC) as a case study to identify key provincial factors involved in provincial policy making about bulk water export. BC is one of three provinces from which bulk water export has been seriously considered: in 1991, Sun Belt Water Inc. (Sun Belt) proposed the bulk shipment of water from BC to California. Shortly after this proposal, BC imposed a moratorium on bulk water exports and enacted legislation prohibiting bulk water exports in 1996. I use Kingdon's (1995) Multiple Streams framework to examine the reasons why BC chose to prohibit bulk water

export. Kingdon's framework analyses how different factors come together to influence policy direction. Using this framework, I describe the complexity of the agenda setting and policy making process and also highlight potential reasons why BC could chose to lift its prohibition in the future. The myriad factors involved suggest that an ongoing commitment to a Canada-wide approach across all jurisdictions is unlikely.

While a Multiple Streams analysis of each jurisdiction in Canada is beyond the scope of this research, I also compare the strength and scope of bulk water export policies and policy making processes across Canada to investigate whether the Accord is likely to achieve its goal. The results of this comparison indicate that the discrepancies between jurisdictional policies are large, that the Accord provides little incentive for signatories to remain committed to prohibition, and that therefore the Accord has not been and is not likely to be effective at meeting its goal.

The paper is organized as follows. Chapter 2 provides background information on bulk water exports and explores the environmental and jurisdictional issues, as well as the complications of Canada's potential obligations under NAFTA. Chapter 3 outlines my research methodology, including a discussion of Kingdon's Multiple Streams Framework and Key Informant Interviewing. Chapter 4 contains my analysis of the BC case, and in chapter 5, I compare provincial and territorial policy responses to bulk water export. In chapter 6, I integrate the results of chapters 4 and 5 and present potential policy options, and in chapter 7, I summarize the main findings and suggest further research.



## 2 Background

### 2.1 Current global water situation

The diversion, depletion and pollution of water sources caused by a rapidly growing population, industrialization, urbanization and large-scale agriculture threaten water supplies globally (Barlow & Clarke 2002; de Villiers 2000; Revenga 2000). As a result of water diversion, the Nile, Ganges, Yellow and Colorado rivers do not reach the oceans for portions of the year (Barlow 2001). In the American southwest, the 50 million litres a minute that are withdrawn from the Ogallala aquifer outpace by 14 times the rate at which the aquifer is restored (Barlow & Clarke 2002). Nevada and Arizona, two of America's driest states, are also experiencing the highest rates of population growth, 66% and 40% respectively from 1990-2000, putting more pressure on declining resources (U.S. Department of the Interior 2003 p. 5). Globally, water consumption increased six-fold from 1900-1995 – more than double the rate of population growth (Revenga 2000). The United Nations Educational, Scientific and Cultural Organization and the United Nations Industrial Development Organization estimate that industrial water use is likely to increase 1.4 to 2.9 times in developed countries and 3 to 10 times in developing countries between 1990 and 2025 (United Nations Educational Scientific and Cultural Organization 1999), and the World Resources Institute estimates that by 2025, nearly half of the world's population will be living in areas of water stress (less than 1700m<sup>3</sup>/person/year) (Revenga 2000).

Sheer volume of water use is not the only threat to the Earth's fresh water. Thousands of factories, industrial farms, and cities pour or leak pesticides, fertilizers and herbicides, bacteria, medical waste, chemicals, radioactive wastes and other pollution into water sources (Barlow & Clarke 2002). Wetland loss, deforestation and climate change also contribute to deteriorating water quality.

Compared to the dire water situation in some countries, Canada is a goldmine of water resources. Water in Canada makes up an estimated 9% of the world's fresh water resources (Bocking 2000). With a potential global water crisis looming, many eyes are turning to the water riches of Canada for help, and profit.

## **2.2 Defining bulk water export**

Bulk water can be exported in a variety of ways. Defining precisely what is meant by "bulk water export" is a challenging task. Environment Canada defines bulk water removal as

the removal and transfer of water out of its basin of origin by man-made (sic) diversions (e.g., canals), tanker ships or trucks, and pipelines (Environment Canada 2004).

They explain that such removals have the potential, directly or cumulatively, to harm the health of a drainage basin. Similarly, the Accord defines bulk water removal as

the withdrawal and transfer out of its basin in quantities which individually or cumulatively could result in damage to the ecological integrity of the system (Environment Canada 1999a).

Both of these definitions use "removal" instead of "export" in their definitions. On the one hand, the term "removal" captures all uses of bulk water, not just those destined for export. This definition therefore acknowledges the ecological consequences of removing large quantities of water, regardless of the intended use of the water. However, the areas



export”, would constitute on average only 1% of river flows, while as much as 30-80% of river flows are diverted for electricity generation (Boyd 2003 p.65). Canada also ships water in bottles in the form of bottled water or other beverages and though these do not technically fall under the category of “bulk export,” they do constitute a large volume of water (Day & Quinn 1992 p. 35). This study will focus on large-scale diversions and tanker exports.

Opinions differ on the actual threat posed to Canada’s water resources by increasing international demand. Boyd (2003) claims that American water use declined by 5% from 1990-1997 as a result of conservation measures (Boyd 2003 p.55). Similarly, Bocking (2000) argues that according to American resource experts, there are no water shortages in the US that threaten “life or economy” and that any American demand is strictly political (Bocking 2000). Even in the areas that may be experiencing either an increase in demand or a decrease in supply, desalination may still be a less expensive option than import, especially in countries where energy is relatively inexpensive (Boyd 2003 p.55; Bremere, Kennedy, Stikker, & Schippers 2001).

At the same time, large-scale diversions of Canada’s water to the US have been proposed since at least the 1960s. Of particular note were two schemes. The first was the North American Water and Power Alliance (NAWAPA) plan to flood the Rocky Mountain Trench and divert 310 million dam<sup>3</sup>/year of water southward to the US (Pearse, Bertrand, & MacLaren 1985 p. 127). The second, the Great Recycling and Northern Development (GRAND) canal, was a proposal to dam James Bay and turn it into a fresh water reservoir with an annual diversion to the Great Lakes basin of 347 million

dam<sup>3</sup>/year (Day & Quinn 1992 p. 37-41; Pearse et al. 1985 p. 127). Neither proposal was accepted, but they were followed by many more.

The 1990s saw three major water export proposals in Canada. The first was in British Columbia by Sun Belt Water Inc. (Sun Belt). In 1991, Sun Belt won a contract with the Goleta water district of California to import water. Prior to 1991, Sun Belt, an American company, had formed a partnership with Snowcap Water Inc., a BC company that held one of six licenses to export bulk water from BC. Together, these companies applied for an expansion to the license in order to fulfill the terms of the contract with Goleta (Campbell & Nizami 2001 p. 13). The application was circumvented by the BC provincial government's imposition of a moratorium on bulk water exports from BC in 1991.

The second proposal was by the Nova Group to export 600dam<sup>3</sup>/year from Lake Superior in Ontario in 1998 (Boyd 2003 p. 57). In this case, the government of Ontario issued a permit to the Nova Group, but rescinded it in response to public and opposition pressure (Boyd 2003 p. 57; Campbell & Nizami 2001 p. 12). The third proposal was by the McCurdy Group to export 50,000-100,000dam<sup>3</sup>/year from Gisborne Lake in Newfoundland in 2001 (Boyd 2003 p.57). Though this proposal prompted the government of Newfoundland and Labrador to reconsider its legislation prohibiting bulk water exports, the eventual conclusion was to maintain the prohibition (Government of Newfoundland and Labrador 2001).

An important distinction needs to be made between international water transfers and those that occur inter or intra provincially. In this paper, I deal with water that is transferred internationally. Water that is transferred on an inter or intra provincial basis

has the same potential environmental impacts as water that is transferred internationally, however it does not carry with it the potential international trade obligations of international transfer (except in some instances) (see section 2.3.1 and 2.3.2 for a full discussion of these obligations). In addition, water that is transferred within Canada does not arouse the same public concerns as does water transferred internationally.

Exporting bulk water is not without potential benefits to Canada. Those in favour of exporting Canada's water argue that water is no different than other resources that Canada already exports (Day & Quinn 1992 p. 41). Exporting water could also produce economic gain in the form of employment and royalties collected from the extraction of water. Indeed, in Newfoundland and Labrador, the prospect of badly needed jobs near Gisborne Lake made exporting water an attractive possibility (Barlow & Clarke 2002 p. 67). However, despite potential benefits, the potential costs loom large.

## **2.3 Problem definition**

The problem of exporting bulk water from Canada can be approached from two angles. The first is to consider the potential threats to sustainability posed by the actual export of water. These include potential environmental impacts both in Canada and in importing regions, and the potential creation of dependency on Canada's water supplies. The second is to consider both the regulatory constraints imposed by Canada's obligations under international trade agreements, and the potential that foreign investors could gain access to Canada's water under these same agreements. This section explores the definition of bulk water export as a problem from these two angles.

### **2.3.1 Threats to sustainability**

Is bulk water export sustainable both for Canada and for regions importing Canadian water? Environmental, social and economic concerns arise when we consider the full ramifications of bulk water export. Environmental concerns include not only the impacts of removing water from Canadian ecosystems and the potential introduction of invasive species through large scale diversions, but also the impacts of water tankers on sensitive coastal regions (Bocking 1992). How would freshwater and marine ecosystems be affected by water removal? What would be the impact of the passage of tankers through sensitive ecosystems? What would be the risks of fuel oil spills? Would invasive species be introduced to these regions from the ballast of tankers? These concerns fall against the backdrop of increasing climate change: a trend that is likely to make water supplies more unpredictable in the future (Bruce, Burton, Martin, Mills, & Mortsch 2000; Elwell 2001 p. 162-163).

Concerns have also been raised about the economic implications of bulk water export. How would imported water be priced? Would it be priced out of the reach of the poor who need it (Barlow & Clarke 2002)? Depending on the conditions of the importing nation, these questions could be of concern. Further, would importing regions become dependent on Canadian water (Gleick, Wolff, Chalecki, & Reyes 2002)? Regardless of Canada's obligations under NAFTA, if a region becomes dependent on Canadian water, what would the implications be for "shutting off the tap"? Are regions turning to imports before adequately considering conservation measures at home (Bocking 2002)? What are the impacts of continued over-use of water in arid regions on local ecosystems (e.g. soil salinization)? Should Canada have a say in what the water exported from within its borders is used for (Fritz & McKinney 1992)? On the other

hand, does Canada have an international humanitarian obligation to provide water to those regions that are lacking (Paley 1992)? All of these questions raise serious concerns about the economic and social sustainability of the practice of exporting water. Some of these questions played a large role in defining the debate in British Columbia. Those that are relevant to the BC case will be explored in the Analysis section.

### **2.3.2 International trade agreements**

Canada's ability to enact a bulk water export policy is constrained by its obligations under NAFTA and GATT. Both of these agreements are intended to liberalize trade between nations and any limitations on trade must be carefully justified by existing exemptions contained within the agreements, or else be subject to claims before a trade tribunal. The most likely conflict between Canadian prohibition on bulk water export and Canada's trade obligations can be found in GATT Article XI

(Shrybman 1999a), which states:

(1) No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party (*General Agreement on Tariffs and Trade* 1966).

Under this provision, an outright prohibition on bulk water export could be considered problematic unless it fell within an excepted exemption. To avoid being challenged as protectionism before a trade tribunal, Canada's bulk water export policy must fall within the recognized exemptions offered by NAFTA and GATT.

The protection of ecological integrity is recognized as an exemption under which the federal government could prohibit the export of bulk water (Boyd 2003; Little 1996;



International Joint Commission 2000a). Accordingly, Canada's current strategy specifies that the prohibition of bulk water must be based on potential damage to the ecological integrity of the system of Canadian water basins. It is arguable that this approach is intended to avoid any claims that bulk water export prohibition is "protectionism in green clothing" (Saunders 1995 p. 1171).

An exemption for the conservation of exhaustible natural resources can be found in GATT Article XX(g). Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...(*General Agreement on Tariffs and Trade* 1966).

Essentially, a country may use the exemptions laid out in GATT Article XX(g) only if those restrictions are made in combination with proportional domestic reductions. The test for exemption under Article XX(g) is two-tiered, requiring proof of the connection between the conservation of the resource and the trade action and proof that the exemption is not a disguised trade restriction (Benidickson 2002 p. 81-82). This is apparently a very difficult test to pass as no tribunal or appellate body has been willing to accept a trade restriction on the grounds that it fell within Article XX (Shrybman 1999a). The exemption of GATT XX may not provide any guarantee that Canada's policy will not be challenged, but the Canadian government has chosen to frame its policy in terms of this exemption.

## *Investors' rights*

In addition to making an outright prohibition difficult, international trade agreements potentially grant rights to Canada's water to American and Mexican investors; rights that could override federal legislation (Little 1996; Saunders 1995). The list of articles that could grant access to Canada's water includes: NAFTA Article 1102, the National Treatment clause; NAFTA Article 1103, the Most Favoured Nation clause; and NAFTA Article 315, the Proportionality clause.

NAFTA Chapter 11, or the Investor-State clause, extends rights to investors that GATT extends only to nations. Essentially, Chapter 11 ensures that a NAFTA country will treat investors from another NAFTA country no less favourably than it treats investors from its own country or investors from any other NAFTA country.

NAFTA Chapter 11, Article 1102, affords the National Treatment of GATT Article III to investors and their investments:

(1) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors... (*North American Free Trade Agreement* 1992).<sup>3</sup>

NAFTA Chapter 11, Article 1103, affords the Most-Favoured Nation principle of GATT Article I to investors and their investments:

(1) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party... (*North American Free Trade Agreement* 1992).<sup>4</sup>

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<sup>3</sup> GATT Article III (4) The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use (*General Agreement on Tariffs and Trade* 1966).

<sup>4</sup> GATT Article I (1) With respect to customs duties and charges of any kind ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties (*General Agreement on Tariffs and Trade* 1966).

If an investor feels that it has not been treated in accordance with any of the provisions laid out in Chapter 11 of NAFTA, it may appeal to the NAFTA tribunal on its own behalf against the offending nation. This is a significant change from the GATT under which only governments can appeal the decisions of other governments. Consequently, in order to meet the obligations of NAFTA Chapter 11, the Canadian federal government must ensure that any legislation it imposes does not infringe on the rights of investors from other NAFTA countries.

In its recommendation to the Canadian and US governments, the IJC stressed that there is nothing to prevent the application of a policy designed to protect the ecological integrity of the Great Lakes system as long as there is “no discrimination against individuals from other countries in the application of those measures” (International Joint Commission 2000a). This condition appears to be an application of National Treatment principles.

Little (1996) provides an example of how an investor could challenge a Canadian bulk water export prohibition under NAFTA. He suggests that if there were a federal prohibition on bulk water export and a company in BC transferred water to another province in a time of national shortage, Canada could be found in violation of its National Treatment obligations (Little 1996). While this transfer might not technically be a water “export”, a company in another NAFTA country could argue that it is in “like circumstances” to the BC company and should therefore have the same access to Canada’s water (Little 1996 p. 150-151).

The Sun Belt Water case in BC also exemplifies potential challenges to Canada under NAFTA Chapter 11. In 1998, Sun Belt filed intent to submit a claim to arbitration

under NAFTA against the Canadian government, claiming that the BC provincial government's prohibition on bulk water exports violated several sections of Chapter 11 (Campbell & Nizami 2001 p.13). If the NAFTA tribunal finds Canada in violation of NAFTA, Canada could be required to pay compensation for damages to Sun Belt (Campbell & Nizami 2001 p.13). A ruling in favour of Sun Belt would imply that a corporation's right to be treated "fairly" as per the NAFTA articles supersedes a government's authority to regulate the use of its resources in these circumstances.

The possibility of one province's actions affecting another province's sovereignty is also a concern under National Treatment. As Gary Horlick from the law firm O'Melveny and Myers writes in his legal analysis for the government of Newfoundland and Labrador,

in accordance with the principle of national treatment, if the Province of Newfoundland allows the sale for export of bulk water, then Canada is responsible for ensuring that no other Province deny the sale for export of bulk water and that no other Province afford treatment less favourable than the one afforded by the Province of Newfoundland (Government of Newfoundland and Labrador 2001 p. 33).

In this analysis, the principle of "like" circumstances equates provinces. In a legal opinion prepared for the Council of Canadians, Shrybman (1999d) agrees. He raises the concern that the Accord actually increases the risk of the National Treatment principle being applied to provinces:

Even more troubling is that by entering into an Accord, provincial governments may actually be exposing themselves to claims that they provide National Treatment with respect to any licenses or permits to provincial water resources. This raises the spectre of an export approval sanctioned by any province or the federal government setting the de facto standard with respect to which all other provinces must then conform. (Shrybman 1999d).

However, two other legal opinions that the government of Newfoundland and Labrador solicited disagree with the views of Horlick and Shrybman. Professor Donald M. McRae from the Faculty of Law at the University of Ottawa argues that if one province allows bulk exports, it does not oblige others to do so:

NAFTA Article 1102 makes clear that with respect to a province, national treatment is treatment that is no less favourable than the best treatment accorded in like circumstances by that province to domestic investors or their investments. The fact that one province provides an opportunity for investors, including foreign investors, does not mean that other provinces have to provide the same opportunity (Government of Newfoundland and Labrador 2001 p. 4).

Because of the uncertainty created by NAFTA and GATT with regard to bulk water export, it is difficult to predict what the outcome of a challenge to Canadian policy would be.

NAFTA Article 315 is also relevant in the discussion of investors' rights to Canada's water. Article 315 states that:

(1) Except as set out in Annex 315 a Party may adopt or maintain a restriction otherwise justified under Articles XI:2(a) or XX(g), (i) or (j) of the GATT with respect to the export of a good of the Party to the territory of another Party, only if:

a) the restriction does not reduce the proportion of the total export shipments of the specific good made available to that other Party relative to the total supply of that good of the Party maintaining the restriction ...

c) the restriction does not require the disruption of normal channels of supply to that other Party ...(*North American Free Trade Agreement 1992*).<sup>5,6</sup>

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<sup>5</sup> GATT XI:2(a): The provisions of paragraph I of this Article shall not extend to the following:  
(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party (*General Agreement on Tariffs and Trade 1966*).

<sup>6</sup> NAFTA Annex 315: Article 315 shall not apply as between Mexico and the other Parties (*North American Free Trade Agreement 1992*).



A side statement to NAFTA, issued by the three NAFTA parties, echoes this. In 1993, they agreed that “[t]he NAFTA creates no rights to the natural water resources of any Party to that Agreement” and 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” (*1993 Statement by the Governments of Canada, Mexico and the United States*). However, this statement is not legally binding and does not influence the enforcement of NAFTA trade rules or definitively remove water from NAFTA (Little 1996 p.140; Saunders 1995 p.1183; Shrybman 1999b).

The IJC similarly believes that its recommendations to frame bulk water export policy in terms of the protection of ecological integrity do not violate NAFTA or GATT because the recommendations deal with water in its natural state (International Joint Commission 2000). Campbell and Nizami (2001), writing for West Coast Environmental Law, interpret this to mean that the IJC believes, like others, that water in its natural state is not subject to NAFTA or GATT, but that once export is allowed, it would be subject to these agreements (Campbell & Nizami 2001).

If water in its natural state is not covered by NAFTA, as DFAIT, the NAFTA parties and the IJC argue, then water in its natural state could be considered to be “safe” from NAFTA provisions. However, careful examination of what exactly constitutes commodification reveals that Canada’s water may already be considered a good. As Shrybman (1999a) points out, much of Canadian water has already entered into commercial use, including the generation of hydropower, the irrigation of crops and industrial use. In addition, most provinces and territories currently allow the export of water in bottles (Government of Newfoundland and Labrador 2001), and water is already

piped across the border for domestic use from BC, Alberta and New Brunswick, and is diverted from the Great Lakes Basin (see section 2.2). To a trade tribunal, Canadian water may already be subject to NAFTA and GATT rules.

Some argue that the failure to expressly exclude water from NAFTA has created this uncertainty. While the federal government claimed that water would not be included in NAFTA, it ultimately was, or at least it was not clearly excluded (Boyd 2003 p.57). Even government representatives may have been confused about whether or not water was included in NAFTA. According to Holm (1988) and de Villiers (2000), when Pat Carney, Canada's trade minister at the time, and a senior aide were asked to identify the water exemption in NAFTA, both were surprised that it did not exist. "I don't know what happened. We discussed it. It should be there," the aide is reported to have said (de Villiers 2000 p. 279; Holm 1988). What happened in the time between internal government discussions and the signing of the agreement is uncertain. But the enduring uncertainty of the status of water with respect to NAFTA has created a chilling effect on bulk water export policy in Canada. As Bocking (2002) describes:

[A] chill is descending on environmental legislation as governments decide it's not worth facing the possibility of NAFTA claims by foreign corporations who consider that our laws interfere with potential profits (Bocking 2002 p. 233).

Canada is currently facing exactly this conundrum.

### **2.3.3 Jurisdictional uncertainty**

In addition to the uncertainty created by NAFTA, Canadian constitutional jurisdiction over bulk water exports has yet to be resolved. Under the *Constitution Act*, 1867, s. 92 the provinces are accorded jurisdiction over





imposed by NAFTA and GATT, and domestic jurisdictional limitations on the federal government. These limitations on the federal government's authority create obstacles to implementing a national bulk water export policy. The following section will explore the policy response of the federal government given these limitations.

## **2.4 Current federal policy**

When the first proposals for export were made in the 1960s, the federal government did not have an official policy in place to deal with the question of bulk water export. Finally, in 1985, the federal government conducted a badly-needed review of its water policy. Chaired by Peter Pearse, the Inquiry on Federal Water Policy published *Currents of Change*, which outlined recommendations for many areas of federal water policy, including export of water (Pearse, Bertrand, & MacLaren 1985). The report recommended the development of a federal bulk water export policy in which the granting of licenses was contingent upon an assessment of the potential environmental, economic and social impacts of the proposed export (Pearse et al. 1985 p. 131).

In 1988, Bill C-156, the *Canada Water Preservation Act*, which prohibited bulk water export from Canada, was tabled in parliament. Frank Quinn argues that its introduction was largely motivated by concern raised by the impending Canada-US Free Trade Agreement (FTA), an aborted increase in the Chicago Diversion project and a period of drought across the continent (Quinn 1992). However, Bill C-156 died on the order paper. Day and Quinn (1992) argue that the bill was dropped because it was tabled just before an election and the signing of the Free Trade Agreement. Once the election was won and the agreement signed, there was less incentive to pursue the legislation

(Day & Quinn 1992 p. 51). Since Bill C-156, there have been at least three other water export bills brought to parliament: C-202 (1994), C-232 (1997) and C-286 (2002) all entitled *Canada Water Export Prohibition Act (Bill C-202 1994 ; Canada Hansard, November 1, 2002; Private Members' Business: Canada Water Export Prohibition Act 1997)*. None of these bills were adopted.

The federal government has yet to impose a federal prohibition on bulk water exports. In 1999, the House of Commons adopted a motion on water security, voting in favour of a federal ban on water exports (Campbell & Nizami 2001). In that same year, the federal government adopted a strategy to prohibit bulk water exports that it hoped would not violate any of its constitutional or international obligations (Department of Foreign Affairs and International Trade 1999). As described in chapter 1, the strategy consists of three parts: 1) a joint reference, with the US, to the International Joint Commission; 2) amendments to the *International Boundary Waters Treaty Act*; and 3) development of a Canada-wide Accord with the provinces and territories on bulk water removals.

The first component of the federal strategy was to make a joint reference with the United States to the International Joint Commission (IJC). After consultation with a variety of stakeholders, the IJC presented the *Protection of the Waters of Great Lakes, Final Report to the Governments of Canada and the United States* in February, 2000. In its report, the IJC recommended that

...Canadian and U.S. federal, provincial and state governments should not permit the removal of water from the Great Lakes Basin unless the proponent can demonstrate that the removal will not endanger the integrity of the Great Lakes ecosystem (International Joint Commission 2000b).

The report goes on to list the requirements that proponents must meet in order to ensure protection of the ecosystem.

The second component of the federal government's strategy, the amendment to the *International Boundary Waters Treaty Act* (Bill C-6), incorporates the IJC's recommendations. It controls the export of bulk water from any boundary waters between the United States and Canada, an area over which the federal government has clear jurisdiction under the Canadian constitution. The bill prohibits bulk removal of water, but sets up a licensing scheme to provide for diversions and other uses (Government of Canada 2001). It grants authority to the Minister of Foreign Affairs to grant licenses, and authority to the Governor in Council on recommendation of the Minister of Foreign Affairs to define acceptable uses of the Great Lakes waters in regulations (s.16, 21). Some critics question whether bulk water exports will be permitted at ministerial discretion under the Act (Campbell & Nizami 2001; Holm 2001). However, Stephen Owen, a main proponent of the Act, argues that this is not a concern:

The language of Bill C-6 is absolutely clear on this matter. Any proposal for diversion of boundary waters outside of the basin would be captured by the prohibition provision, not covered by the licensing regime (Owen 2001).

Despite these assurances, the Act does grant significant power to the Minister of Foreign Affairs to make decisions on water use in the Great Lakes without parliamentary approval.

The final component of the federal strategy is a provincial accord in which all provinces would voluntarily agree to prohibit bulk water exports within their jurisdiction. In 1999, the federal government proposed the *Accord for the Prohibition of Bulk Water Removal from Drainage Basins* (the Accord). While the Accord is certainly

constitutionally valid, many questions remain about its effectiveness. Does it adequately address the problem of bulk water exports? Does it provide sufficient incentive for provinces and territories to remain committed to their prohibitions? Will the Accord be effective at meeting its goal of a Canada-wide approach? Will it prohibit bulk water exports?

## **2.5 Current provincial policy**

Currently, nine provinces have policies in place regarding bulk water exports. New Brunswick, Nunavut, the Yukon and the North West Territories do not have water export policies (Government of Newfoundland and Labrador 2001 p.17-18). Of the provinces that do have policies in place, five have not signed the Accord: BC, Alberta, Saskatchewan, Manitoba and Québec (Canadian Council of Ministers of the Environment 1999; Heinmiller 2003 p.18).

In BC, bulk water exports were prohibited prior to the federal Accord under a moratorium in 1991. Prior to that date, six export licenses had been granted in BC. In 1992, when the first moratorium expired, a second was put in place. It was not until 1996 that the BC government enacted the *Water Protection Act* prohibiting the export of water from BC. The policies of the provinces and territories are discussed in detail in chapter 5.

## **2.6 Background summary**

Given the uncertainty about the world's water supply and the increasing scarcity in many parts of the world, Canada should have a policy on bulk water exports that will ensure the sustainability of Canada's water resources into the future. Many proposals to export bulk water from Canada have already surfaced: a trend that could easily escalate.

The current federal response has been against a backdrop of jurisdictional uncertainty and uncertainty about the implications of NAFTA and GATT. The federal government has attempted to navigate this uncertainty by proposing the *Accord for the Prohibition of Bulk Water from Drainage Basins*. The remainder of this paper assesses the effectiveness of this approach.

### 3 Research Methodology

The *Accord for the Prohibition of Bulk Water Removal from Drainage Basins* is the main component of the federal government's strategy to prohibit the export of water from Canada. To consider the effectiveness of the federal Accord, I assess whether or not the Accord meets its stated goal:

To establish a Canada-wide approach for the protection of Canadian waters, by prohibiting bulk removal of surface and ground water from the Canadian portions of major drainage basins (Environment Canada 1999a).

This goal implies uniformity both in terms of policy specifications and in terms of each signatory's ongoing commitment to its policy. To assess these factors, I use both an in depth case study of BC (chapter 4) and a provincial and territorial policy comparison (chapter 5).

In chapter 4, I use Kingdon's Multiple Streams framework to investigate the factors that motivated the BC government to prohibit bulk water exports (a detailed explanation of the Multiple Streams framework follows in section 3.1). I analyze the interview responses from seven key informants, records of proceedings from the BC legislative assembly (Hansard) and government publications, following the methods used by Kingdon in *Agendas, Alternatives and Public Policies* (Kingdon 1995 p. 233). I organize the data collected from these sources into Kingdon's three streams: in the problem stream, I discuss problem definition and focusing events; in the politics stream, I discuss general public mood and organized political forces; and in the policy stream, I discuss the policy options available at the time to address the problem. Synthesized

together, these three streams provide insight into the agenda setting process of the BC government with regard to its bulk water export policy.

In chapter 5, I look at the remaining jurisdictions (provinces and territories) in Canada. The data for this analysis come mainly from records of parliamentary proceedings (Hansards) from each jurisdiction and from the policies themselves. While it is beyond the scope of this research to conduct a Multiple Streams analysis of each jurisdiction, I briefly analyze factors that apparently motivated each government to implement or not implement a bulk water export policy. I also compare the policies to determine if they do in fact meet the Accord's goals. To do this, I use a series of questions that serve as indicators of the strength and scope of the policies, the jurisdiction's adherence to the goals of the Accord, and the likelihood that individual jurisdictions will remain committed to their individual prohibitions. These questions are formulated to be easily comparable across policies and are based on data that are readily available.

1. Is there evidence of an on-going commitment to bulk water export prohibition inspired by the Accord?

To meet the goal of a "Canada-wide approach," signatories must remain committed to their prohibition of bulk water export as per the federal government's statement that Canada needs a permanent solution to the issue (Environment Canada 2004). As an indication of commitment, I investigate if any jurisdictions have considered lifting their prohibitions, despite signing the Accord.



2. Do the water export policies have clear penalty and enforcement mechanisms?

The absence of clear penalty and enforcement mechanisms in the policy itself does not indicate that the jurisdiction is not committed to the prohibition or that enforcement and penalties do not exist, but can indicate a jurisdiction's specific consideration of the seriousness of the crime of exporting bulk water.

3. Do the policies follow the Accord's specifications with regard to Canada's obligations under NAFTA? Specifically, are the areas from which the export of water is prohibited defined by watershed boundaries? Are the prohibitions based on the intention to protect ecological integrity?

The Accord specifies that water should not be removed from the Canadian portions of major drainage basins. It also defines the bulk export of water as "quantities that individually or cumulatively could result in damage to the ecological integrity of the system" (Environment Canada 1999). Both of these specifications could reduce the potential for a prohibition on water exports to be considered a violation of NAFTA. In order to meet the specifications of the Accord, the policies should therefore specify that their prohibitions are based on the intention to protect ecological integrity and are defined by watershed boundaries, not political boundaries.

4. Does this definition include both surface and ground water?

The Accord specifies that the prohibitions should include surface and ground water.

5. Do the water export policies require legislative approval for amendment, exemption or repeal, rather than a cabinet or administrative decision?

If cabinet or administrators are granted the power to amend the policy at their discretion, it may be changed without legislative debate. If this discretion extends to changing the

definition of acceptable bulk water export, it becomes more likely that the prohibition could be lifted or amended.

None of these criteria address the fact that five jurisdictions in Canada have not signed the Accord. Without full participation in the Accord, it cannot be considered to be effective. However, if the end result of policy efforts across the country is a coherent network of policies, perhaps the Accord can be thought of as being an effective piece of a Canada-wide approach (Heinmiller 2003). Therefore, I assess all jurisdictions to determine if the existing bulk water export policies constitute a continued, uniform approach to bulk water exports across Canada.

### **3.1 Kingdon's Multiple Streams framework**

In 1972, Cohen, March and Olsen developed the Garbage Can Model as a framework to assess organisational choice in what they referred to as “organized anarchies.” Organized anarchies are institutions characterized by problematic preferences, unclear technology and fluid participation (Cohen, March, & Olsen 1972 p. 1). Cohen et al. describe choice situations within this context as a garbage can into which different people from different perspectives dump various problems and solutions (Cohen et al. 1972 p. 2-3). The final decision is not the result of a “rational” process in which solution follows problem, but rather the outcome of a subjective mix of four types of factors (or streams) of varying strengths, each acting independently of the others (Cohen et al. 1972). They described organisations as being

a collection of choices looking for problems, issues and feelings looking for decision situations in which they might be aired, solutions looking for issues to which they might be the answer, and decision makers looking for work (Cohen et al. 1972 p. 2).

Cohen et al. felt that this model was a more accurate representation of organisational choice than rational theories because it took into account the complexity and the element of chaos that pervades decision-making processes in organized anarchies.

In 1984, Kingdon published *Agendas, Alternatives and Public Policies*. In it, Kingdon proposed some adaptations to Cohen et al.'s model in order to apply it to the US federal government; an organisation that he felt met the three characteristics of Cohen et al.'s organized anarchies (Kingdon 1995 p. 86). Instead of four streams, he proposed three: the problem stream, the politics stream and the policy stream (see Table 1). Policy change occurs when the three streams are "coupled" by a policy "entrepreneur" resulting in an open policy window: a transient opportunity for policy change (Kingdon 1995 p. 88).

**Table 1: The Three Streams of Kingdon's Multiple Streams Framework**

<b>Problem Stream</b>	<b>Politics Stream</b>	<b>Policy Stream</b>
<ul style="list-style-type: none"> <li>▪ systematic indicators</li> <li>▪ feedback from monitoring programs or public</li> <li>▪ focusing events</li> <li>▪ crises</li> <li>▪ symbols</li> </ul>	<ul style="list-style-type: none"> <li>▪ ideology of governing party</li> <li>▪ public mood</li> <li>▪ organized political forces</li> </ul>	<ul style="list-style-type: none"> <li>▪ possible policy options</li> </ul>

The problem stream includes those factors that contribute to the identification of an issue as a "problem." A problem is a perceived gap between reality and an ideal. As Kingdon defines it: "conditions become defined as problems when we come to believe that we should do something about them" (Kingdon 1995 p. 109). Values therefore play

an important role in problem definition, as do one's perception of government's responsibility in a particular issue (Kingdon 1995 p. 100).

Kingdon identifies several ways that problems can come to the attention of decision-makers: systematic indicators such as price indices, feedback from those affected by a problem or monitoring programs, and focusing events, crises and symbols. Depending on how the problem comes to light, a certain amount of background awareness is necessary for the event or indicator to move the issue to the status of "problem." Especially in the cases of focusing events or crises, generally there has to have been some awareness "in the back of people's minds" that this issue was already or had the potential to become a problem (Kingdon 1995 p.98).

The politics stream involves factors that shape the way in which an issue is conceived. Kingdon defines as political "any activity related to the authoritative allocation of values or to the distribution of benefits and costs" (Kingdon 1995 p. 145). It is in the politics stream that the power to decide agendas resides. Included in this stream are obvious political factors, such as the particular ideological bent of the party in power (or very powerful individuals within that party), but also the general public mood on a particular issue and organized political forces operating outside of government. Any one of these factors can serve to elevate an item to the policy agenda or constrain it from entering the decision-making process.

Kingdon identifies two ways in which government actors can motivate agenda change: either incumbents change their priorities, or the personnel in a position change and bring with them new ideas (Kingdon 1995 p. 153). In some cases, public mood can serve as a rationale either for or against a policy decision. Organized political forces use

political pressure to highlight problems. Often, their greatest influence is to give the impression that they represent many people who feel a certain way about a particular issue (Kingdon 1995 p. 150).

Kingdon describes the policy stream as the most random of the three streams. This is the stream in which the potential solutions to problems reside. He proposes that “much as molecules floated around in what biologists call the ‘primeval soup’ before life came into being, so ideas float around in [policy] communities” (Kingdon 1995 p. 117). New ideas are not generated, he argues, but are rather a recombination or mutation of familiar elements (Kingdon 1995 p. 124). The policy stream is often described as “solutions looking for problems.” Individuals often have “pet” solutions to problems and are always looking for an opportunity to present them as the answer to a pressing question. Kingdon argues that the intellectual merit of an idea also carries a certain amount of weight in the decision process. Whatever the influencing factor, it is in the policy stream that solutions present themselves and are selected.

Kingdon defines policy entrepreneurs as “advocates who are willing to invest their resources – time, energy, reputation, money – to promote a position in return for anticipated future gain in the form of material, purposive or solidary benefits” (Kingdon 1995 p. 179). They must have their proposals ready and be able to take advantage of whatever opportunity presents itself (Kingdon 1995 p. 182-183). Entrepreneurs are often motivated by personal values and their desire to enact policy that reflects their values (Kingdon 1995 p. 123). Kingdon emphasises that it is not always a single individual and that entrepreneurs are rarely solely responsible for the placement of an issue on the agenda (Kingdon 1995 p. 180).

According to Kingdon's framework, a policy window is "an opportunity for advocates of proposals to push their pet solutions, or to push attention to their special problems" (Kingdon 1995 p. 165). Policy decisions get made when the three streams converge. Sometimes, these opportunities present themselves predictably, as in elections, program renewal or budgets, while at other times, they appear unpredictably. However, Kingdon suggests that policy entrepreneurs must be ready to take advantage of the open window, no matter how it occurs. Windows open and bring attention to issues, but do not necessarily define action. Kingdon argues that windows are more likely to be opened by events in the politics or problem streams, which then find an accompanying solution from the policy stream. It is up to the policy entrepreneur to propose a packaged solution (Kingdon 1995 p. 168). The acceptance of an idea as a solution to a given problem is influenced greatly by the work of the policy entrepreneur in doing what Kingdon calls "softening up" decision makers to select a given alternative.

Critics of Kingdon's framework point out several shortcomings. The first is Kingdon's assertion that the three streams are actually acting independently of each other. Mucciaroni (1992) argues that it is more useful to consider the connections between the streams. He states that "by stressing the mutual *interdependence* of the streams and tracing them out, agenda-setting seems less indeterminate and random and more purposive and strategically based" (p. 474) and that "there is a good fit between the three variables or 'streams' precisely because their relationship is interdependent and symbiotic" (Mucciaroni 1992 p.481). Zahariadis (1999) agrees that there are linkages between the streams and that to acknowledge them will lead to a more complete analysis of the situation (p. 81-82). He asserts that changes in one stream can influence or

stimulate changes in another (Zahariadis 1999 p.81). Kendall (2000) also found a greater degree of dependence among the streams than suggested by Kingdon, in a study on the third sector in the UK (Kendall 2000 p.555). However, to assume linkages between the streams assumes perhaps more rationality in the process than Kingdon envisioned.

Kingdon maintains that while the streams are acting independently of each other, there are different relationships among the streams that change the likelihood of an issue rising to the decision-making agenda (Kingdon 1995 p. 174). For example, he identifies two kinds of windows: those that originate in the problem stream and those that originate in the politics stream. Rarely do windows originate in the policy stream (Kingdon 1995 p. 174). But, it is still necessary to assume relative independence of the streams in order to understand the more random nature of their eventual coupling: solutions float around looking for problems or a favourable political climate to which to attach themselves (Kingdon 1995 p. 172). As one participant in Kingdon's research described the process of getting an issue on the agenda: "as I see it, people who are trying to advocate change are like surfers waiting for the big wave" (Kingdon 1995 p. 165).

A second critique of the Multiple Streams framework is a lack of acknowledgement of the institutional structure in which decisions are made. Critics argue that the institutional context in which decisions occur has a fundamental influence on how decisions are made. Zahariadis (1999) argues that Kingdon's model does not go far enough to acknowledge the impact of hierarchies, multiple levels of government and their interactions, or specific constitutional arrangements on decision-making (Zahariadis 1999 p. 89). Similarly, Mucciaroni (1992) argues that the Multiple Streams framework does not take into account institutional factors that he describes as "independent" of the





A third critique of Kingdon is that his framework is based on the assumption that the decision-making process is random and amorphous and therefore the framework is not well-suited to making predictions about policy processes. Mucciaroni (1992) notes that Kingdon does not indicate how to predict what kinds of problems might be coupled with what kinds of solutions or what kinds of political conditions might lead to an open policy window (Mucciaroni 1992 p. 464). Zahariadis (1999) counters this assertion. He supports Kingdon's approach, which embraces the ambiguity and uncertainty of many policy environments:

“[M]ultiple streams does not reject rationality, but it seeks to explain policy precisely when the assumptions of clarity and self-interest are inappropriate descriptors....[P]olicy makers frequently face dynamic and shifting environments where ambiguity is rampant and where decision outcomes appear to be beyond anyone's control. Complexity, fluidity, and fuzziness are particularly appropriate characterizations of policy-making at the national level” (Zahariadis 1999 p.87).

Indeed, Kingdon identifies several instances when policy windows are predictable, including elections, policy renewals and budget cycles. While he maintains that there are “considerable doses of messiness, accident, fortuitous coupling and dumb luck” at play in the policy arena,

it would be a grave mistake to conclude that the processes [of decision-making] are essentially random. Some degree of pattern is evident in three fundamental sources: processes within each stream, processes that structure couplings, and general constraints on the system (Kingdon 1995 p.206).

Kingdon attempts to incorporate the potential for randomness, but does not disregard the many factors that increase the predictability of policy windows opening.

Some scholars have questioned the applicability of the Multiple Streams framework to situations other than the United States. However, it has generally been found to be quite applicable to Canada. Zahariadis (1996) argues that “even in the case

of a smaller system with strong executive control and partisan discipline, there must still be coupling of three relatively independent streams before important new policies are adopted” (Zahariadis 1996 p.419). Howlett (1998) found that the institutional differences between Canada and the US were significant in terms of conceptualizing policy windows. In general, he found that the more institutionalized the system, the more frequent and predictable the windows. He concluded that Canada’s system is more institutionalized than the US, but this only increases the predictability of Canada’s policy windows and does not decrease the applicability of the Multiple Streams approach to Canada (Howlett 1998 p. 515). Similarly, Blankenau (2001) found that Canada’s parliamentary system with a “fusion of legislative-executive relations is more tenable to quick, significant change, so a shorter duration for a policy window is sufficient” (Blankenau 2001 p. 3). While these analyses are of federal level politics, it seems reasonable to extrapolate them to the provincial level where the Multiple Streams model is applied in this paper. In Canada, provincial level politics proceed with a similar structure to federal level politics. Both operate on a system of parliamentary democracy, have similar delegation of legislative authority and are subject to similar policy enactment processes.

The Multiple Streams method of analysis provides an excellent framework with which to analyse why the problem of bulk water export was elevated to the policy agenda of the British Columbia government and why the government decided to prohibit the export of water. Given that water export tends to be an issue that evokes strong ideological responses and emotional reactions, one which is a political hot potato and one for which there are clear policy alternatives, it seems very appropriate to assess BC’s decision from the problem, political and policy perspectives.

### 3.2 Key informant interviewing

While Kingdon does not specify a particular methodology with which to use the Multiple Streams framework, his own research relied heavily on key informant interviews (Kingdon 1995 p. 233). While he gathered information from a variety of sources, including congressional committee hearings and reports, presidential addresses, party platforms and coverage in the press, he states that the most useful information came from case studies and interviews (Kingdon 1995 p. 231). He describes the interviews as “extremely rich in perspectives” (Kingdon 1995 p. 233). As Wilkinson (2003) observes, “...interviews give the researcher more of an insight into the meaning and significance of what is happening” (Wilkinson & Birmingham 2003 p. 44). Accordingly, in order to gain a more accurate picture of the decision-making and agenda setting processes in the BC government, I interviewed key informants. I chose this method in order to gain an in-depth understanding of the motivations and perceptions of key actors in the bulk water export policy process in BC.

Kingdon chose respondents by identifying individuals who were key in the agenda setting process (Kingdon 1995 p. 233). Following Kingdon, I selected respondents based on their level of involvement with the decision-making process and access to decision-makers. Sarantakos (1998) describes this process as “elite” interviewing in which respondents are chosen because of their position and influence. Sarantakos (1998) identifies one drawback to these types of interviews: it is difficult to arrange the interviews and to establish trust with the informant, a drawback that was evident in this research (Sarantakos 1998 p. 255).

Kingdon relied on a snowballing technique to identify further key individuals. A snowballing technique is one in which respondents are asked to identify other important actors in the field as potential respondents (Babbie 2001 p.180; Sarantakos 1998 p. 153). I also employed a snowballing technique to determine potential respondents. Respondents were selected based on responses and suggestions from previous respondents.

Seven individuals were interviewed in total, five of whom were senior ministerial staff or higher with the BC New Democratic Party (NDP) government during the creation and enactment of the *Water Protection Act*, 1991-1996. Included among the respondents are Glen Clark (Minister of Finance 1991-1993, Minister of Employment and Investment 1993-1996, Premier 1996-1999), and John Cashore (Minister of Environment, Lands and Parks 1991-1993, Minister of Aboriginal Affairs 1993-1998, Minister of Labour 1997-1998). Because the *Water Protection Act* (WPA) involved work over five years, some respondents were more familiar with certain aspects than others. I have noted where this seems to have influenced the responses. In the text of the analysis, the government officials are referred to by randomly assigned numbers in order to protect the identities of those respondents who wished to remain anonymous. The sixth respondent, Wend Holm, is an influential author (*Water And Free Trade: The Mulroney Government's Agenda for Canada's Most Precious Resource*) and activist against water export. The seventh, George West, was a lawyer for the Klahoose First Nation during their initial bulk water export negotiations, from whose territory the Sun Belt proposal would have taken water.

For this research, I did not interview any members of the Social Credit government that was in power until 1991. This analysis is about the process of enactment

of the WPA by the NDP government. While bulk water export was first brought to the policy agenda in BC by the Social Credit government, the WPA was an initiative of the NDP government. I am therefore interested in the factors that motivated the NDP government: factors that may be different than those which originally motivated the Social Credit government.

The possibility exists that given the political and ongoing nature of the bulk water export question, respondents might have answered some questions strategically.

Strategic responses have the potential to skew the results because they could misrepresent factors that influenced the policy process. To help mitigate the possibility of misrepresentation, throughout this paper I have commented on instances where strategic motivations are likely to be strong and have avoided drawing conclusions based solely on these responses by using a process of triangulation. Further, all of the respondents who were government officials during the period examined in this research were no longer with the government at the time of the interviews, thereby reducing the likelihood of a strategic response.

The interviews were qualitative and semi-structured in nature. They followed accepted qualitative interview format in that the questions were mostly open-ended and the questionnaire structure was not fixed or rigid (Sarantakos p.255-256; Babbie 2001 p. 292). Semi-structured interviews fall between structured and unstructured interviews. Structured interviews are essentially questionnaires presented orally, while unstructured interviews lie at the opposite end of the spectrum and are more conversational (Sarantakos 1998 p. 247). In semi-structured interviews, there are defined areas for discussion with predetermined questions that can be changed if the interviewer sees fit

(Wilkinson & Birmingham 2003 p. 45). While I used a structured questionnaire, the order of the questions was sometimes changed or certain questions were skipped if they had previously been answered or if they were inappropriate for a given respondent. Respondents were encouraged to speak for as long as they wanted on any question. For a list of interview questions, see the Appendix.



explore the problem definition process of the NDP in more depth.<sup>7</sup> In 1991, the Social Credit party imposed a moratorium on bulk water exports, which was subsequently renewed by the NDP until 1996, when the NDP put the *Water Protection Act* in place. Assessing the problem definition of each government individually makes sense because the evolution of bulk water exports into a perceived problem straddled the change from the Social Credit to the NDP government. It would be possible to treat the government as a continuous entity, but this would deny the very different political approaches of the two governments and therefore different problem definitions. Kingdon identifies a change in government as a major factor in the political stream, but in this case, it played a large role in problem definition as well (Kingdon 1995 p. 153). While separate assessments of problem definitions for the two parties makes sense given their very different political perspectives and situations, it would be naïve to assume that the processes happened in isolation of and had no bearing on each other. Clearly, by elevating bulk water exports to the policy agenda, the Social Credit party set the stage for the NDP to define bulk water exports as a problem according to their own beliefs; indeed, the pending expiration of the Social Credit's moratorium required the NDP take a position on this issue. And conversely, the NDP's beliefs while they were in opposition influenced the Social Credit party's definition of bulk water exports as a problem.

#### **4.1.1 Focusing events/crises**

As outlined in chapter 3, Kingdon argues that problems can present themselves in a variety of ways, including through a crisis or focusing event. He asserts that in order

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<sup>7</sup> The Social Credit party was in power in BC from 1952-1972 and 1975-1991. Initially a mix of populism and conservatism, in its later years it became more fiscally and socially conservative (Uslaner 2000). The NDP was in power in BC from 1972-1975 and from 1991-2002. The NDP has more socialist roots and continues to maintain a centre-left position in BC and Canadian politics (Whitehorn 1993).



for a focusing event to bring an issue to the agenda, it must have a certain amount of “accompaniment:” pre-existing perceptions about the issue at hand, something that was “in the back of people’s minds” (Kingdon 1995 p. 98). By 1991 when the Social Credit government introduced the first moratorium on bulk water exports in BC, the issue was more than in the back of people’s minds across Canada. In 1988, the question of water and who controls its flow gained attention at least partly because of two events: the signing of the Free Trade Agreement (FTA) between Canada and the US and a drought that affected much of the continent (Day & Quinn 1992 p. 48-49). With the FTA came discussions about whether or not water would be subject to GATT provisions, raising concerns about Canada’s sovereignty over its water. In 1988, Wendy Holm published *Water and Free Trade*, which outlined many of the issues concerning sovereignty and water (Holm 1988). At the same time, a drought stricken America was casting its eyes northward, signalling a rapidly increasing demand for Canada’s water.

### *Social Credit party*

For the Social Credit party, who imposed the initial moratorium in 1991, there appears to have been one focusing event: Sun Belt’s contract to export water to California.

In 1991, Sun Belt won a contract with the Goleta water district of California to export water. Prior to 1991, Sun Belt, an American company, had formed a partnership with Snowcap Water, a BC company that held one of six licenses to export bulk water from BC. Together, these companies applied for an expansion to the license in order to fulfill the terms of the contract with Goleta (Campbell, K. and Y. Nizami: 2001 p.13). The provincial government’s response was encouraging. It appeared to be interested in

developing the water export sector and guaranteed loans to Sun Belt for this purpose under its new Export Loan Guarantee Program (*BC Hansard, July 5, 1991*). Given the government's position, it is unlikely that Sun Belt could have anticipated what was about to happen next.

On March 20, 1991, Clifford Serwa, Minister of Environment, announced that the government had imposed a moratorium on bulk water exports from BC. In his address to the legislative assembly, Serwa stated:

Mr. Speaker, in the past few weeks considerable interest has been generated around the subject of the export of bulk water from the province of British Columbia. In light of that concern, our government is determined that the full implications of bulk water exports should be examined thoroughly and objectively (*BC Hansard, March 21, 1991*).

What caused this dramatic change? How did the policy environment change so substantially and quickly? Several factors were involved.

Prior to the proposal to export water to the Goleta district of California, Sun Belt had made another proposal to export to Santa Barbara in 1990. Toba Inlet, the source site for the Santa Barbara proposal, the Goleta proposal and nine other export proposals, is in the traditional territory of the Klahoose Nation (West 2004). When the Klahoose became aware of these applications starting in 1990, they began engaging the Social Credit government in order to become meaningful participants in the decision-making process (Francis 1992; West 2004).

The Klahoose Nation insisted that any discussion of water export from this area not proceed until the settlement of their land claims (Francis 1992 p. 93). Chief Kathy Francis describes how the Klahoose people were shut out of the decision process for both the Santa Barbara proposal and the Goleta proposal. However, with the backing of the entire Coast Salish Nation of 54 bands, they managed to communicate their concerns

(including the lack of a proper environmental review, the absence of debate and unresolved aboriginal rights) to the potential importers, exporters and the BC government (Francis 1992). She argues that their concerns were taken seriously because of the very real threat that water export could be disrupted by First Nations groups. She writes:

One should recall that August of 1990 is probably best remembered by most Canadians as the time of the Oka crisis, when the Mohawk Nation faced off against the Canadian army over proposed development of their sacred land. The drama was unfolding nightly on television screens, not only across Canada but throughout North America and beyond (Francis 1992 p. 97).

In response, Fred Paley, CEO of Snowcap water, informed the Social Credit government that the initial water export contract would collapse unless the Klahoose withdrew their opposition (West 2004). Though the Klahoose Nation was never officially consulted, Francis and West argue that the pressure of opposition from the Coast Salish Nation, the Alliance Tribal Council (including the Burrard, Chemainus, Halalt, Homalco, Klahoose, Nanaimo, Sliammon, and Tsawwassen Nations) and the First Nations Summit significantly contributed to the government's decision to impose a moratorium in 1991 (Francis 1992 p. 98; West 2004).<sup>8</sup>

At the same time as they were engaging the Social Credit government and potential water importers and exporters, the Klahoose nation also began lobbying the NDP. During this period, the NDP were in opposition with five seats in the legislative assembly. George West recounted how the Klahoose invited Colin Gableman, the MLA for Cortez, and John Cashore, the environment critic, as well as approximately ten members of the shadow NDP government to a meeting on Cortez Island. During this

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<sup>8</sup> The First Nations Summit occurred in October, 1990 when leaders of BC First Nations met with the Prime Minister of Canada and then with the Premier and Cabinet of British Columbia to develop a process for modern treaty negotiations in BC (*About the First Nations Summit* 2002).

meeting, the Klahoose informed the NDP, who did not have an internal policy on bulk water exports at the time, that water export was about to become a national issue. George West recalls:

[E]ssentially, those of us who were meeting with John [Cashore] and Colin [Gableman] on behalf of Klahoose said to them at that time: “The NDP has a choice. They can either get ahead of this issue and become proactive, or Klahoose would take them on. They were going to become the target...[A]nd from a political perspective they could either be seen politically to be ahead of the issue and to be proactive and to be on the right side of what was going to be a huge issue, or they were forever going to be behind public opinion and playing catch-up on this thing” (West 2004).

A government official confirms that the interaction between the NDP and the Klahoose, specifically George West, was important in shaping the NDP’s call for a moratorium and eventual water export prohibition (BC Government Official 2 2004). The NDP’s opposition in turn also played a role in the Social Credit government’s decision to impose the moratorium:

I credit ourselves as opposition for getting that moratorium from the Socred government at the time. Because ... not only were we going after them, but we started to encourage the public to join this battle (BC Government Official 2 2004; confirmed by BC Government Official 1 2004).

By mobilizing opposition from the NDP and concern among potential importers and exporters, the Klahoose opposition was important in bringing about the Social Credit decision to impose a moratorium.

For the Social Credit government, the license that was granted to Sun Belt was a focusing event, situated on a backdrop of concern that had been brewing since 1988. The license triggered responses from the Klahoose, the NDP and the public. Opposition to water export became a problem with which the Social Credit government had to contend.

## *NDP*

With the moratorium in place, the NDP took power in November of 1991. The issue of bulk water exports was clearly on the agenda and requiring attention not only because of public interest, but because the moratorium would expire in May of 1992 and a new policy would be needed. While Sun Belt was a crucial turning point for the Social Credit government, it was not as prominent for the NDP government as a motivating factor (BC Government Official 1 2004). Unlike the situation for the Social Credit government, there was no one “focusing event” as per Kingdon’s framework, but rather a stage that had been set by a previous agenda-setting process, including a soon to expire moratorium, requiring the NDP to take action.

However, the Sun Belt case appears to have been useful to the NDP government in a number of ways. The Sun Belt case was a symbol that the NDP government could use to support its policy. One respondent identified the Sun Belt case as a concrete example of the demand for and commercial interest in Canada’s water: it proved that the NDP’s concerns were not simply “academic” and therefore needed to be addressed (BC Government Official 3 2004).

The legacy of the Sun Belt case as a trigger of public awareness was also important to the NDP government. Public opposition was sparked by the Sun Belt licence. Holm and others have identified the Sun Belt license combined with the drought in California as the primary trigger that raised public concern (Holm 2004b; BC Government Official 2 2004). In response to a question regarding Sun Belt, one respondent stated:

[Sun Belt] may have been a peripheral, but not a material factor. Largely because there was public opinion that was driving it not the potential for one proponent for export. The purpose of the legislation was not to foreclose on [Sun Belt's] right; it was to deal with the public concern (BC Government Official 4 2004).

Similarly, another government official identifies the public concern as a factor that moved the issue from the back-burner into the spotlight:

[Water export] is a matter that had been percolating and I think something triggered the need to look at this in more detail. I can't remember exactly, but it's usually the case, even though I might have been predisposed to this notion...there likely was some public debate around this issue and people looking at doing it that gave us pause to reflect and to bring in the legislation (BC Government Official 5 2004).

It is important to acknowledge that especially with regard to the Sun Belt case, which is still pending before a NAFTA tribunal, these responses may have more of a strategic intent than others. However, they are still instructive in identifying that, as will be discussed further, the NDP's perception that the public was opposed to water exports was an important consideration in their policy making. This concern was partially triggered by the Sun Belt case in 1991. Even if the respondents do not identify Sun Belt specifically, the indirect effect of that case influenced their agenda setting.

Additionally, as has been previously discussed, pressure from the Klahoose and First Nations more broadly, which had initially been triggered by export applications, helped the NDP to define the problem. As George West states:

The province [under the NDP] was being assailed by a broader level of First Nations concern and activism on this issue than just Klahoose at this point, and it was at a time when the province was committed to improving relationships with First Nations and dealing more openly and honourably, and any attempt to continue to exploit probably one of the last unexploited resources within First Nations territories just ran so counter to what was a pretty major policy priority with the NDP in terms of establishing a new respectful relationship with First Nations (West 2004).

In the policy context in which the *Water Protection Act* was being formulated, public and First Nations opposition as triggered by the Sun Belt case certainly played an important role in defining the problem of bulk water exports, but the actual incident itself seems to be less of a factor on the radar of NDP policy makers.

A final indication of events that focused attention on bulk water export can be found in a government commissioned report called *The Export of Water from the British Columbia Coast* (also known as the “Carter Report”). Though commissioned by the Social Credit government in 1991, the report was not released until 1992. It is interesting to note that nowhere in the Carter Report is Sun Belt identified as a focal point for the sudden rise in interest about bulk water export, nor is there extensive discussion of Aboriginal rights and title. The report does identify the FTA and drought in California as events that drew attention to the issue and goes on to identify as a third factor the proposal in the early 1990’s by Multinational Water and Power Inc. to dam the North Thompson River to divert water to California on a continual basis (Barlow 2001; BC Government Official 1 2004; Educom International 1992 p. 5). All of these events helped to crystallize bulk water export into a problem for the NDP government.

While the Social Credit party and NDP had different problem definition processes and different factors influencing the problem stream, it is clear that the two influenced each other: the NDP influenced the Social Credit party by voicing strong opposition to bulk water exports and the Social Credit party laid the groundwork that required an NDP policy response.

#### 4.1.2 NDP problem definition

In this section, I elaborate on why the NDP government viewed bulk water export as a concern. In accordance with the initial issues about bulk water export described in chapter 2, sovereignty and environmental issues figured prominently.

As outlined in chapter 2, Canada's obligations under NAFTA and GATT call into question Canada's sovereignty over its water resources. While the respondents had slightly different interpretations of what the trade agreements meant for BC, they were in general agreement that trade agreements and specifically NAFTA were cause for concern. The following three responses exemplify this belief:

For me, the concern had a lot to do with the trade issues and the free trade agenda.... For me the concern has always been the sense that given the trade obligations we now have as a country and as a province, once we begin the process of bulk water exports, with no pun intended, it's very difficult to turn off the tap. It becomes a right to access and ...say Californians start importing water from BC in bulk and we're required to give them the same rights to that water as everybody in BC (BC Government Official 5 2004).

Well, it was the agreement around NAFTA. It was lack of certainty as to whether or not water was covered by NAFTA and whether it would be a tradable commodity (BC Government Official 4 2004).

There was an enormous amount of discussion about whether water was included or wasn't included in the trade agreement...And the provisions of the free trade agreement imposed significant risks on being able to control water once they had commenced. Or even being able to prohibit them. So there was an enormous uncertainty about the treatment of water. And so that was one thing. The sense of the policy environment had really changed with the passing of the free trade agreement (BC Government Official 3 2004).

These three respondents all identified uncertainty about NAFTA's influence on the future of BC's water policy as a primary cause of concern. Among the issues identified were the commodification of water and its definition as a good; loss of control of water exports to other regions; and uncertainty about whether water was covered by NAFTA. Unlike



the example of income distribution given by Kingdon at the beginning of this section where the income distribution itself is not disputed, there was not a consensus on the implications of NAFTA for BC's bulk water export policy. Indeed it was the uncertainty about NAFTA that caused the greatest concern.

The concern over sovereignty is inextricably linked to concerns about the environmental implications of export: in order to create sustainable water use policy, BC (and Canada) must maintain the ability to manage its resources. Respondents identified several concerns about the environmental impact of bulk water exports, including impacts of water removal on marine and freshwater ecosystems and impacts of tanker traffic in BC's coastal areas. One respondent identified the environment as the primary concern:

My overriding sense was that water was seen as the lifeblood of the province's ecology and it was as simple as that. And siphoning it out whether it's through a pipeline from the North Thompson or in tankers off the coast was just simply a non-starter. NAFTA and politics came into it but the overriding issue was the environment. I have no hesitation in saying that at all (BC Government Official 1 2004).

Other respondents also identified protection of the environment and maintaining sustainable policy options as a strong second to sovereignty as a concern:

I've always been concerned in public policy [about] trying to protect the options for the province in the future and [consider]... the long term viability of exports and the impact on ecosystems etc. (BC Government Official 5 2004).

Similarly, several respondents identified concern over the sustainability of water practices in potential importing nations:

But the question came up "well why would we be sending water for sale to a state that exercises very poor stewardship in its application of water in its agriculture?" (BC Government Official 2 2004).

These comments indicate that the respondents felt that in order to protect the environment, BC must have control of its resources.

Kingdon identifies that values play an important role in problem definition (Kingdon 1995 p. 110). Thus, when faced with the same bulk water export “conditions” as the Social Credit government, the NDP quickly defined bulk water export as a problem where the Social Credit government had initially granted licenses. The value that the NDP placed on the environment and sovereignty formed the backbone of its conviction to prohibit bulk water exports. The question in this analysis is not whether these concerns were founded, but how they influenced policy makers to make the decisions that they did.

#### **4.1.3 Problem stream summary**

In this section I have shown how the Sun Belt proposal defined bulk water export as a problem for the Social Credit government and how that definition laid the groundwork for the NDP to keep bulk water export on the policy agenda. I have also outlined that key policy makers in the NDP thought that bulk water export was a problem for environmental reasons and concerns about sovereignty in the face of NAFTA: concerns that reflected their values and led to eventual prohibition of bulk water exports from BC.

## **4.2 Politics stream**

It is in the politics stream where different factors interact to shape the conception of an issue. Included in this stream are obvious political factors, such as the particular ideological bent of the party in power (or very powerful individuals within that party), but also the general public mood on a particular issue and organized political forces operating outside of government. In this section, I examine the factors that shaped the political context for the creation of the *Water Protection Act* (WPA).

#### 4.2.1 Political climate

Kingdon identifies turnover of key personnel as a critical factor in agenda setting largely because of the associated swings in ideological perspective. In the case of BC, the 1991 election that changed the government from Social Credit to NDP is an important consideration in how the policy eventually unfolded.

In March 1991, Premier Bill VanderZalm of the Social Credit party put a moratorium in place in response to public concern about water export from BC. This was a dramatic about-face for a government that was initially in favour of expanding the bulk water export market as part of a strategy to grow the BC economy, as witnessed by its loan guarantees to Snowcap. The Social Credit party did not have to deal with the issue for long, though: the NDP was elected to office in November of that year. After their election, the NDP began a five-year process to eventually enact the *Water Protection Act* in 1996.

In 1992, the NDP stated in its throne speech that it was committed to opposing bulk water export (*BC Hansard, March 24, 1993*). According to interview respondents, this commitment was based on the firm ideological conviction that prohibiting bulk water exports was the “right” thing to do. One respondent identified the influence of his own beliefs on his policy recommendations:

... [A]nd of course I have to confess some philosophical belief that conservation and other initiatives should be pursued first say in places like California, just to buttress my view that we shouldn't be moving rapidly in this direction without giving lots of care and attention and appropriate protection [to the environment] (BC Government Official 5 2004).

Another emphasises:

But as I said before I think this is one of those issues where you can look back and say from a values point of view, we felt very strongly about it ... So I guess what I'm saying is, while I know that [public opinion] is a factor, in my opinion, our government was being very committed to something that was part of its value base (BC Government Official 2 2004).

This idea is echoed by another respondent, when asked to identify the most important motivating factor for the policy decision to enact the WPA:

Doing the right thing. Even if [the government] didn't have to do something, they would have wanted to pass legislation because they saw the lifeblood of the ecosystem threatened...I think that was a priority and all the others were secondary to that. That may sound awfully optimistic, but that's my sense (BC Government Official 1 2004).

By identifying the pursuit of a prohibition on water exports as the "right" thing, this respondent emphasizes the sense that the policy was motivated by a strong, values-based approach. All of these responses indicate that the NDP were ideologically predisposed to enact a policy that prohibits the export of bulk water.

Sigurdson (1996) argues that in provincial politics, the premier and the executive wield considerably more power than do the executive on a federal level (Sigurdson 1996 p. 311-312). "An election victory," he writes, "tends to give provincial premiers a fairly broad mandate to put their own stamp on public policy" (Sigurdson 1996 p. 311). Couple this with the comparatively progressive stance on environmental issues that marks the NDP's ideology (Sigurdson 1996 p.315), and concepts of the "right" thing to do with regard to bulk water export become agenda-setting.

Kingdon argues that the administration's ideology figures very prominently in agenda-setting and that those members of the bureaucracy who are not in agreement with this ideology often have difficulty finding an ear for their concerns (Kingdon 1995 p.21).

This dynamic played out in an interesting way in the NDP government around the WPA. Two of the government respondents interviewed clearly identified a large ideological gap between the elected or appointed government officials and the bureaucracy and stated that this gap had a significant impact on the way in which the policy was crafted. Both respondents stated that the bureaucracy was generally in favour of exporting bulk water from the province, in contrast with the new government's agenda to oppose export. This difference in agenda priorities appeared to be rooted in deeper ideological differences.

As a government official observes:

So I would try to have the assumption that the bureaucracy was a neutral agency of hopefully smart, publicly minded people and part of that's true... They just had a particular mindset that was the government mindset prior to our government... They really were so subconsciously ideologically committed to a neo-conservative free trade agenda that they couldn't even comprehend – they thought that I was some kind of whacko, dictator, communist kind of operation (BC Government Official 5 2004).

In order to get around this problem, the government began staffing important positions with people of a similar ideological bent to that of the NDP. As the same official recalls:

What I did on the trade front was recognize the extreme neo-conservative bias in the bureaucracy that we inherited. I recruited some people who I thought were extremely bright and capable and shared my ideological perspective (BC Government Official 5 2004).

However, even with people of a similar ideology in policy making positions, the government still had to struggle to accomplish the WPA. Part of the problem stemmed from the resistance from the bureaucracy:

So what we had to do was basically fight back [against the bureaucracy]. And when I say we, I mean the representatives of the elected government, not the representatives of the government who happened to be there – the so-called civil servants. We had to beat them back and we had to beat them at the analysis game...And if you don't have enough people and if you don't have enough allies and people who are on side with where the government's going, there's only certain ways you can do things (BC Government Official 1 2004).

This person goes on to recall:

[T]he argument going around the media at the time was that the government was politicizing the bureaucracy. And I was sitting on the inside saying whoa! Where is this coming from? I always thought I was working for the people of British Columbia as opposed to the people who wanted to sell water for next to nothing... I remember going through the briefing binders on the free trade stuff that had come out in previous years from the ministry...And it wasn't just that they were giving the government lines that the government wanted – they were supplying lines that the government wouldn't have thought of before in order to justify the FTA and that NAFTA was going to be good for the province...So the notion of the government somehow politicizing the bureaucracy just took me as the ultimate in reverse spin (BC Government Official 1 2004).

This experience certainly illustrates the power that the bureaucracy can wield in terms of agenda setting and policy making and the difficulties that can be faced by a new government assuming power. By this example, one cannot simply assume that the ideological views of the incoming government will swiftly or easily change the policy agenda. Indeed, even when the official agenda is changed, resistance from the bureaucracy can impede progress towards a given policy. Despite these challenges, the NDP eventually managed to enact a policy that reflected its convictions.

#### **4.2.2 General public mood**

Kingdon identifies the public mood as an important political factor in agenda setting. He argues that policy makers may use public support for an issue to promote it to the agenda, while they may not as readily choose to pursue issues that do not have the support of the public (Kingdon 1995 p.147). In BC, the important role of public opinion is evident in both the Social Credit government's and the NDP government's policy decisions, albeit in different ways.

In section 4.1.1, I identified public opinion as a driving force behind the Social Credit government's decision to do an about face and impose a moratorium on water

export. This suggestion is supported by several of the interview respondents. One respondent commented, “I think the initial ban by the VanderZalm government was purely a response to public outcry, opposition pressure, interest groups and concerns that were raised” (BC Government Official 4 2004). Another government official concurred that public opposition to water export motivated the policy change:

[T]he Socred government and particularly the VanderZalm government really was a populist government ... And so populist governments and VanderZalm in particular, notwithstanding maybe their personal neo-conservative ideology, they tend to try to listen to the public and popular will, they tend to be less ideological in their pursuit of policies. So as I recall, there was obviously a big issue around it [and] we made it a big issue in the legislature in opposition and the government actually responded by putting a moratorium on it (BC Government Official 5 2004). 283

Public opposition and opposition expressed in the legislature played a large role in the Social Credit government’s decision to impose a moratorium on bulk water exports.

Similarly, public opinion was a strong influence on the NDP’s policy decisions.

All respondents agreed that the public was opposed to bulk water export from BC and that this was a very important factor in their policy choices. One government official commented:

There was just enormous opposition to water export. People had done various polls on this – I can’t remember who they were – but it was something like 85% of people were opposed to water exports. It’s one of those black and white issues. (BC Government Official 3 2004).

Echoing this sentiment, another government official commented that the public “was opposed to the loss of a resource known as water and was concerned that water in the future could become a commodity like oil” (BC Government Official 4 2004). One respondent notes how public opinion resonated with their policy agenda:

[The public was] definitely in favour of banning exports. I think that came over loud and clear anytime there was polling done. And that gave us a degree of comfort. And we thought “Oh! People actually want this!” (BC Government Official 1 2004)

In the trenches of policy development, public opposition lent support to the government’s conviction.

The Canadian public has historically been wary of the export of water. A 1988 Gallup Poll showed that two thirds of Canadians were opposed to bulk water exports and that water was widely regarded as the nation’s most essential natural resource (Day & Quinn 1992 p. 50). Two reasons in particular stand out as motivators for this stance.

Quinn (1992) agrees that water simply holds a special place in our hearts and minds as Canadians. He explained this opposition in the following way:

I believe that [the opposition] is one of the stronger manifestations of our fear for survival which is held firmly in the national psyche. Our waters are treasured: life-supporting, beauty-enhancing, heritage-defining, not just another resource to be bought, sold and transported to the world’s markets. Our past cannot be understood nor our future imagined, apart from this bounty of nature (Quinn 1992 p. 112).

The special status of water seems to make its export all the more problematic. It is considered differently than other resources. One respondent noted the interesting comparison between the debate about other resource exports and the debate about water:

I always find it interesting that we export a non-renewable resource like natural gas with very few qualms and a renewable resource like water is in a different category for whatever reason. ... We export lumber, trees, all sorts of stuff. It’s an interesting set of questions why water is perceived differently than other resources in such an export-oriented economy... I think it’s really more a question of precedents... Once you start exporting – the first export of something is always very controversial. (BC Government Official 3 2004)

Canadians’ attachment to water certainly plays a significant role in people’s reactions to export proposals and is one reason for this historical opposition.



Compounding this feeling, is an unease about the implications of trade agreements and a sense of outrage that the US is attempting to “usurp” yet another of Canada’s resources. In the late 1980s, the public was concerned that water was being included in the Free Trade Agreement (Day & Quinn 1992 p. 50) despite assurances that it was not (Holm 1992 p. 181). Once the deal was signed, it became clear that there was no certainty about whether water was included or not (Holm 1992 p. 182). Subsequently, the public were very sceptical that water would not be included in NAFTA (Quinn 1992 p. 113). Once NAFTA was signed, again uncertainty prevailed (see section 2.3.2). In general, there was (and continues to be) distrust that the federal government is committed to protecting Canada’s water from export pressure (Day & Quinn 1992 p. 51; Holm 2004b).

Holm (2004b) points out that the public continues to be uncertain about the intricacies of the bulk water export issue, especially with regard to NAFTA implications. She comments on the way she feels the public perceived the issue in the early 1990s and continuing today:

At most I think [the public] became confused – I think they tended to want to believe that a politician wouldn’t stand there and lie. And then there was the very slippery slope of spin, for example John Crosbie saying, “water is not included and just to make perfectly clear, we’ve added an amendment to the free trade legislation specifically prohibiting the bulk export of water.” What’s the public to think? Free trade legislation is not the free trade agreement. Free trade legislation is domestic enabling legislation it does nothing to change the NAFTA, but the public heard that and thought it was the free trade agreement. And that was the style, the level of sophistication that has continued to prevail with respect to official communication from government on the water issue. So I think that Canadians right now are feeling scared witless and disempowered on this water issue because they know that it’s big, they feel that it’s looming and no one’s even talking about it anymore (Holm 2004b).

In an environment of uncertainty, it is not difficult to understand why the public was wary of the idea of water export.

Public opinion is also subject to change. Despite any special status that water may have in our national psyche or the general opposition to its export, the public may be swayed to support bulk water export if the benefits appear high enough. In Newfoundland, Premier Grimes was able to mount a very convincing argument that Newfoundlanders would receive free tuition if the export of bulk water were to be permitted: a compelling argument in a depressed economy (MacDonald 2001). However, at the time that the WPA was being crafted, the public appeared to be committed in its opposition.

The role of public opinion for the NDP government presents an interesting cause and effect scenario. Did public opposition to water exports, initially vocalized about the Sun Belt case, drive the policy agenda, or was public opposition used to support an already existing policy agenda? Either way, the impression of the policy makers was that the public was overwhelmingly opposed to bulk water exports: an opinion that supported the creation of the WPA.

#### *Gaining information on public mood*

If the NDP had the impression that the public was opposed to bulk water export, from which sources was it receiving this information? According to respondents, polling, letters from the public and commentary on open-line talk shows were the main ways that policy makers became aware of public opinion (BC Government Official 4 2004; BC Government Official 3 2004; BC Government Official 5 2004). However, there were

other initiatives undertaken by the NDP government to ascertain public opinion on this matter.

In 1992, John Cashore, then Minister of Environment Lands and Parks, explained that BC had begun a series of discussion papers and consultation processes, all of which were taking place in the context of the new Environmental Action Plan. The first discussion paper was a Social Credit party initiative entitled *Sustaining the Water Resource*, which was distributed to key stakeholders and the public in August of 1991 (Cashore 1992). Comments from this review and internal ideas formed the basis for the next discussion paper *Stewardship of the Water of British Columbia*, which was released in 1992 (Ministry of Environment Lands and Parks 1993). Cashore indicated in a speech to the delegates at a Canadian Water Resources Association conference on bulk water exports that these discussion papers would be the basis of a further process of public and stakeholder consultation, the results of which would help his government determine BC's bulk water export policy (Cashore 1992).

Given these initiatives to assure the public that a consultation process was well underway, it would seem that the government was quite interested in public opinion and the views of various stakeholders. However, examination of the second discussion paper *Stewardship of the Water of British Columbia* and its impact reveals a somewhat different perspective.

*Stewardship of the Water of British Columbia* is actually a series of eight discussion papers on eight distinct areas of water management within BC. The introduction clearly indicates that bulk water export policy is a high priority: it lists bulk water export as the first area of provincial policy that requires clarification and it

identifies bulk water export as the first area of focus based on response to *Sustaining the Water Resource* (Ministry of Environment Lands and Parks 1993 p. 6, 13). The eight papers that follow are intended to gauge public and stakeholder opinion on each issue. However, of the eight papers and therefore eight topics that are open for discussion, there is not one that involves or even mentions bulk water export. Given that Cashore identified *Stewardship of the Water of British Columbia* as a major component of the government's plan to determine its water export policy, one wonders how committed the government actually was to this process of consultation.

When asked about this document, respondents gave different views. While one government official indicated that he thought the report had been useful and it validated his "desire to act" (BC Government Official 4 2004) another respondent indicated that it was poorly done and lacking in many areas (BC Government Official 1 2004). While it is difficult to ascertain the influence of this public participation process on the decision-making process, it is clear from the respondents that their perception of public opinion did play a large role in supporting the WPA.

#### **4.2.3 Organized political forces**

Kingdon identifies organized political forces as the second component of the political stream. He asserts that governments weed through input from various groups and interests and determine where the balance of opinion lies. He is careful to add that just because the government does not have general support for a policy, does not mean that the policy will not be pursued (Kingdon 1995 p.150). Determining exactly how government comes to its opinion of the balance of interests is very difficult (Kingdon 1995 p. 51). In the case of bulk water export in BC, there were several key groups who

played a role in this process: Anti-free trade coalitions, environmentalists, First Nations, pro-export advocates (including the water industry) and the media.

However, as was shown in the discussion of “political climate” in section 4.2.1, the NDP had a moral conviction to prohibit the export of bulk water, regardless of what interest groups had to say. When asked about the influence of interest groups on the policy making process, most respondents indicated that interest group pressure was either non-existent or not a factor when compared to their determination to pass this legislation. Two respondents identified business as being the only group that was vocal about their opposition and that this voice was not really taken into account (BC Government Official 3 2004; BC Government Official 5 2004). It was primarily the conviction of policy makers that drove the agenda. Several responses illustrate this:

I think that it was mainly my own determination to go. I’m sure there were a lot of groups that were asking for it, but there wasn’t any single group that stands out in my mind. It was just the right public policy decision to make once I was aware of the concerns (BC Government Official 4 2004).

[T]here were some groups and they were valuable – but that wasn’t the driving force. The driving force was the commitment to do it. Come hell or high water (BC Government Official 1 2004).

In fact, one government official indicates that in terms of influence from environmental groups at the time, the pressure was almost disappointingly lacking:

Environmental groups in BC are very political and I don’t mean this in a pejorative sense, at least not in a particularly pejorative sense. They tend to focus on high profile causes that they think can influence public opinion and politics. So in BC you may or may not notice, most of the time there’s almost no discussion of ... water exports. [T]here’s a whole range of important environmental issues that get ignored in BC to focus on logging practices and preservation of parkland. And I think that’s not because environmentalists and activists don’t care passionately about the issue, but I think they are pretty media savvy and political in driving what they see as a salient agenda. (BC Government Official 5 2004)

Regardless of what environmentalists felt they were contributing to the policy, this official's impression was that it was insignificant. Similarly, another respondent indicated that there appeared to be a lack of support for their policy efforts from interest groups or the public in general:

But after the government decided not to [allow exports] – basically what happened was the public sat back and they knew that something was going to be done and it was up to the government to do it. And then everyone promptly forgot about it. It didn't come up...But that was part of the problem too, right, it never did keep coming up so there wasn't pressure. I didn't get any boost... (BC Government Official 1 2004).

While the idea that interest groups were not a significant factor in agenda-setting is common amongst respondents, there is also a sense that they would have liked to have had more vocal support from those groups who were in favour of the direction the NDP was heading.

Despite the sentiment that interest groups were not strongly influential, it is still instructive to examine the different groups informing the debate. At the very least, these groups helped to motivate the initial public outcry by bringing to light some of the concerns about the export of bulk water. While the policy makers interviewed for this study may not have felt their influence directly, the different interest groups opposed to bulk water export certainly helped to set the stage for the NDP's policy decisions.

### *Environmentalists /anti-free trade coalitions*

The unease that the public and Canadian politicians were feeling was due in part to the efforts of different citizens' groups to educate the public about the issues connected with bulk water exports. In the late 1980's, groups like the Council of Canadians and the Pro-Canada Network were working to educate the country about some of the potential

problems with the proposed Free Trade Agreement (Ayres 1996).<sup>9</sup> Certain figures became prominent in efforts to prevent water from being included in the agreements including Wendy Holm, who publicly drew attention to the issues and actively lobbied governments.

Also prominent in the debate were those concerned with the environmental implications of bulk water export. Responding to the often-quoted belief that water from rivers simply wastes into the ocean, environmentalists were a strong voice. Bocking (1992) points out that there is no such thing as “surplus” water in BC: “it is all doing something. It supports a land of beauty and rich productivity; it sustains the BC resource-based economy” (Bocking 2000 p. 279). Protecting the environment and sustainable management of water resources was well within the mandate of the BC government, which provided an entry point for arguments that potentially detrimental environmental consequences of bulk water export were justification for the enactment of a prohibition.

Three main environmental concerns with bulk water export were identified. The first was the ecological importance of fresh water for estuaries and marine life. Healey (1992) calls estuaries the most biologically productive areas on Earth to which little attention is usually paid. Fresh water inflow into marine environments produces the nutrient balance necessary for the growth of phytoplankton, and delivers organic carbon necessary for heterotrophic production (Healey 1992 p. 256). Fresh water discharge from rivers is also an integral part of the system of ocean currents, which have a potentially significant effect on fish productivity (Healey 1992 p. 257).

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<sup>9</sup> The Council of Canadians did not launch a specific campaign on bulk water exports until 1999 (Council of Canadians 2004).

A second concern was the impact of tankers on sensitive coastal inlets. Bocking (1992) argues that the large tides that are created in inlets like Toba (the site of the proposed Sun Belt export) create very turbulent waters that are difficult to navigate. Large tankers would be manoeuvring through “tortuous” waterways around small islands and reefs. The presence of tankers also increases the risk of fuel oil spill in these remote areas.

Not only would there be environmental impacts in BC, but the sustainability of importing water in any given region was also questioned. Would importing water really be the magical fix that many believed? Environmentalists said no. Bocking (1992) describes it this way:

Water diversion and export leads us in a direction precisely opposite to that implied by “sustainability.” Water diversion replaces natural systems with costly structures of a temporary nature, for the benefit of a restricted number of people, to meet a need that we have seen to be largely imaginary...It is a pity that we still spend time and effort on the issue of water export...and continue to debate whether we should convert our valleys into reservoirs and our rivers into sluice-ways in order to help California complete its own devastation through continued excessive growth (Bocking 1992 p. 285-286).

From this perspective, importing water would only serve to continue the patterns of water use that helped to create current water shortages in many parts of the developed world.

### *First Nations*

In the creation of the WPA, four of five government respondents did not identify consultation with First Nations as a major factor in their policy decision. Most respondents did not personally remember what kind of consultation took place, but most seemed sure there was not a formal consultation process (BC Government Official 1 2004; BC Government Official 3 2004; BC Government Official 4 2004; BC



Government Official 5 2004).<sup>10</sup> One government official identified George West, the lawyer from the Klahoose band, as a major source of information and policy ideas on the issue (BC Government Official 2 2004). As was outlined earlier in the discussion on focusing events (section 4.1.1), the Klahoose Nation in particular was instrumental in shaping the NDP's initial policy response. It is interesting to note, however, that one of the main policy suggestions put forth by George West on behalf of the Klahoose included reference to Aboriginal right and title: an aspect that was never publicly used by the government as justification for the WPA, nor does it appear in the WPA. West suggests that perhaps this was because the WPA was conceived and enacted during the time when the BC Treaty Process was being established (West 2004).

#### *Water industry/pro-export advocates*

Many arguments in favour of bulk water exports begin with a reference to the increasing populations and increasing water shortages in many parts of the world. Also often noted are the increasing levels of pollution of existing water resources and the uncertainty introduced by climate change in terms of available water for the future (e.g. León 1992; Paley 1992). The proposed solution to this problem is the export of bulk water. For example, Fred Paley, a representative for Snowcap Waters Ltd. suggests that the just and equitable distribution of water is the responsibility of Canadians in general and British Columbians in particular. He emphasizes that we are "citizens of the world" (Paley 1992 p. 5) and that Canadians have "20 times *their share*" (p.7) (emphasis added) of water as compared to the rest of the world. He concludes that

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<sup>10</sup> This response pattern may be related to the fact that First Nations were more prominently involved in the bulk water export debate before the NDP came to power when the majority of the government respondents were not involved with bulk water exports.

it follows that without major assistance by way of the sharing and proper management of the present supplies of safe water and changes in our approach to the treatment of our resources we are heading for a world catastrophe (Paley 1992 p. 6).

He goes on to point out that not only are we obligated to share our resources, but to do so would also bring economic benefit to British Columbians. He estimates that, had Snowcap (and Sun Belt) been granted its application for extension of its water export license, it would have brought \$105 million to a BC company, \$12 million to the BC shipbuilding industry, and construction and tug assistance jobs to the local community (Paley 1992 p. 7-8).

The water industry was not the only advocate of bulk water exports. A strong push came from those living in water scarce regions, including California and Mexico. Robert Salinas León from the Centre for Free Enterprise Research in Mexico City argues that there is really no choice for Mexico but to contemplate the creation of a trilateral water market with the US and Canada (León 1992). He observes that

The majority of studies concerning Mexico's grave water supply problems assume that the solution lies in a threefold policy of increased government investments, better hydrological engineering techniques and overall social awareness in preserving water resources. Yet after sixty years of public sector efforts to improve the country's water sector, scant progress has been achieved relative to the large demands of a rapidly growing population (León 1992 p. 11).

The creation of a water market, he argues, would be stabilized by NAFTA and create a good investment climate for companies from the US and Canada to help Mexico solve its current water crisis.

Proponents also appeal to precedent as an argument in support of exporting bulk water. Transfer of water has been an important component of our social, political and economic development through history from the Roman aqueduct to the present day.

Francis L. Dale, President of Citizens for Water and Power for North America located in California, argues that we need to use this ancient wisdom to continue the development of human civilization (Dale 1992).

Wherever mankind [sic] has used his waterways well, we have prospered. Whenever mankind has abused his waterways – knowingly or unknowingly – he has ultimately lost his habitat (Dale 1992 p. 36).

Dale seems unaware of the precautionary warning inherent in this statement and argues that it is crucial to our further survival to continue to bring water from areas where there is abundance to areas where there is shortage (Dale 1992).

Paley (1992) also appeals to precedent in his argument, citing the cases of water export across the border that already exist. Specifically, he states that water is piped across the border (though not across basin boundaries) for municipal use from Coutts, Alberta to Sweetgrass, Montana, from Gretna, Manitoba to Neche, North Dakota and from St. Stephen New Brunswick to Calais, Maine.<sup>11</sup> He argues that the volume of water shipped in tankers in Snowcap/Sun Belt's proposal would not have exceeded the amounts already being exported in these other locations at the time and that such amounts would have continued to be insignificant in terms of environmental disruption and harm.

Two respondents commented briefly on the role of industry in their decision-making process. Both comments dismissed the interests of industry as irrelevant to the policy decision at hand because the government was already convinced that it would prohibit water exports (BC Government Official 3 2004; BC Government Official 5 2004). However, two respondents agreed that there could be a shift in policy under

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<sup>11</sup> Bulk water is also transferred between the GVRD, BC and Point Roberts, Washington though Paley does not mention this instance.

another government if the “business case” was strong enough (BC Government Official 4 2004; BC Government Official 5 2004).

### *Media*

Kingdon asserts that in general the media is less of a factor in agenda-setting than might be expected, given the influence of the media on public awareness of issues (Kingdon 1995 p. 58). Kingdon found that media coverage tends to be sporadic and intense, calling attention to issues, but unable to sustain that attention long enough to have a significant impact on agenda setting (Kingdon 1995 p. 58-59). Despite these trends, Kingdon identifies three ways in which the media influence agenda setting. The first is as a mode of communication between policy makers, the second is by shaping issues that have already made it to the agenda and the third is by impacting public opinion on an issue, which in turn may affect agenda-setting in some circumstances (Kingdon 1995 p. 60). Kingdon also notes that the media will influence different policy makers in different ways depending on the role and position of the policy maker and their access to information and channels of communication (Kingdon 1995 p. 61).

While a full media survey is beyond the scope of this study, the media did come up as an interesting factor for some respondents. One respondent identified in particular an article in the Vancouver Sun on November 9<sup>th</sup>, 1993 as having had a large impact on the policy formulation. The article in question appeared on the front page of the paper, with the headline *NAFTA covers Canada's water, U.S. says*. The article summarized how then President Bill Clinton's chief trade negotiator Michael Kantor concluded that water exports would be covered under NAFTA (Hamilton 1993). Up until that point, according to the respondent, the media had gone along with the Canadian federal

government's position that water was not covered under NAFTA. But the fact that the Americans were concluding that water was covered lent more support for those calling for a strict prohibition on water exports. As the respondent recalls:

We were getting analysis saying water wasn't covered. The federal government was saying water wasn't covered. The media accepted the fact that water wasn't covered. So anything that happened in Canada wasn't going to make any impact. But in the States, if the United States government said that water was covered [it would have an impact]...and that's what happened. That was actually key. That was a key moment for us and we knew it. That the US reaffirmed people's fears. And it meant that the government could continue to act knowing that the concern was real, despite what advice they were getting (BC Government Official 1 2004).

The media in this instance helped to crystallize concern and support the initiative to enact a policy that was stronger than what the federal government was recommending at the time.

#### **4.2.4 Economic considerations**

Proponents of water export often argue that they are essentially talking about the export of a resource for profit like any other. If this is true, in order for a project to go ahead it should be economically profitable and viable in the foreseeable future. Given that every proposal is different, it is impossible to generalize about the economic viability of water export. However, economists working both within and outside government have attempted to shed some light on the subject.

In 1985, as a part of a series of research papers initiated by the Inquiry on Federal Water Policy, Anthony Scott published *The Economics of Water Export Policy*. In this report, he suggests that any policy regarding water exports should be based on a benefit-cost study of the situation (Scott 1985 p. 95). He argues that this framework would allow the consideration and weighing of all economic, environmental and social aspects of the

proposal. While he is reluctant to offer any conclusive or comprehensive estimates due to the huge uncertainty involved, he does provide a few indications of trends. His analysis indicated that in 1985 the price that Californians were willing to pay was significantly less than the cost to Canada of delivering water (Scott 1985 p. 72). However, he points out that there is no way to estimate what the US government would be willing to pay to subsidise a consistent water supply into the country, if this became necessary. He concludes very tentatively that large scale water diversion projects could have been economically profitable, but underscores the uncertainty involved in this estimate (Scott 1985 p. 74). He also points out that although in 1985 demand in the US was rapidly increasing, it was unlikely at that time that importing water from Canada was the cheapest option (Scott 1985 p. 22).

Similarly, the Carter report (1992) provides a less than rosy economic forecast for water export. Carter reports that despite industry's insistence that jobs and economic benefit would flow into BC, under the circumstances of the time the total benefits to the province would have been small (Educom International 1992 p. 9).

The interview respondents seemed divided on the question of economic potential. One government official described the economic situation as "probably overrated," though he acknowledged that he felt prospects would likely improve in the future (BC Government Official 5 2004). Two government officials indicated that the general assumption had been that there was money to be made and that demand from the United States made that prospect seem real (BC Government Official 4 2004; BC Government Official 3 2004). As one government official commented, "for industry, there was an opportunity to export, there was money to be made in the export of bulk water and

someone would have seized upon that economic opportunity” (BC Government Official 4 2004). Another respondent noted that the NDP government did not conduct an economic analysis because they were opposed to the export of water (BC Government Official 3 2004) unlike the Social Credit government, which had analysed the economic viability of exports (BC Government Official 1 2004).

Given the mixed opinions of the economic prospects for bulk water export and the fact that the NDP did not conduct an economic analysis of the situation, it would appear that economics did not factor prominently in the decision-making process of the NDP government.

#### **4.2.5 Politics stream summary**

In this section I have shown that in the politics stream, a strong conviction to “do the right thing” provided motivation for the NDP government. While public opinion was in favour of a prohibition, respondents suggested that this was not a significant motivating factor. Similarly, while some interest groups and stakeholders were opposed to bulk water export, respondents did not appear to have been greatly influenced by outside opinions. This section has also highlighted the split between the bureaucracy and the NDP administration: a split that considerably slowed down the implementation of a prohibition.

### **4.3 Policy Stream**

The policy stream is often described as “solutions looking for problems.” Individuals often have “pet” solutions to problems and are always looking for an opportunity to present them as the answer to a pressing question. In this section, I

explore the possible policy options that were available to the NDP to address the issue of bulk water exports.

I have already discussed the strong ideological conviction of many of the NDP policy makers to prohibit bulk water exports, and have described some of their efforts to bring the problems of water exports to light to justify and gain support for this initiative. However, it is worth mentioning again that values and ideology clearly formed the basis for the NDP's push to prohibit bulk water exports. Prohibiting exports appeared to be the preferred solution from the outset of the NDP's consideration of policy options.

[A]s I recall, the more we were looking into it, the more we were thinking about it, the more we were getting into a position of realising that it wasn't appropriate at all...I would say that the mindset generally in the NDP and there were some exceptions, but generally, was that this just is not on for a number of reasons... [F]airly early on we called for the moratorium. It took us a little while to just get caught up on it, there's no question about that, but once we did, it was very clear that this was something that [we did not support]. (BC Government Official 2 2004).

As this quote illustrates, prohibition could be considered the "pet" solution of the policy makers who were instrumental in establishing the WPA.

Prior to the WPA, BC's bulk water export policy had been minimal. The *BC Water Act* (1991) specified that all applications for water use licenses had to be approved by the Comptroller who would make decisions about water use priorities. Under this legislation, water export from streams that discharge into the ocean was allowed, provided the water was "surplus" to local and provincial needs and was not environmentally damaging (Fritz & McKinney 1992 p. 73). In accordance with the provision, BC had already granted six licences for the export of water (Day & Quinn 1992 p. 36). In addition, Alberta, Manitoba and New Brunswick were already exporting water across their borders in pipelines. As one government respondent noted:



I don't think that the [Social Credit] government had an export policy that had been thought out... I think that things that were happening at the time were more responding to business opportunities and not really taking a long term view of what all of this might lead to (BC Government Official 2 2004).

Once the issue began to heat up, the Social Credit government began a more extensive consideration of its policy options. One respondent described this effort:

[T]he previous government did a lot of work on economic analysis and how they should structure the government activities, whether they should form a crown corporation for water exports and so on because I did see some of those documents... [T]hey were clearly looking at it very closely. And they were trying to do so in a way that was more defensible politically and at the same time minimize the trade implications (BC Government Official 1 2004).

This information was available to the NDP and they could have chosen to further pursue the economic potential of bulk water export. Precedent also could have been used to justify the continuation of existing policy prior to the moratorium. However, the NDP chose to remain true to its original goal of prohibiting the export of bulk water from BC.

On May 7-8, 1992, just as the NDP was beginning to grapple with this issue, the Canadian Water Resources Association sponsored a conference in Vancouver called *Water Export: Should Canada's Water Be For Sale?* Representatives from a variety of groups presented their views on bulk water export. John Cashore, then Minister of Environment, Lands and Parks, was the final presenter. While he refrained from stating what BC's policy would be, he emphasised that BC was committed to determining the most appropriate policy to manage BC's water (Cashore: 1992). He explained that BC was undertaking a series of discussion papers, *Sustaining the Water Resource* (initiated by the previous government) and *Stewardship of the Water of British Columbia*, and consultation processes, all of which would inform the government's policy making. When asked about the influence of these documents on policy decisions, most

respondents indicated that they did not remember them clearly, but thought that they had probably been used by those in the bureaucracy to help with research of the issue.

Other policy options were also floating around in the policy soup. Some of these options and potential guiding principles are outlined by Fritz and McKinney (1992) from the Montana Department of Natural Resources in their paper "Exporting Water: Toward a Policy Framework" written for Canadian policy makers. First, they outline principles of US policy regarding water transfer and out-of-state export. They argue that export should meet the following three standards: 1) transfers will not adversely affect the public welfare; 2) transfers will not adversely affect conservation; and 3) transferred waters will be put to beneficial use in the receiving area (Fritz & McKinney 1992 p. 60). In addition, decisions to export should take into account the availability of alternate sources of water in the importing area, the current supply of the exporter's water and the exporter's future water demand (Fritz & McKinney 1992 p. 60).

Fritz and McKinney argue that any bulk water export policy in BC should also comply with principles of ecosystem management, including that for any given export: 1) there are no adverse effects on the ecosystem; 2) the public's interest in water is protected; 3) the export is economically and ecologically feasible; and 4) the project is evaluated from an ecosystem perspective (Fritz & McKinney 1992 p. 63).

It could also be argued that the Carter Report also provided policy options. The Social Credit government intended the report to serve as a discussion paper for public release. As well as raising issues for consideration concerning bulk water export, it contained several policy ideas for the assignment of licenses as well as the collection of royalties (Educom International 1992).

Kingdon argues that survival of an idea about an appropriate solution depends in part on three criteria: it must be technically feasible, it must meet with people's values, and it must anticipate future constraints (Kingdon 1995 p. 131-138). Applying these criteria to the policy options facing the BC government, options in which bulk water export would be allowed appear to meet the first and third of these criteria if constructed carefully. However, any policy that allowed bulk water exports would fail to meet the second criteria: accordance with people's values. Prohibition of export meets with all three.

Kingdon argues that the merit of an idea also carries a certain amount of weight in the decision process. The idea of prohibiting water export carried with it questions about the constitutionality of this choice as well as the ability of an investor to challenge the legislation under NAFTA. Resolving these uncertainties took a long time: indeed it was four years after the NDP took power that the WPA was enacted. But, sorting out these issues was a necessity before the policy could be written. As one government respondent commented:

[W]hen you're in government, you learn that some of the things that are really important to you that you want to do, if you're going to do them well, require a great deal of work to make sure that you've covered all the possible bases. I think that thinking was that if we didn't do this properly, we were going to subject ourselves to potential litigation. So we wanted to do as much as we possibly could to make sure that this wasn't going to come back on us and either be an embarrassment or cost the government money in the future. So that would be my recall for this taking a painfully long time (BC Government Official 2 2004).

Another respondent describes the complexity of the policy-making process in the midst of uncertainty:

It was lack of certainty as to whether or not water was covered by NAFTA and whether it would be a tradable commodity. In order to make sure that that was not the case, we brought in legislation – it was political legislation and because it may have been unconstitutional – we brought in legislation to work around what we thought were the deficiencies in the NAFTA agreement so as to prevent the export of bulk water from BC (BC Government Official 4 2004).

A third respondent describes how the internal government dynamics impeded the process:

We had to figure out how we could pass legislation that wouldn't be challenged constitutionally. And the advice that we were getting at the time was that "you couldn't." Forget it, it's federal responsibility blah blah blah. And I wasn't an expert in constitutional affairs, but I knew enough about it to know that that was just too simple. That it was a grey area and that there were competing interests or competing jurisdictional arguments here. And that stuff was given very short shrift in the advice that we were getting from the Attorney General's office. I was appalled actually at the quality of the advice that was given. It wouldn't pass a first year constitutional course (BC Government Official 1 2004).

This respondent goes on to explain how they got around some of these obstacles:

So we had to get around that and at the same time we were also fighting the international trade analysis – opinions coming out of the trade ministry saying that water wasn't in the NAFTA and we didn't have to worry about anything. Or if you did it this way you'd be safe and if you do it that way you wouldn't. And if you do an export ban flat out then you'd be toast and it would be deeply embarrassing for the government... And so what ultimately happened was that we put the trade analysis and the constitutional analysis together and we got outside legal advice that was far more creative and far more accurate and far more useful to what the government wanted to do. It came up with some options instead of just saying you can't do it (BC Government Official 1 2004).

In this quagmire of uncertainty, policy formulation was a challenging task, especially given the inter-governmental disagreement not only between the bureaucracy and the elected officials, but also between various government departments. To make the policy happen in a way that was in keeping with the government's ideological commitment to enact a prohibition, but that was also appropriate given the trade and jurisdictional

implications, advice and options from outside the government were necessary. Ideas that came from outside the government helped to shape the eventual policy.

#### **4.3.1 Policy stream summary**

In this section, I have shown that despite the many policy options available to the NDP government that would have involved the regulated export of water, the government persevered until it was able to develop a policy that reflected its conviction to prohibit the export of water from British Columbia. Part of this process involved circumventing inter and intra provincial governmental resistance and eventually soliciting outside opinions on how to achieve their goal.

#### **4.4 Coupling/Policy window**

According to Kingdon's framework, policy decisions get made when the three streams converge. He calls this convergence a policy window. A policy window is "an opportunity for advocates of proposals to push their pet solutions, or to push attention to their special problems" (Kingdon 1995 p. 165). Windows open and bring attention to issues, but do not necessarily define action; it is up to the actors in the policy arena to couple the problem with a solution (Kingdon 1995 p. 168).

Kingdon argues that windows are more likely to be opened by events in the politics or problem streams, which can then be coupled to an accompanying solution from the policy stream. This pattern holds true for the situation in BC. The NDP were in opposition to bulk water exports before they came to power in 1991. The window of opportunity for a prohibition opened in March of 1991 with the Sun Belt case (the problem stream) and the election of the NDP to government in November of that same

year (the politics stream). The solution, a prohibition, already existed in the policy stream and was attached to the issue of bulk water exports.

In the problem stream, bulk water exports were defined as a problem by the NDP for environmental reasons and issues of sovereignty in the face of international trade agreements: a problem definition in keeping with their values. The Sun Belt case brought bulk water exports to the attention of the public, brought the issue to the agenda of the Social Credit government, and added fuel to the growing opposition from the NDP. By enacting the initial moratorium, the Social Credit government acknowledged that bulk water export was an issue that needed to be addressed, thereby not only setting the stage for the NDP policy agenda, but *requiring* a response to the pending moratorium expiration.

In the politics stream, a very strong trend towards ideological and value-driven agenda setting emerged amongst the government respondents. While public opinion was perceived to be against bulk water exports, the main motivating factor for the NDP government was their conviction that a prohibition was the “right thing to do.” Most respondents did not identify any organized political forces as having been particularly influential in terms of agenda setting. The election of the NDP was therefore a strong factor in the enactment of the *Water Protection Act*.

In the policy stream, even once a prohibition was identified as the favoured solution to the problem, a good deal of work over many years was necessary to create legislation that reflected this goal, while minimizing the danger of being challenged on either a constitutional or trade front. As identified previously, this was a formidable task

in the bureaucratic environment in which the NDP found itself, but one that was overcome in part by their ideological conviction.

## 5 Provincial/Territorial Policy Comparison

In order to assess the effectiveness of the Accord at meeting its goal, I compare the bulk water export policies across Canada to determine if they do form a Canada wide approach to bulk water export and if they meet the policy requirements set out by the Accord.

This chapter analyzes factors that have motivated each province or territory in Canada to implement or not implement bulk water export policy in the last ten years. I also assess each policy based on the questions outlined in chapter 3, which give a sense of the strength and scope of the policies and their collective effectiveness at meeting the goals of the Accord. Specifically I look at the commitment that each jurisdiction has shown to its prohibition, the definitions of water and watershed boundaries in each policy, the intentions of each policy, the penalty or enforcement mechanisms outlined in each policy and the power vested in the cabinet or administrators to change each policy without legislative approval. I look mainly at records of parliamentary proceedings (Hansard) and the policies themselves for this analysis and comparison. Table 2 summarizes the policy comparison.

In November of 1999, the Canadian Council of the Ministers of the Environment met in Kananaskis, Alberta, to discuss and sign the *Accord for the Prohibition of Bulk Water Removal from Drainage Basins* (the Accord). Nunavut, the Northwest Territories, the Yukon, Ontario, New Brunswick, Nova Scotia, PEI and Newfoundland have all since signed the Accord. Of these, Nunavut, the Northwest Territories, the Yukon, and New



Brunswick did not have bulk water export policies in place as of December 2004. Nova Scotia enacted legislation in 2000, PEI in 2002 and Newfoundland in 1999. Ontario created a regulation in 1999, but does not have legislation. BC enacted legislation in 1996, Alberta in 1996, Saskatchewan in 2001, Manitoba in 2000 and Québec in 2001, but none of these have signed the Accord. This situation raises some interesting questions not only about the effectiveness of the Accord at motivating policy change, but also about the other factors motivating individual jurisdictions to enact policy.

Despite the fact that not all jurisdictions have signed, nine do have bulk water export policies in place. While these policies display a good deal of variety, Heinmiller (2003) argues that the provinces and territories have achieved policy harmonization by emulating each other's policies, and that the net result is a "nationwide regulatory regime for water exports in Canada" (Heinmiller 2003 p. 508). On the other hand, Boyd (2003) argues that the variety across the provinces is problematic not just because of inconsistencies among the policies, but also because at any point, any province or territory could opt to change its mind and allow bulk water exports (Boyd 2003 p. 59; see also Shrybman 1999a). The distinction between these two perspectives is crucial to the analysis of the effectiveness of the Accord. Following Heinmiller (2003), one could consider the Accord to have been effective as a component of a policy emulation process that has resulted in policy harmonization approximating a "Canada-wide approach." Conversely, one could consider the Accord to have been ineffective because, even among signatories, there is too much variety among policies to consider it a national approach and there is little evidence of a nation-wide commitment to the prohibition of bulk water exports.

It is important to consider the possibility that while the stated goal of the Accord is to create a Canada-wide approach to prohibiting the bulk removal of water from the Canadian portions of major drainage basins, the federal government could have intended to allow for regional discretion in crafting these policies. However, although flexibility to deal with regional variation may be important, there are certain core elements that must be in place (including an on-going, strong and enforceable commitment to prohibition from all signatories) to ensure that the goal of the Accord is achieved. Too much variety and discretion could render the national approach meaningless, especially if a common and ongoing commitment to the prohibition among jurisdictions is lacking. As Smith (1998) argues, when given the discretion to interpret flexible or collective policies (such as the Accord), provinces will act in their own interest. The result, she argues, is weaker implementation in each region and a lowering of the collective policy to the “lowest common denominator” (Smith 1998 p. 11). The analysis in this chapter is intended to illustrate if, collectively, the bulk water export policies provide enough protection of Canada’s water resources to achieve a meaningful national prohibition on bulk water exports.

## **5.1 The Accord**

In order to achieve its objective, the Accord sets out the minimum standards that each signatory is expected to take into consideration when creating its policies. These standards are vague, on the one hand leaving room for individual jurisdictions to create regionally appropriate policies and on the other the possibility that jurisdictions will create policies that are equally vague and potentially ineffectual.

The Accord defines five drainage basins in Canada: the Atlantic, Arctic, Pacific, Hudson Bay and the Gulf of Mexico. It makes note of the importance of smaller watershed systems within each of these basins and suggests that each jurisdiction enact policies at a watershed scale “appropriate for the protection of ecological integrity or for other management purposes” (Environment Canada 1999a).

The Accord defines bulk removal of water as “the withdrawal and transfer of water out of its basin in quantities which individually or cumulatively could result in damage to the ecological integrity of the system” (Environment Canada 1999a). This definition leaves open the possibility that water could be transferred within a basin but across the Canada-US border. The Accord specifically exempts the transfer of water in small portable containers from this definition. It also suggests several possible exceptions including water used in products, transportation, short-term safety and humanitarian needs and other purposes “as determined by individual jurisdictions to meet environmental and other management needs consistent with the objective of the Accord” (Environment Canada 1999a).

**Table 2: Provincial Policy Comparison**<sup>12</sup>

Jurisdiction	Signed Accord?	Initial policy	Current Policy	Clear definition of water	Water basin boundaries or political boundaries specified	Exemptions for containers	Exemptions for vessels/transport/food	Other exemptions	Penalties or enforcement specified	Referral to regulations for exceptions	Authority to Amend	Purpose of prohibition
BC	No.	Moratorium (1991)	Water Protection Act (1996)	Major watersheds defined by region (s.1).	Political Boundaries (s.4).	20L (s.5(c))	Yes (s.8).	Licenses grandfathered (s.4(1)). (although none were renewed). GVWD to Point Roberts (s.1).	\$200,000/day and/or 12 months imprisonment. And can be required to relinquish profits (s.17(4)). Officers have the right to stop and search vessels (s.20).	No.	Not specified.	*Foster sustainable use of British Columbia's water resources in continuation of the objectives of conserving and protecting the environment" (s.2).
AB	No.	Water Act (1996)	Water Act (2000)	No.	Political Boundaries (s.46(2)).	Bottled water allowed, but no specification of volume (s.3(e) of Water Ministerial Regulations).	Yes (s.3(e) of the Water Ministerial Regulations).	Processed water and municipal water (s.46(3)).	Individual: \$50,000- and/or 2 years imprisonment. Corporation: \$500,000 - \$1million. May also be required to relinquish monetary benefits (s.143 and 144).	Yes s.49 (2) Class of diversion or area from which water can be diverted without a license to be defined in regulations.	Minister must consult public "in a manner satisfactory to the Minister" before introducing a "special Act" to the legislature (s.46 and s.48). Minister can exempt diversions from licensing (s.169(2)(k)).	*For the purpose of promoting the conservation and management of water including the wise allocation and use of water" (s.46(2)).

<sup>12</sup> See also Heimiller (2003).

Jurisdiction	Signed Accord?	Initial policy	Current Policy	Clear definition of water	Water basin boundaries or political boundaries specified	Exemptions for vessels/containers transport/ food	Other exemptions	Penalties or enforcement specified	Referral to regulations for exceptions	Authority to Amend	Purpose of prohibition	
SK	No.	Amendment to Water Corporation Act (2001)	Saskatchewan Watershed Authority Act (2002)	No.	Watershed boundaries (s. 43).	Specified in regulations.	Yes.	Not specified.	\$10,000 fine (s.81(2)).	Yes s. 44(e) Definition of purpose of water to be removed can be specified in regulations.	Lieutenant Governor in Council can define regulations under which water may be exported (s. 92).	Unspecified.
MB	No.		Water Resources Conservation and Protection Act (2000)	Includes surface, ground water, ice. Defines water basin and sub-basin (with reference to regulations) (s.1).	Political boundaries (s.4).	25L (can be defined in regulations) (s.3(1)).	Yes (s.3(1)).	Short term safety, humanitarian needs (s.3(1)).	Individual: \$50,000- \$100,000; Corporation: \$500,000- \$1mil. Both can be required to relinquish profits (s.5(1)).	Exemptions defined in regulations (s.3(3)).	Lieutenant Governor in Council can make regulations defining further exceptions (s.3(3)). Minister can approve use for humanitarian, short-term safety and security (s. 3(1)(d)).	Preservation of the ecological integrity of Manitoba's water resources and the long-term environmental, social and economic well-being of the province (summarized from preamble).

Jurisdiction	Signed Accord?	Initial policy	Current Policy	Clear definition of water	Water basin boundaries or political boundaries specified	Exemptions for containers	Exemptions for vessels/ transport/ food	Other exemptions	Penalties or enforcement specified	Referral to regulations for exceptions	Authority to Amend	Purpose of prohibition
ON	Yes.		Regulation 387/04 (Ontario Water Resources Act) (1999)	Three water basins defined (s.3(1)).	Water basin boundaries (s.3(1)).	20L (s.3(6))	Yes (s.3(5)).	Licenses grandfathered (s.2(7)). Transfer to Winnipeg Water District (s.3(8)).	Individual: \$20,000-\$50,000/day and/or imprisonment. Corporation: \$100,000-\$200,000/day.	N/A	Regulation can be changed without legislative review.	*Conservation, protection and wise-use and management of Ontario's waters* for *long-term environmental, social and economic well-being* (s.1).
QUE	No.		Water Resources Preservation Act (2001)	Surface and ground water (s.1).	Political boundaries (s.2).	20L (s.2)	Yes (s.2).	Electricity generation (s.2).	Referred to Environmental Quality Act (s.4).	No.	Government can lift prohibition for reasons it considers *in the public interest* including humanitarian reasons subject to Environmental Quality Act (s.3).	Sustainable use of Québec's water resources, public concern and environmental impacts (summarized from preamble).
NB	Yes.		No.									

Jurisdiction	Signed Accord?	Initial policy	Current Policy	Clear definition of water	Water basin boundaries or political boundaries specified	Exemptions for containers	Exemptions for vessels/transport/food	Other exemptions	Penalties or enforcement specified	Referral to regulations for exceptions	Authority to Amend	Purpose of prohibition
NS	Yes.		Water Resources Protection Act (2000)	Atlantic drainage basin defined. Includes surface, ground water, ice (s.2).	Water basin boundaries and political boundaries (s.4).	25L (s.5(1))	Yes (s.5(1))	Non-commercial/safety/humanitarian uses. Any other circumstances prescribed in regulations (s.5(1)).	\$1000-\$1mil/day and/or imprisonment (s.7(1)).	Yes s. 5(1)(f).	Minister can define "non-commercial" purpose (s.5(1)(d)). Governor in Council has authority to change definitions of acceptable removal in regulations (s.8(1)).	Preservation of well-being; environmental and economic objectives of Nova Scotia; the need for a precautionary approach in the face of uncertainty; and the potential ecological harm of export (summarized from preamble).
PEI	Yes.		Amendment to Environmental Protection Act (2002)	Applies to water basin, water course or other surface water body in the province (s.12.1).	Political boundaries (s.12.1).	25L (s.12.1)	Yes (s.12.1).	Short-term safety, security, humanitarian needs (s.12.1)	\$200-\$10,000 and/or imprisonment (s.32).	No.	Minister can specify "short-term safety, security or humanitarian needs" (s.12.1).	Unspecified.
NFLD	Yes.	Water Resources Protection Act (1999)	Water Resources Act (2002)	All water within or derived from a body of water (s.2(y)) and includes groundwater (s.6).	Political boundaries (s.12)	30L (s.12)	Yes (s.12).	Non-commercial/safety/humanitarian uses (s.12)	Person: \$500-\$10,000/day or 3-6 months imprisonment. Corporation or Municipality: \$1000-1mil/day (s.91).	No.	Minister can define "Non-commercial purpose" (s.12).	Unspecified.
YK	Yes.		No.									
NWT	Yes.		No.									
NT	Yes.		No.									

## 5.2 Alberta

Alberta has not signed the federal Accord. However, it does have a bulk water export policy in place. In 1996, the provincial government passed the *Water Act*, which was updated in 2000 with no revisions to the portions pertaining to bulk water export. Section 46 of the *Water Act* deals with the removal of bulk water from the province of Alberta. The government claims that this legislation and the accompanying regulations effectively prohibit the export of bulk water (*Alberta Hansard, December 1, 1999*). Hansard records from 1996 show that there was little discussion of many of the issues related to bulk water exports. Unlike other provinces, there was not a heated debate about bulk water export in Alberta when the *Water Act* was put in place. Primarily, this appears to be because Alberta already has problems with water allocation and drought, especially in the south (*Alberta Hansard, May 8, 1996*). Indeed, some argue that bulk water is already “exported” from Alberta when it is injected into deep oil wells in the process of oil and gas production: water injected in this manner is essentially removed from the water cycle, and the oil and gas may then be exported (Watson 2001). It is unclear from the Alberta Hansard what the problem of bulk water exports was perceived to be or what brought it to the government’s attention in 1996.

In 1999, when Alberta decided not to sign the federal Accord, there was also little debate in the legislature. The provincial government cited an unclear definition of the “precautionary principle” in the Accord and an unclear definition of “water basin” in the *International Boundary Waters Treaty Act* amendment as reasons not to sign the Accord (*Alberta Hansard, December 1, 1999*). The provincial government also claimed that its



own *Water Act* already prohibited bulk water removal and therefore there was no need to sign the Accord (*Alberta Hansard, December 1, 1999*).

A closer look at the *Water Act* assesses this claim. Section 46 (2) states that a licence shall not be issued for the purpose of transferring water from the Province outside Canada by any means, unless the licence is specifically authorized by a special Act of the Legislature (Government of Alberta 2000).

This section does not address the impacts of transferring bulk water out of the province within Canada. Though such a transfer may not have NAFTA implications, it would certainly have environmental implications. Further, this section may leave the door open for the transfer of water to another province and then export out of Canada.

Section 46 indicates that legislative approval is required for the granting of licenses. Section 48 describes the process referred to in s. 46 to enact a “special Act of the Legislature”:

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 must consult with the public, in a form and manner satisfactory to the Minister, with respect to such a Bill (Government of Alberta 2000).

Section 46 and s. 48 essentially set up a decision making process for when the question of bulk water exports is raised in the future. The consultation process would be at the discretion of the Minister, but any amendment to the existing policy would require debate in the legislature. However, s. 169(2)(k) states that the Minister may exempt certain diversions or classes of diversions from the licensing requirement.

Because the *Water Act* deals with many issues other than the export of bulk water, its defined purpose (s.2) is broad. However, it still provides insight into the potential interpretation of the sections regarding the export of water. Section 2 very clearly defines Alberta’s economic growth and prosperity as a purpose of the Act and stresses the

need to allocate resources based on “sound planning, regulatory actions and market forces” (Government of Alberta 2000). Section 2 makes it clear that Alberta will heavily emphasize economic concerns along with environmental concerns when interpreting this legislation. At the same time, s. 46(2) states that the prohibition is “for the purpose of promoting the conservation and management of water including the wise allocation and use of water” (Government of Alberta 2000).

The *Water Act* does not clearly define the ecosystem boundaries or “water” to which it applies. The prohibition of the Act is based on the political boundaries of the province and specifies that water will not be transferred from the province to a destination outside of Canada (Government of Alberta 2000). It is not based on water basin boundaries as specified by the Accord. The *Water Act* specifies penalties for the violation of the Act as ranging from \$50,000 to \$100,000 and/or two years imprisonment for individuals and \$50,000 to \$1,000,000 for corporations (s.143). Both may also be required to relinquish any profits that accrued to them from the illegal activities (s. 144).

### **5.3 Saskatchewan**

Saskatchewan has not signed the Accord. However, the Saskatchewan government was considering the implications of bulk water export policy before the Accord was tabled. The Water Management Framework for Saskatchewan, written in 1999, had as one of its objectives the prevention of the export of bulk water from Saskatchewan by developing legislation to strengthen Saskatchewan Water’s existing

policy on bulk water exports (Saskatchewan Environment 1999).<sup>13</sup> Saskatchewan Water's bulk water export policy stated that water would not be exported across the border unless it was in containers of 10L or less and the total annual volume of export did not exceed 20,000dam<sup>3</sup> (Saskatchewan Environment 1999).

Saskatchewan had also been considering potential threats to its water resources. Under the *Boundary Waters Treaty Act*, Saskatchewan is obligated to ensure that a certain flow reaches the US via international streams that cross the border and there was concern that this demand would increase. Public consultation also revealed that most people were opposed to the idea of bulk water exports (*Saskatchewan Hansard, May 24, 2001*). NAFTA implications do not appear to have been a major concern or motivator, perhaps because of assurances that the government's legal advisors confirmed that the legislation would not conflict with NAFTA (*Saskatchewan Hansard, June 26, 2001*). The Saskatchewan provincial government claims that it was the threat of increasing demand from the US on Saskatchewan's water that motivated the creation of legislation to prohibit bulk water exports (Saskatchewan Environment 1999).

The *Water Corporation Amendment Act* was passed in 2001, prohibiting the removal of water from watersheds (Government of Saskatchewan 2001). The *Water Corporation Act* was repealed in 2002 and replaced by the *Saskatchewan Watershed Authority Act* which transferred water management authority to the Saskatchewan Watershed Authority, but the substance of the prohibition remained the same

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<sup>13</sup> Saskatchewan Water (SaskWater) was established in 1984 as a Crown corporation of the Government of Saskatchewan. In 2002, SaskWater was refocused as a commercial Crown subsidiary of Crown Investments Corporation, with a mandate of providing water, wastewater and related services to municipal, industrial, government and domestic customers in the province. At that time, all water resource management activities were transferred to a new Treasury Board Crown called the Saskatchewan Watershed Authority (Mossing 2004).

(Government of Saskatchewan 2002; Mossing 2004). The *Watershed Authority Act* states that the Watershed Authority is not permitted to grant “any license or approval to take water out of a watershed”(Government of Saskatchewan 2002). It provides no definition of watershed and does not specify any political boundaries to the transfer of water: odd given that one of the expressed concerns was increasing water demand in the US, and there are shared watersheds between bordering states and Saskatchewan (Government of Saskatchewan 2002). It also contains a clause to allow acceptable water removal to be defined in regulations: s.44(e) states that the prohibition does not apply to water “of a prescribed class or that is removed in a prescribed manner or for a prescribed purpose”(Government of Saskatchewan 2002). Section 44 is not subject to any overall restrictions.

Of additional relevance is s. 92 which states that the Lieutenant Governor in Council may make regulations:

- (a) defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act;
- (b) prescribing any matter or thing required or authorized by this Act to be prescribed in the regulations... (Government of Saskatchewan 2002).

Thus, the Lieutenant Governor in Council (effectively cabinet) has the power to describe conditions under which the bulk export of water would be acceptable without legislative consultation. The Act also does not specify any enforcement or penalty provisions.

## **5.4 Manitoba**

Manitoba has not signed the Accord. In 2000, Manitoba passed the *Water Resources Conservation and Protection Act*. A good amount of debate surrounded this legislation before it was passed. Generally, those opposed to the bill were concerned that

it was redundant, unnecessary and that it closed the door on a potentially valuable resource for Manitobans and for people around the globe (*Manitoba Hansard, July 18, 2000*). The government cited environmental concerns and the threat of previous proposals as reasons to enact the legislation, as well as concerns about water being considered a good under NAFTA (*Manitoba Hansard, April 26, 2000*).

The Conservation Minister, Oscar Lathlin, decided not to sign the Accord in 1999, citing the need to consult with stakeholders before making a final decision (*Manitoba Hansard, April 26, 2000*). It is unclear from Hansard whether these consultations took place, but Manitoba did not subsequently sign the Accord. The Minister did state in 2000 that he felt that the federal government should not rely on the Accord as protection of Canada's water resources "should the circumstances regarding the bulk removal of water change" (*Manitoba Hansard, April 26, 2000*). He stated that Manitoba's legislation was in keeping with the provisions of the Accord, but he felt that the best way to protect Canada's resources would be for the federal government to prohibit the removal of bulk water from Canada (*Manitoba Hansard, April 26, 2000*).

The preamble of the Manitoba Act states that its purpose is to preserve the ecological integrity of Manitoba's water resources and the long-term environmental, social and economic well-being of the province (Government of Manitoba 2000). The Act clearly defines the water resources that are covered in the legislation including ground water, surface water and ice. The Act states that "a person shall not remove water from the province" (s.2) thereby basing the prohibition on political boundaries, not water basin boundaries (Government of Manitoba 2000). Like water export legislation in many other jurisdictions, it contains a clause giving power to the Lieutenant Governor

(cabinet) to make regulations respecting exemptions from the prohibition (s.3(3)) and grants the Minister authority to make exceptions for short-term safety, security or humanitarian needs (s. 3(1)(d)) (Government of Manitoba 2000). The Act does define offences and penalties (s. 5(1)) for contravention of the Act.

## 5.5 Ontario

In 1998, the Ontario Ministry of the Environment granted a five year “water-taking” permit to Nova Group Inc. to remove 600 million litres/year of water from Lake Superior for export to China (Campbell & Nizami 2001 p. 12; Canadian Environmental Law Association 2000). Opposition members argued that the Ministry of the Environment had not followed established policies requiring consultation with the Ministry of Natural Resources, nor had it followed policies requiring consultation with other governments with jurisdiction over Great Lake waters before granting this permit (*Ontario Hansard, May 4, 1998*). Further, there was concern that an environmental assessment had not been completed before the permit was granted and that the potential consequences of commodifying Ontario’s water had not been considered (*Ontario Hansard, May 4, 1998; Ontario Hansard, May 7, 1998*). The government claimed that it was not within their jurisdiction to enact policy regarding international trade and that they did not issue a permit for export, but a permit for removal (*Ontario Hansard, May 6, 1998; Ontario Hansard, May 7, 1998*). However, the government eventually created a regulation that limited the export of water and Nova Group’s license was revoked (Campbell & Nizami 2001). Initially, Nova Group appealed this decision to the Ontario Environmental Appeal Board, but eventually withdrew its appeal (Campbell & Nizami 2001).

Unlike many other jurisdictions, Ontario does not have legislation prohibiting bulk water export. The *Ontario Water Resources Act* specifies that any water taking over 50,000 litres/day requires a permit from a Director (s.34(3)), but does not prohibit any uses of that water (Government of Ontario 1990).<sup>14</sup> Instead, Ontario has established the Water Taking and Transfer Regulation (Ontario Regulation 387/04) under the *Ontario Water Resources Act*. The purpose of the Regulation is “conservation, protection and wise-use and management of Ontario’s waters” for “long-term environmental, social and economic well-being” (s.1). Section 4.2(1) of the Regulation states that the Director shall consider the natural functions of the ecosystem before issuing a water-taking permit (Government of Ontario 2004). The Regulation specifies that water shall not be transferred out of Ontario’s three major water basins (the Great Lakes-St. Lawrence basin, the Nelson basin and the Hudson Bay basin) except for water in containers of less than 20L or for transportation or the production of a product that is then transferred out of the basin (Government of Ontario 2004). This specification is in keeping with the Accord’s definition of water basin boundaries and does not specify any political boundaries from which water should not be taken. The Act specifies the penalties associated with contravention of the Regulation (s.108). As a Regulation, Ontario’s water policy can be changed by cabinet without approval by the full legislature.

## 5.6 Québec

In 1999, before the meeting of environment ministers in Kananaskis, Alberta, the Québec government announced that it was going to enact a temporary moratorium on

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<sup>14</sup> A Director is an individual appointed by the Minister of the Environment, subject to approval by the Lieutenant Governor in Council (s.5) (Government of Ontario 1990).

bulk water exports beginning in November 1999 and ending in January, 2001 (Assemblée Nationale Québec 2000; Environment Canada 1999b). The moratorium was put in place in response to growing concerns about water export from the province and was intended to give the government time to consider and craft its permanent bulk water export policy (Assemblée Nationale Québec 2000). At the meeting in Kananaskis, Québec was the only jurisdiction that did not agree in principle with the goal of the Accord, namely to prohibit bulk water removals from major drainage basins in Canada (Environment Canada 2004).

In 1998, Québec Environment Minister Paul Bégin had requested that the Bureau d'Audiences Publiques sur L'Environment (BAPE) conduct a public consultation on water management, including bulk water exports from Québec (Environment Québec 2002). The BAPE report was released in 2000 and entitled *La Gestion de l'eau au Québec*. It concluded that bulk water exports of any form from Québec were unlikely to be profitable because of the high cost of shipping and infrastructure and the relatively low cost of desalination in some potentially importing regions (Environment Québec 2002 p. 41). It also concluded that the environmental risks were too high, especially with regard to the uncertainty of climate change. It recommended making the moratorium permanent legislation prohibiting bulk water export, and recommended considering the consequences of NAFTA more carefully before making any decisions (Bureau d'Audiences Publiques sur l'Environment 2000).

In 2000, Minister Bégin outlined his main concerns about bulk water export in a meeting of the Assemblée Nationale. They included: public concern about NAFTA and the WTO; the importance of the St. Lawrence River to the socio-economic vitality of the



region; ecosystem fragility; and concern that NAFTA would require the continued export of water once it had begun (Assemblée Nationale Québec 2000). He outlined that the public consultation that had taken place indicated that the majority of the public was concerned with the commodification of water and NAFTA and WTO implications for the export of water from Québec (Assemblée Nationale Québec 2000). He continued on to state that there is the possibility that Québec may still consider exports in the future in response to the deteriorating global water situation (Assemblée Nationale Québec 2000).

In response to these concerns, the *Water Resources Preservation Act* prohibiting the removal of bulk water from Québec came into force in 2001. It applies to surface and ground water (s.1) within the province and specifies the political boundary of Québec as the region from which water export is prohibited (s.2) (Government of Québec 2004). The preamble to the Act identifies sustainable use of Québec's water resources, public concern and environmental impacts as the motivating factors behind the legislation (Government of Québec 2004). Section 2(1) of the Act states that water transferred for the purpose of producing electricity is exempt from the prohibition. According to Boyd (2003), this exemption includes water that is exported for the production of electricity outside of Canada. Further, the Act explicitly gives authority to the government to lift the prohibition for any reason it deems to be in the public interest, either on all exports or for a specific project, subject to the *Environment Quality Act* (s.3) (Government of Québec 2004).<sup>15</sup> It does not specify if a change in the prohibition must face legislative debate or if it can be a decision made exclusively by cabinet.

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<sup>15</sup> The *Environment Quality Act* states that an environmental impact assessment must be carried out for all projects as determined by the government (s.31.1) (Government of Quebec 2004).

In 2004, the government decided to take advantage of the flexibility of the legislation and reopen the question of bulk water export from Québec. In June of 2004, the current Minister of the Environment, Thomas Mulcair, announced his government's intention to open public consultation on the issue by the fall of 2004 (Madigan 2004). Mulcair stated that he wants Québec to profit from water exports, in the same way that it profits from mining (Madigan 2004). The current situation in Québec resembles the situation in Newfoundland five years earlier in which a change in government resulted in reconsideration of the bulk water export question.

## **5.7 New Brunswick**

New Brunswick is a signatory to the Accord. In its 1999-2000 Annual Report, the Department of the Environment notes that New Brunswick has opted to sign the Accord because it reflects New Brunswick's interests (New Brunswick Department of the Environment 2000). However, it has yet to enact a policy to deal with bulk water export as specified by the Accord.

## **5.8 Nova Scotia**

In June 2000, Nova Scotia introduced the *Water Resources Protection Act*, prohibiting the export of bulk water from that province. Nova Scotia had signed the Accord at the time the *Water Resources Protection Act* was enacted. The Act was a direct answer to the Accord and "mirrored" the federal government's proposed (but not enacted) "Water Protection Act" (*Nova Scotia Hansard, April 10, 2000 p. 3637*). It was also motivated by what Nova Scotia saw happening in Newfoundland and Ontario with

the Gisborne Lake and Lake Superior proposals (*Nova Scotia Hansard, April 10, 2000* p. 3638).

Nova Scotia identified environmental protection and the increasing uncertainty of climate change as well as concern over sovereignty as reasons for enacting the *Water Resources Protection Act* (Government of Nova Scotia 2000a; *Nova Scotia Hansard, April 10, 2000* p. 3638). At the time of first reading, there were still serious concerns about NAFTA (*Nova Scotia Hansard, April 10, 2000* p. 3642). Nova Scotia did not see itself as a major player in the potential water export market, but as a part of a network of provinces (*Nova Scotia Hansard, April 10, 2000* p. 3643). Though there was some concern about unintentionally capturing water used for purposes other than export and some concern about the enforcement of the legislation, there was generally a high level of support for the spirit of the legislation among the members of the Nova Scotia legislature (*Nova Scotia Hansard, April 10, 2000; Nova Scotia Hansard, April 11, 2000; Nova Scotia Hansard, June 8, 2000*).

The preamble to the Nova Scotia *Water Resources Protection Act* identifies the preservation of well-being and environmental and economic objectives of Nova Scotia, the need for a precautionary approach in the face of uncertainty and the potential ecological harm of export as the motivating factors for the legislation (Government of Nova Scotia 2000b). Section 4 of the Act states that “no person shall...remove water, from the portion of the Atlantic Drainage Basin that is located within the Province” (Government of Nova Scotia 2000). The Act defines the “Atlantic Drainage Basin” as “the geographic area that drains into the Atlantic Ocean and, for greater certainty, includes all of the Province” (s.2(a)) (Government of Nova Scotia 2000). This definition

appears to prohibit water export based on water basin boundaries, in accordance with the specifications of the Accord, but it also prohibits export from the jurisdictional boundaries of the province itself. The Act specifies that the prohibition on exporting water applies to surface water, ground water and ice (s.2). Contravening this legislation carries with it a penalty of \$1000 to \$1 million per day the offence is committed and/or imprisonment (s.7).

Section 5(1)(f) leaves open the possibility that water can be removed under conditions specified by regulations subject to the *Environment Act*, which specifies that an environmental assessment is needed before an undertaking commences, and that the Governor in Council may make regulations that define the circumstances under which water may be removed and the quantity of water that may be removed (s.8(1)(a) and (b)).<sup>16</sup>

## 5.9 Newfoundland and Labrador

Newfoundland is the third of the three jurisdictions (along with BC and Ontario) where there has been a serious proposal to export water. Beginning in 1997, the McCurdy Group began exploring the possibility of exporting water from Gisborne Lake (Barlow & Clarke 2002 p.66). In 1999, the government of Newfoundland and Labrador under Premier Tobin introduced the *Water Resources Protection Act* prohibiting the export of bulk water from that province. This legislation was enacted partly in response to the national discussions surrounding the federal Accord and partly in response to the McCurdy proposal (Government of Newfoundland and Labrador 1999a).

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<sup>16</sup> The *Environment Act* requires that an Environmental Assessment be completed before approval is granted to an undertaking (Government of Nova Scotia 1994-1995).

At the time that the *Water Resources Protection Act* was being debated, the environmental impact assessment for Gisborne Lake was released with the conclusion that there would be no significant negative impacts of exporting water in that case (*Newfoundland Hansard, November 22, 1999*). However, the government argued repeatedly that the *Water Resources Protection Act* was mainly based on environmental concerns and protecting the water resources of Newfoundland for Newfoundlanders (*Newfoundland Hansard, Dec 2, 1999; Newfoundland Hansard, November 18, 1999*). The implications of NAFTA were also debated: was water considered a “good” under NAFTA? (*Newfoundland Hansard, November 18, 1999*); and would they be able to turn off the tap? (*Newfoundland Hansard, November 22, 1999*). Newfoundland had also already made a reference to the federal government regarding NAFTA implications (*Newfoundland Hansard, November 22, 1999*). The Newfoundland government was confident, however, that nothing in its legislation would result in a claim against Newfoundland under NAFTA (Government of Newfoundland and Labrador 1999b).

A prohibition on bulk water export was supported in several arenas. Public opinion appeared to be opposed to exporting water, based on the “open line” talk shows where politicians and the public voiced concern about bulk water exports. There were also assertions that in fact there was much less demand than was currently believed (*Newfoundland Hansard, November 22, 1999*) and that the potential financial gain through royalties might not be as great as anticipated (*Newfoundland Hansard, Dec 2, 1999; Newfoundland Hansard, November 22, 1999*). And the principle of the legislation, that bulk water exports should be prohibited, received general agreement in

legislative debates (*Newfoundland Hansard, November 18, 1999; Newfoundland Hansard, November 19, 1999*).

Despite the support that the legislation had received, the newly elected Premier Grimes re-opened the debate on bulk water exports in 2001. The change in premiers in 2001 (though not a change in party) appears to have altered the political climate, making the export of bulk water a potential option. Premier Grimes was actively in favour of exporting bulk water from the province. He was quoted as saying that “the water is just running into the Atlantic Ocean, no one is getting one nickel out of it... Why shouldn't it help us?” (O'Malley & Bowman 2001). A ministerial committee was struck to examine the issues that the Grimes government felt had not been adequately addressed when the Act was put in place: the environmental, economic, jurisdictional and trade implications of allowing the export of bulk water from Newfoundland and Labrador (Government of Newfoundland and Labrador 2001).

The results of the committee's study were published in *Report of the Ministerial Committee Examining the Export of Bulk Water*. The committee recommended that the government not amend the *Water Resources Protection Act* and that bulk water exports remain prohibited in Newfoundland and Labrador (Government of Newfoundland and Labrador 2001). The report highlighted the main reason not to amend the *Water Resources Protection Act*: the lack of confidence in the economic prospects of exporting bulk water. Other aspects seemed more favourable for lifting the prohibition: the committee seemed fairly confident that there would be no NAFTA implications; the committee also appeared aware of potential environmental implications, but confident in the province's environmental impact assessment process to identify any potential

environmental harm; and the committee concluded that making decisions about bulk water exports was within the jurisdiction of the province.<sup>17</sup>

Newfoundland and Labrador had already signed the federal Accord when the reconsideration of the *Water Resources Protection Act* occurred. Nowhere in the ministerial report are the Accord or Newfoundland and Labrador's commitment to it mentioned. This indicates that a commitment to the Accord alone would not have been enough incentive to maintain its previous prohibition and suggests that the Accord was not considered to be an important factor. In other words, given the favourable political climate, had there been more certainty regarding the economic profitability of exporting water from Newfoundland and Labrador, it is likely that the Act would have been amended.

The *Water Resources Protection Act* was repealed in 2002 and replaced by the *Water Resources Act*, with no major changes to the prohibition itself. The definition of water was the only significant change under the new Act. Under the *Water Resources Protection Act*, water was defined as per the *Environment Act* and included surface water, ground water and ice within the province (s.2) (Government of Newfoundland and Labrador 1999; Government of Newfoundland and Labrador 2002). Under the new *Water Resources Act*, water is defined as "all water located in or derived from a body of water", (s.2) and includes groundwater (s.6) (Government of Newfoundland and Labrador 2002a). The prohibition states that "a person shall not remove water from the province", thereby basing the prohibition on political boundaries (s.12). Penalties for contravention are \$500 - \$10 000 and/or 3-6 months imprisonment for a person or \$1000

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<sup>17</sup> The Environmental Impact Statement prepared by LGL consulting for Gisborne Lake had to be completed twice because the Newfoundland government found it to be unsatisfactory the first time (LGL Environmental Research Associates 1999).

- \$1,000,000 for a corporation (s.91) (Government of Newfoundland and Labrador 2002a). Under the Act, water may be removed for “non-commercial purpose” as defined by the Minister (12(2)(d)) without legislative approval (Government of Newfoundland and Labrador 2002a).

## **5.10 Prince Edward Island**

Prince Edward Island has signed the Accord and enacted an amendment to its *Environmental Protection Act* in 2001 that prohibits the removal of bulk water from that province. The legislative assembly did not enter into a great deal of debate on this issue, perhaps because PEI did not see itself as a great potential exporter of water (*PEI Hansard, Dec 3, 1999*). Potential drought and protection of a potentially limited supply of PEI’s water for its residents in the future was the main justification offered for this legislation in the legislature (*PEI Hansard, May 9, 2001*). Within the legislature there was little discussion about the concerns of NAFTA or environmental consequences, nor was there any significant opposition to the spirit of the bill (*PEI Hansard, May 9, 2001*). The amendment does not specifically define “water basin” or “water course”. Penalties are defined in the *Environmental Protection Act* as a fine of \$200 - \$10,000 and/or imprisonment (s.32). The prohibition specifies that “no person shall drill for, extract, take or use groundwater for the purpose of transfer or removal from the province” and that “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” (s.12 (1) and (2)), thereby defining the boundaries of the prohibition as political (Government of Prince Edward Island 2001). The Minister has the



authority to license removal for “short-term safety, security or humanitarian needs” (Government of Prince Edward Island 2001).

### **5.11 NWT/Yukon/Nunavut**

Though all three of Canada’s territories have signed the Accord, none have enacted policies to support this commitment.

### **5.12 British Columbia**

British Columbia’s *Water Protection Act* (WPA) was put in place in 1996. It is by far the most extensive of the provincial policies. It covers the nine major watersheds of BC: the Fraser, Mackenzie, Columbia, Skeena, Nass, Stikine, Taku, Yukon and Coastal, but is clear that removal of water from the province of British Columbia is prohibited (s.4). However, the Act does not specifically include ground water or ice in its definition of water. The Act specifies that a fine of \$200,000 per day as well as imprisonment are the potential penalties for breach of the prohibition, and the offence includes intentionally misleading authorities about water use registered under the Act (s.17). The Act also specifies that officers have the authority to stop and search vessels suspected of a contravention (s.20) (Government of British Columbia 1996). The Act does not specify if amendments require the approval of the legislature.

The stated intention of the Act is in keeping with the previous analysis of the intentions of the BC NDP government. It states its purpose is to “foster sustainable use of British Columbia’s water resources in continuation of the objectives of conserving and protecting the environment” (s.2) (Government of British Columbia 1996).

In 1999, three years after the BC government passed the WPA, the federal government proposed the Accord. While the Accord had no bearing on the enactment of the WPA, BC's decision not to sign the Accord highlights some of the issues with the Accord itself. When asked why BC did not sign the Accord, the government respondents articulated two main concerns: 1) five respondents thought that the Accord was a weaker policy option than the WPA; and 2), two respondents thought that to sign the Accord would be to undermine BC's independence within Canada to make its own resource decisions.

Most of the government respondents argued that the WPA was stronger than the regulations proposed in the Accord. As one respondent recalls,

Well there were a couple of reasons. We felt that we had already dealt with the issue decisively and more decisively than the federal government. We thought that the federal legislation was weak and didn't want to participate in it... I mean what motivation would there be to what would be perceived as actually weakening the provincial decision by signing on to a weak federal position? (BC Government Official 3 2004)

Similarly, another government official describes the Accord as being a "softer position which could have gotten softer with successive governments and we wanted to maintain a purer position in BC" (BC Government Official 5 2004). Another respondent felt that the federal government's policy stance on NAFTA was weaker than BC's and could lead to the dismantling of the prohibition that BC enacted:

The federal government came around consulting all the provinces, and we told them flat out what was needed and the BC approach on the WPA, why we used a ban why we reasserted ownership of the resource and all that sort of stuff. And we were advising the federal government what to do, but we noticed right off the bat that the person leading the consultation was a DFAIT [Department of Foreign Affairs and International Trade] representative, it wasn't an environment person...[The federal government's] approach was that [water export policy] can't conflict with NAFTA. So as soon as you take that approach then you can't have a water export policy. And that's where they were coming from... And [the Accord] would have been the wedge by which the current [provincial] government could have gotten rid of the WPA. Because they could have said "oh well, all this export stuff...that's going to be deemed to be NAFTA problematic, so we'll just keep this stuff that we know will be safe and the federal government assures us that it will have the same effect." So we thought it was critical that we defeat the water accord (BC Government Official 1 2004).

The introduction of the Accord in 1999 appears to have reaffirmed the NDP's policy decisions and their commitment to the prohibition.

Respondents were also concerned about the possibility of BC losing control over its water export within the Canadian context. This position was due at least in part to the sense that BC's policy needs were different than those of other provinces. A government official recalled that the government was uncomfortable with the idea of other provinces having any kind of say or input into BC's policy:

And so we didn't really want to allow Alberta to have a role in [creating policy] if we were the ones with the dominant position. Even if you took a conservative view or a free-market view, we could make more money from exporting in BC or we could have bigger impact on BC, so we didn't want other provinces or the federal government impacting on that. That's my memory (BC Government Official 5 2004).

Another respondent highlighted the differences between BC's and other jurisdiction's watershed boundaries; a crucial distinction given that the Accord stipulates a watershed approach.

British Columbia has a problem that lots of other jurisdictions don't have. I was just in Manitoba and their border, their watershed corresponds roughly to the national boundaries. So they can do a watershed approach and have it work. Where as there's no way you could have a watershed approach as a provincial policy in BC. And that was the problem with the federal water accord that came up years later. It was one of the main threats to the WPA... (BC Government Official 1 2004).

An approach to water export policy that required the agreement of all jurisdictions was seen as a threat to BC enacting policy that would meet its unique water needs. The strong negative response to the Accord by the respondents indicates that they were satisfied with the lengths to which the WPA goes and adamant that the Accord not compromise their legislation.

### **5.13 Provincial policy summary**

The differences in the experiences of different jurisdictions are quite striking. Some jurisdictions clearly have a more natural interest in bulk water export because of their geographic locations or natural resource endowments. Some jurisdictions have had to weigh different economic and social trade-offs when enacting policies because of the real possibility of exports. Applying Kingdon's framework broadly across these regional responses reveals these differences.

#### *Problem stream*

Different factors in different jurisdictions appear to have focused the attention of policy makers on bulk water exports. As Smith (1998) points out, the specific circumstances of a region tend to influence its problem definition. In jurisdictions where a proposal to export bulk water had been seriously considered (BC, Ontario, Newfoundland), the proposal, and the opposition to it, appear to have served as focusing

events. Indeed, these proposals served to focus attention on bulk water exports in many jurisdictions across the country. For some jurisdictions, the Accord itself appears to have been a focusing event (as well as an event in the policy stream), drawing the attention of policy makers to the need to consider bulk water exports more carefully.

The problem definition varied from jurisdiction to jurisdiction. While some jurisdictions engaged in debate about the implications of NAFTA (i.e. Manitoba, Québec, Nova Scotia, Ontario, BC, Newfoundland) others did not spend as much time on this issue (i.e. Saskatchewan, PEI). For some, environmental and future supply concerns appeared prominent (i.e. Manitoba, Québec, Nova Scotia, PEI, BC). For others, increasing demand from neighbouring states was a main concern (i.e. Saskatchewan). Some jurisdictions appeared to have considered bulk water export less of a concern given their water resource situation in comparison to other jurisdictions in Canada (i.e. PEI, Nova Scotia).<sup>18</sup>

### *Politics stream*

Not surprisingly, in each jurisdiction, the governing party's position about bulk water exports appears to have had a strong influence on the policy process and the level of commitment to a prohibition once it is enacted. In some jurisdictions, governments appeared to be generally inclined towards prohibiting bulk water exports (i.e. BC [NDP], Saskatchewan, Manitoba, Nova Scotia), while in others governments were poised to go ahead with exports (BC [Social Credit], Ontario). In two jurisdictions where there has been a change in government since the enactment of bulk water export prohibition, the policy has been reconsidered. In both Newfoundland and Québec, new governments

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<sup>18</sup> Because the analysis of each jurisdiction was not a full Multiple Streams account, I can only draw tentative conclusions about problem definition in each jurisdiction.

have re-opened the question of bulk water export: in Newfoundland, the prohibition was maintained; the outcome of Québec's reconsideration is pending. These two examples illustrate the influence that the politics stream can have on a jurisdiction's bulk water export policy.

Many jurisdictions also cited public opposition as a reason to enact the prohibition. Certainly, this is evident in the three jurisdictions in which there were export proposals. It was also a factor in other jurisdictions, some of which solicited public input through a consultation process (i.e. Saskatchewan, Québec). While public opinion was a factor in many cases (e.g. for the Social Credit government in BC), the re-opening of the issue in Québec suggests that public opposition alone may not be enough to sway governments that are in favour of exporting bulk water. Similarly, the case of the BC NDP indicates that while public opposition served to support the position of the government, it was the government's conviction that was the main motivating factor in the final policy decision.

### *Policy stream*

This comparison has revealed that while there are similarities among jurisdictional bulk water export policies, there are significant differences. Similarities include standard exemptions from the prohibition including bottled water, water used in transport or water contained in products (see Table 2). Differences, as outlined throughout this section, include degree of discretionary power vested in cabinet or administrators, definitions of "water", boundaries from within which water removal is prohibited, and penalty and enforcement mechanisms. Some jurisdictions also have

special exemptions that are specific to their situations (i.e. Québec exempts water for electricity generation).

Chapter 6 integrates the conclusions from the BC case study and the provincial comparison and assesses the effectiveness of the Accord.

## **6 Discussion**

### **6.1 BC and the provincial comparison**

The BC case study and the provincial comparison provide enough information to assess the effectiveness of the Accord at meeting its goal of a “Canada-wide approach” to prohibiting the bulk removal of water from the Canadian portions of major drainage basins. In this section, I first highlight conclusions from BC, then highlight conclusions from the provincial comparison and finally put the results of these two analyses together in an assessment of the Accord’s effectiveness.

#### **6.1.1 Conclusions from BC**

##### *Ideology*

The Multiple Streams analysis showed that the ideology of the BC NDP provincial government greatly influenced their policy decision to prohibit bulk water export. The analysis showed that a conviction to “do the right thing” and strong environmental and social values (politics stream) supported the definition of bulk water export as a problem (problem stream), and underpinned the eventual policy formulation (policy stream). Beginning with their role in opposition and continuing to their role as the government, the NDP’s commitment to opposing bulk water export drove the policy process. Despite the availability of policy options other than a prohibition, and the resistance of an ideologically differing bureaucracy, the NDP remained committed to prohibiting the bulk export of water from BC. In this case, public opinion and the



uncertain economic forecast for bulk water exports (both factors in the politics stream) supported the conviction of the NDP. It is difficult to say how their policy response might have changed in the absence of these supporting factors. However, as per Kingdon's three criteria for an appropriate policy (it must be technically feasible, it must meet with people's values, and it must anticipate future constraints), a policy that was not accepted by the public may have met with less success.

### *NAFTA and environment*

The analysis showed that the respondents were concerned that allowing bulk water exports would compromise BC's sovereignty and environment and that these compromises threatened the social, economic and environmental well-being of the province. In addition, as mentioned by several respondents, water was seen as a resource that was different than other resources. As a party committed to social and environmental justice, it is not surprising that the NDP was motivated by these considerations to prohibit water exports. However, it should also be noted that the personal conviction of the key policy makers in this instance clearly helped to drive the policy agenda.

The historical and geographic context in BC also played a role in the framing of the water export debate. Like Ontario and Newfoundland, BC has experienced a near miss in terms of water export. The Sun Belt proposal almost went ahead before it was stopped at the last minute and the Multinational Water and Power Inc. proposal also came close. These very tangible experiences played a role in motivating the NDP policy makers to respond with as much conviction as they did.

### *Likelihood of WPA changing*

When asked about the future of bulk water exports in BC, the respondents were mixed. Some felt that there was a very real possibility that the WPA would be amended and that it was only a matter of time:

[A]t the end of the day, if you have a very pro-business government with a big majority in the legislature and – this is the most important thing – and you have a business case and a business lobby that wants to do it, then they're going to do it... When the price of water goes up to more accurately reflect its value, if growth in Arizona continues and pricing policies catch up to that and we have true marginal pricing policies ... then certainly most governments would lift it, I would think. (BC Government Official 5 2004)

Clearly if there's a strong economic case, it's just like the moratorium on [offshore] oil and gas, it may well get lifted because opinions have shifted. (BC Government Official 4 2004)

These two responses both suggest that the economic viability of bulk water exports is a key factor that could lead to lifting the prohibition. It is interesting to note that the second response uses offshore oil and gas drilling as an example in which the economic benefits have the potential to shift opinions. Research has shown that offshore oil and gas drilling in BC is not as economically viable as was once thought (Offshore Oil and Gas Research Group 2004). So perhaps it is the *perception* that bulk water exports would be economically viable, combined with a government that is seeking economic development initiatives and is ideologically predisposed to allowing exports, that could lead to a change in the prohibition.

Some respondents, however, felt that it would take a lot to change the *Water Protection Act*. Short of a humanitarian disaster or crisis, they did not think that the BC public would support the export of water (BC Government Official 1 2004) (BC Government Official 2 2004). One respondent commented that the BC public had

become more aware of the implications of NAFTA and of the potentially large environmental implications of bulk water export and that this awareness would inform an even stronger opposition if the issue was brought up again (BC Government Official 1 2004). Another commented that water would have to be clearly removed from NAFTA before exports would be contemplated (BC Government Official 3 2004).

The first set of comments is based on a view that government ideology will ultimately determine what the policy response will be, while the second set is based on the belief that an informed and active public will be able to influence the government not to proceed, even if there is potential economic benefit. It is interesting to note that both of these factors are included in Kingdon's politics stream; one of the two streams that Kingdon identifies as likely to open a policy window. It is impossible to predict what would happen in BC if the question of bulk water exports were reopened. However, this analysis of BC has shown that the ideological bent of the NDP was a key factor in motivating the current policy response.

### **6.1.2 Conclusions from the provincial comparison**

Table 3 summarizes the conclusions of the provincial summary. It illustrates that there are wide discrepancies among the policies in the different jurisdictions in Canada.

**Table 3: Summary of Provincial Comparison**

Jurisdiction	Does the jurisdiction have a policy?	Has the policy been reassessed?	Does the policy specify the preservation of ecological integrity as a primary purpose?	Do watersheds define boundaries from which water may not be removed?	Does the policy specify penalties and enforcement?	Does the definition of "water" include surface and ground water?	Do amendments require approval of the legislature?
BC	✓		✓		✓		
AB	✓		✓		✓		✓
SK	✓			✓	✓		
MB	✓		✓		✓	✓	
ON	(regulation)		✓	✓	✓		
QUE	✓	(pending)	✓		✓	✓	
NB							
NS	✓		✓	✓	✓	✓	
PEI	✓				✓		✓
NFLD	✓	✓			✓	✓	✓
YK							
NV							
NWT							

*Commitment to prohibition*

Part of an effective “Canada-wide approach,” under the terms of the Accord, requires that provinces remain committed to their enacted prohibitions. Bulk water export policies are relatively new in most parts of Canada, but are already being challenged. One indication of the effectiveness of the Accord is whether jurisdictions have remained committed to their prohibitions. Not only are there no provisions in the Accord that would enforce this commitment, even the potential of moral suasion to encourage signatories to remain committed appears to be ineffective. So far, one signatory to the Accord has re-opened debate. Newfoundland reopened its discussions on bulk water export after signing and enacting legislation prohibiting bulk water export. Nowhere in the report of the Ministerial Committee charged with the examination of the

export issue is Newfoundland's commitment to the Accord mentioned. Instead, it was the poor economic prospects for export from Newfoundland at the time that prompted the government to maintain a prohibition.

Many provinces have not signed the Accord. The argument could be made, as does Heinmiller (2003), that if non-signatories still enact policies and remain committed to them, the end result is a national approach to bulk water removal prohibition. To date, one non-signatory, Québec, has re-opened discussion on its bulk water export prohibition. Its reassessment is pending. The lack of commitment of Québec and Newfoundland to their prohibitions indicates that the Accord has not been successful at inspiring an on-going, nationwide commitment to the prohibition of bulk water removal, nor has a de facto nationwide approach, suggested by Heilmiller (2003), occurred.

#### *Watershed boundaries and ecological integrity*

The Accord defines the Canadian portions of five major drainage basins as the areas from which water removal should be prohibited. It also specifies that the removal of bulk water from these water basins that harms ecological integrity should be prohibited (Environment Canada 1999a). These specifications are part of the federal government's attempt to respect its NAFTA obligation not to restrict trade unless for the preservation of ecological integrity. Policies that do not specify ecological integrity as a primary purpose or that do not use watershed boundaries to define the region from which water should not be removed, not only do not meet the requirements of the Accord, but are also at risk of being challenged under NAFTA. Of the nine jurisdictions with prohibitions in place, six specify the consideration of environmental impacts as at least one purpose of their policy. The remaining three do not specify the purpose or intention of their prohibitions. Three

of nine (Nova Scotia, Ontario and Saskatchewan) specify that water removal is prohibited from water basins or watersheds. Of these, Nova Scotia and Ontario specify water basins that are shared with the US. The other six jurisdictions specify the political boundaries of the province as the region from which water may not be removed. Of the nine jurisdictions, only Ontario and Nova Scotia satisfy both the ecological integrity and watershed definition specifications of the Accord.

### *Poor definition of “water” and enforcement*

The Accord clearly states that bulk water export policies should apply to surface and ground water. Given that these policies should be concerned with the definition of the water that they are referring to, it is surprising that some jurisdictions are not clear about watershed boundary definitions or definitions of what is included in the term “water.” While some policies go farther than specified in the Accord and include ice as well as surface and ground water, others have only vague definitions. Only Nova Scotia, Newfoundland, Québec and Manitoba clearly and adequately define “water” as covered by the prohibition. In the rest of the provinces, vague or inadequate definitions could be difficult to enforce if challenged. All jurisdictions with policies have specifically defined the penalties or enforcement mechanisms with which to sanction offenders.

### *Process of policy amendment*

In eight out of nine provinces with export policies, the Minister or Lieutenant Governor (cabinet) can make changes to the policy. Only in Alberta are all changes subject to debate in the legislature. The discretion afforded to cabinet varies from province to province, but only Alberta, Prince Edward Island and Newfoundland require

legislative approval to change the definition of acceptable bulk water export. Policies that do not require legislative approval are easier to change and therefore do not evidence the same strength of commitment as those that do require legislative approval.

### *Ideological differences*

As in the results of the BC case study, ideological differences appear to underlie the different provinces' responses to the issue of bulk water export. A good indication of these differences can be seen in the preambles to the policies. Preambles carry information about the intent of the law and inform the interpretation of a policy. Some provinces emphasize the environment and ecological integrity, while others emphasize the need for a strong economy: a split that seems to belie differences in values, or at the very least, differences in problem definition.

Alberta's preamble stands out for its particularly strong emphasis on the economic well-being of Albertans. Contrast this approach with that of Manitoba, where the preamble is centred on the preservation of ecological integrity. It is clear that these two pieces of legislation are based on two very different sets of values. The different ideological motivations of different governments across Canada suggest that an ongoing uniform commitment is unlikely.

### *Variety of responses*

The comparison showed that for most jurisdictions, bulk water export landed on the policy agenda either because of a proposal to export or the Accord itself, factors in the problem stream and policy stream respectively. While there were similarities in the problem definitions of different jurisdictions, the specific interplay of streams in each

jurisdiction led to each problem definition. Similar differences are evident in the politics stream where the specific ideology of the provincial government appears to influence the intention of the policy. This is evidenced by the differences among the preambles, and the influence that a change in government can have on policy direction.

These different policy responses indicate that there is no one factor in any particular stream that will necessarily motivate policy makers to take action. Indeed, each province has been influenced by a different combination of factors. It is therefore very difficult to predict how governments will respond to changing local and global circumstances and how provincial bulk water export policies might change in the future, in spite of the Accord.

### **6.1.3 Effectiveness of the Accord**

Currently posted on the Environment Canada website is the following statement:

All provinces have in place or are developing legislation, regulations or policies prohibiting the bulk removal of water. This provides solid assurance that bulk removals and exports will not proceed any time in the near future (Environment Canada 2004).

This analysis has shown that this statement is, at best, debateable. One need only look as far as Québec where the question of bulk water exports will be back on the table by the beginning of 2005 to see that Canada's policy does not provide "solid assurance." The provinces and territories do not all appear to support the approach of the federal government, as witnessed by the unwillingness of many to sign the Accord.

In this analysis, I have shown that there is little evidence of a Canada-wide approach to bulk water exports. The Multiple Streams analysis of BC suggested that ideology and values played a major role in the implementation of the *Water Resources Protection Act*. A similar trend is apparent in the policies of other jurisdictions: the



experiences of some provinces indicate that changes in government can re-open previously closed debates on water export. I have also established that most of the bulk water export policies in Canada grant authority to cabinet to change legislation without the approval of the legislature and that there are discrepancies among the definitions of “water”, boundaries and enforcement contained in the prohibitions.

The results of this analysis also suggest that even a de facto national approach does not exist. Disregarding the Accord and its specific goals, the policies across Canada do not form a coherent, nation-wide approach to regulating bulk water exports. The federal government’s strategy has not inspired and does not appear likely to inspire a unified and on-going commitment to the prohibition of bulk removal of water from the Canadian portions of major drainage basins.

## **6.2 Policy implications/recommendations**

The potential demand for bulk water export is likely to increase as water scarcity and demand increase. Given that the Accord has not met and is not likely to meet the goal of creating a “Canada-wide approach,” the federal government should, if it is truly committed to ensuring that bulk water exports do not occur, begin exploring new approaches to the issue.

Currently, each province or territory is free to begin the export of bulk water at any time. If one jurisdiction were to begin exporting bulk water, it could have serious implications for the rest of Canada. First, there is the uncertainty about NAFTA’s National Treatment clause (1102) as it applies to provinces (see section 2.3.2 for a full discussion). Under this clause, if export commences in one province, it may be incumbent on all jurisdictions in Canada to also allow export. Secondly, even if NAFTA

1102 is not applicable to provinces, a “race to the bottom” type of situation may occur: as one province begins to enjoy the financial rewards of exporting its water, others may follow suit to attract a growing bulk water export industry.<sup>19</sup> Further, if an individual jurisdiction begins export, thereby classifying water as a good, that province could expose itself (if not all of Canada) to the potential of investor-state challenges under NAFTA Chapter 11 if it decides to change its water export policies. Finally, if a province decided to export water, it could open the door to unknown environmental impacts: impacts that could have environmental ramifications in other jurisdictions of Canada. All of these possibilities make it necessary for Canada to have a unified and consistent approach to bulk water exports.

In this section, I discuss some of the alternatives available to the federal government in its effort to take a more effective approach to protecting Canada’s water from bulk export.

### **6.2.1 Stronger federal role**

One option is for the federal government to take a stronger role: an option supported by many respondents in this study. When asked if it would be possible for the federal government to enact an effective strategy, one respondent commented:

Absolutely, if they have the political will to do so... but I see no evidence that that’s going to happen...they’re going the other direction. With closer integration with the states, which is the policy that the current government is going with, they’ll be looking more closely at the prospects of water exports. I don’t think there’s much question about it. The only thing that might make them hesitant is the political fall-out (BC Government Official 1 2004).

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<sup>19</sup> For a full discussion of this phenomenon, see (Elgie 1998).

A second response echoed the first and outlined possible reasons for the federal government's hesitation:

I think it's best left to the federal government as was our original position largely because they do have jurisdiction over matters of international trade and the provinces don't. And I think that provincial legislation is constitutionally suspect. So it would be better if they occupied the field totally. I don't see a willingness on their part to do it because some governments in this country are open to the idea of export of bulk water as an economic commodity for trade and others are ideologically opposed. So it would be difficult for them to get a provincial consensus regardless of public opinion (BC Government Official 4 2004).

Another respondent felt that the federal government should take on bulk water export because the actions of one province might have implications under trade law for the other provinces, but was also hesitant because of the possibility that the federal policy might be too "wishy-washy" and leave the door open for exports in the future (BC Government Official 2 2004). Again, it was the concern among BC policy makers that the federal approach might undermine the strength of provincial legislation that gave pause, not the idea of a strong federal approach in and of itself.

Other critics of the federal government's strategy claim that by creating the non-binding Accord that puts the obligation to legislate about bulk water exports solely in the hands of the provinces, the federal government is downloading its responsibility to protect the environment (Shrybman 1999a). Bocking (2000) agrees. He states that

[t]he new federal water strategy of which the Accord is a part, is a timid, inadequate approach to the control of our most precious resource. It may actually reduce the control of Canadian water by Canadians because according to legal experts it is not binding on the provinces, and will produce a patchwork of regulations across the country. It will not prohibit exports because that requires as a first step legislation by the federal government, which is responsible for international trade (Bocking 2000).



national emergency because this only applies to short-term measures, and water export does not fall into a “gap” between federal and provincial jurisdiction.

In *R. v. Crown Zellerbach Can. Ltd.* [1988] 1 S.C.R. 401, Le Dain J. referred to the test for “national concern” set out by Dickson J.:

... the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces (Magnet 2002 p. 448).

Following from this, the “provincial inability” test evolved. Applying this test together with the test for “singleness, distinctiveness and indivisibility,” Le Dain J. found that marine pollution was of a nature that placed it under federal jurisdiction under the national concern doctrine of POGG. Le Dain J. determined that actions occurring within the jurisdiction of provinces had a real impact on the environmental quality of the “sea,” an area within federal jurisdiction and therefore federal marine pollution legislation was valid even though it was applied to affect activities within provincial waters (Magnet 2002 p. 450). By this decision, the Supreme Court of Canada acknowledges that environmental issues can be considered of national concern.

This decision may open up a space for the consideration of bulk water exports under the national concern doctrine for two reasons. First, because of Canada’s international trade obligations, the decision of one province to export water could have “grave consequences” for other provinces (see section 2.3.2). Second, it could be argued that the movement of large quantities of water from one province could have extra-provincial environmental impacts if the removals were from a shared watershed. Both of

these possibilities indicate that the “provincial inability” test could easily be met, and that bulk water export could be considered a national concern.

The second possible point of entry for the federal government with regard to jurisdiction is s.91 (2), which grants authority over the Regulation of Trade and Commerce (*Constitution Act 1867*). However, the federal government must ensure that its legislation does not infringe on the jurisdiction of the provinces under s.92 with regard to intra-provincial trade. Regulation under the federal power that incidentally captures intra-provincial trade must satisfy a number of conditions. Dickson J. in *Canada (Attorney General) v. Canadian National Transportation Ltd* [1983] 2 S.C.R. 206, suggested that in determining the validity of federal trade jurisdiction over a matter that appears to fall within the provincial realm, courts should be looking for something “qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination” (Funson & Meehan 1994 p.81). While it is difficult to predict whether federal legislation prohibiting bulk water exports would hold up under this test, this analysis has shown that the attempt to regulate water exports through policies enacted by individual provinces or territories is ineffective. Similarly, if the failure of one province to enact legislation would jeopardize the bulk water export legislation enacted by other provinces, it could be considered jurisdictionally valid to impose a federal prohibition on the trade of bulk water (Funson & Meehan 1994 p. 81). Further, it is questionable that the provincial governments have the constitutional power to enact international trade bans. If it was determined that such bans were ultra vires the provincial governments, the federal government could use its authority under the Trade power to enact federal legislation.

However, in its exploration of the legal implications of bulk water exports, the government of Newfoundland and Labrador concluded that it is unlikely that the federal government would be able to impose a prohibition under the Trade power. Their legal analysis emphasized that the courts have interpreted this section as a “power to regulate and govern, not to prohibit” (Government of Newfoundland and Labrador 2001 p. 2)

The third possible point of entry for the federal government is under s. 91(27) of the Constitution, which grants jurisdiction over Criminal Law in Canada. Jurisdictional overlap issues apply to this power as well. As Magnet (2002) reports,

the only limitation on the federal criminal law power is what may be referred to as the doctrine of colourability. The form of the criminal law must not be used as a disguised or colourable attempt to usurp an area of provincial jurisdiction (Magnet 2002 p. 632).

If the export of bulk water falls within provincial jurisdiction, can the federal government criminalize it without being ultra vires its jurisdiction? The validity of criminal law is determined by its pith and substance: what is the law actually attempting to do? In the Margarine Case ([1949] S.C.R. 1 Reference Re S. 5(A) of The Dairy Industry Act), Rand, J. defined this question more clearly:

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law... (Magnet 2002 p. 640).

Could protection of the environment be considered to fall within this definition? If so, the purpose of federal law might not be considered ultra vires its jurisdiction, even if it concerned water, which generally falls in the provincial realm. In *R. v. Hydro-Québec* [1997] S.C.C. 217 NR 241, La Forest J. indicated that the environment is increasingly recognized as a valid area of the federal Criminal Law power. He writes, “I entertain no

doubt that the protection of a clean environment is a public purpose within Rand J's formulation in the *Margarine Reference*. . . sufficient to support a criminal prohibition" (Bowden 1998 p.60). He went on to recognize "stewardship of the environment" as a "fundamental value" to which the Criminal Law power could be applied (Magnet 2002 p. 632). In reaction to this ruling, Paul Muldoon and Richard Lindgren writing for the Canadian Environmental Law Association assert that the *Hydro-Québec* decision is "enormously important" in its identification of environmental protection as valid purpose of criminal law (Muldoon & Lindgren 1997). In light of this decision, the question of jurisdiction over the prohibition of bulk water exports remains open. If it can be shown that significant environmental damage will result from the export of bulk water, criminalization may be a constitutionally valid option for the federal government.

The federal government claims that it is hesitant to legislate against bulk water exports because it is uncertain that it has the jurisdiction to do so. It is clear that the management of water strictly within a province does fall under provincial jurisdiction. However, as outlined in this section, there are some areas in which the federal government could arguably claim jurisdictional precedence. Whether or not these claims are valid is a matter greatly debated among lawyers. But the ultimate answer could be determined by a reference to the Supreme Court of Canada. Such a reference would provide a definitive answer to the jurisdictional uncertainty and potentially allow the federal government to enact binding, enforceable legislation that prohibits bulk water exports. If the federal government's claims that it is opposed to bulk water export are true, it would seem a logical step to make such a reference in order to exhaust all possible



options available. Muldoon and Lindgren (1997) argue that by not doing so, the federal government is currently shirking its constitutional responsibility:

...the irony is that while the Supreme Court regards the environment as a "fundamental value" and permits the federal government to invoke the criminal law to protect that value, the same government is in the midst of perhaps the largest "garage sale" of its environmental responsibilities in Canadian history (Muldoon & Lindgren 1997).<sup>20</sup>

By not exploring its potential jurisdictional options, the federal government is perhaps indicating a lack of commitment to the protection of Canada's water resources.

### **6.2.3 Effectiveness of the water basin approach**

The expressed goal of the Accord is to prohibit the bulk removal of water from the Canadian portions of major drainage basins (Environment Canada 1999a). The Department of Foreign Affairs and International Trade website proclaims:

"Our federal strategy to protect water, *at the source not at the border* [emphasis added], strengthens our commitment to securing water supplies for Canadians," said Environment Minister David Anderson. "This approach is supported by the provinces and territories" (Department of Foreign Affairs and International Trade 2002).

Even if all the provinces and territories did support this approach – and this analysis has shown that they do not – the major water basin approach suggested by the Accord may not effectively protect Canada's water from export. While a water basin approach may make sense from an ecosystem-based management perspective and may avoid trade implications (Little 1996 p. 150; Boyd 2003; International Joint Commission 2000b), it raises the concern that inter-basin, cross-border export, for example from British Columbia to Washington, would be allowed.

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<sup>20</sup> See also Boyd (2003).

A good deal of debate surrounds the interpretation of the Accord's intent concerning inter-basin, cross-border transfer. Boyd (2003) observes that the federal government chose to focus on the transfer of water from one watershed to another and not to focus on limiting exports (Boyd 2003). James Dunn (1999) goes further to argue that the water basin approach specified in the Accord sets up corridors for water transfer that when coupled with the licensing scheme of the *Act to Amend the International Boundary Waters Treaty Act*, explicitly allows bulk water export from Canada (Dunn 1999). Holm (2003) agrees. She states that Accord would not prevent inter-basin transfer across the Canada-US border (Holm 2003). Shrybman (1999b) argues that, despite the federal government's attempt not to contravene NAFTA with the water basin approach, this approach could actually be problematic in terms of each province's obligations under the National Treatment article of NAFTA. He argues that by entering into an Accord to manage water at a watershed level with other jurisdictions in Canada, a province may be found in contravention of NAFTA if it refuses to enter into a similar agreement with US jurisdictions in the same watershed (Shrybman 1999b).

Currently, six of nine provinces have prohibited the bulk removal of water from within their provincial boundaries. These policies may already be in contravention of NAFTA. On the other hand, had all the provinces crafted policies in line with the Accord's water basin approach, it is likely that inter-basin, cross-border transfer would be allowable. NAFTA clearly makes prohibiting bulk water export from Canada quite difficult.



It may seem unlikely that the government will invest the resources or deal with the tradeoffs that might be necessary to amend NAFTA. However, there is a new round of talks currently underway to negotiate the Free Trade Area of the Americas (the FTAA). The US, Mexico and Canada could take this opportunity to clarify the intentions of the new agreement with regard to bulk water exports. This seems especially crucial given that there are many more countries that will be subject to the FTAA. Once the uncertainty is removed, the threat of any one province choosing to export water is much less dire. This would not mean that bulk water export is not a problem for the environmental reasons outlined in this paper, but it would mean that Canada, the provinces and territories would retain the control necessary to make appropriate and sustainable decisions.

#### **6.2.5 Expand the definition of bulk water export**

At all levels of government, the definition of bulk water export needs to be expanded. In this paper, I have taken a narrow view of the definition, focusing mostly on the prospect of tanker exports and some larger scale diversion schemes. However, in order to truly protect its water resources, Canada needs to consider the question of water export in a larger context.

Some critics argue that Canada already exports a huge quantity of water. Day and Quinn (1992) point out that we need to think about the virtual export of water from Canada in the form of hydroelectricity. While water itself is not exported with electricity, huge volumes of water are committed to the production of the electricity that is exported. They argue that these types of exports are a far greater threat to our ability to manage our

water supplies sustainably than the mega-diversion schemes like NAWAPA and

GRAND:

In a sense, we have been deceived by our preoccupation with conventional water export...What we have been slow to recognize is that more and more of our northern free-flowing rivers are falling under the control of provincial hydroelectric commissions (Day & Quinn 1992 p. 175).

Holm (2004) argues that water is used in the export of oil and gas in the same way. As an example, water in northern Alberta is committed to the production of oil and gas, a large portion of which will be exported to the US (Holm 2004b). She argues that the definition of water export must include these uses:

[I]t's too convenient to focus it on tankers. It's about water use by Americans. It's about the rights American's have to water as a resource within Canada whether it's for export or it's for domestic use (Holm 2004b).

If meaningful protection of Canada's water resources is a priority, these forms of virtual export must be addressed as well.

### **6.2.6 Reduce demand**

As current global trends towards water scarcity continue and population increases, so too will demand. If demand could be reduced, potential pressure on Canada's water resources would also be reduced.

Water scarcity is a very serious problem and desperately needs to be addressed with an international effort in order to avoid the often-quoted prophecy about water and the next world war coming true. Because increasing demand looks very different in different parts of the world, no one strategy will solve all problems. Getting enough water to someone in Arizona is a very different problem than getting enough water to someone in Burkina Faso. What is "enough"? What is "water"? How do we make our

solutions sustainable over the long term? These are very difficult questions with no easy answers. Exporting water is not among the solutions that will be sustainable in the long term. If we put resources into finding sustainable answers for water-scarce areas, we will be helping to ensure that demand for Canadian water resources will not lead to unsustainable policy decisions.

### **6.3 Comments on the Multiple Streams framework**

Kingdon's Multiple Streams framework formed the basis of the case study of BC in this paper. In many ways, this framework was an effective tool with which to tease out the different factors influencing the agenda setting and decision making of the BC government. It allowed me to highlight the importance of the ideological framework of the NDP, the different actors involved in this complex issue and the significance of the NDP's policy decision in light of the policy options that were available. I also encountered some challenges with this framework for use with this case study.

#### *Policy entrepreneur*

While Kingdon acknowledges that there may be more than one policy entrepreneur and that entrepreneurs are rarely solely responsible for the placement of an issue on the agenda (Kingdon 1995 p. 180), it was still not possible to identify policy entrepreneurs within this study. This problem arose for several reasons. The first may simply be that the scope of this project was too small to confidently assign the role of entrepreneur to one or two individuals. More interviews could help to alleviate this challenge. The second is that this case study spanned two governments and essentially six years. Over this time, the key actors changed and different people drove the policy.

Third, policy change happens on many levels and in this case, it was support from various levels that allowed the change to happen. While it may be possible to identify one individual whose conviction drove the process on a bureaucratic level, the space for that individual to operate might not have existed if another individual at the administrative level did not share that conviction. Kingdon may identify the second individual in this scenario as a factor in the political stream (i.e. as part of a favourable political climate), but in this case study, that distinction is too fine to make a definitive identification of “entrepreneur.”

Two larger issues also emerged with the identification of a single policy entrepreneur. The first is that individuals can over-emphasize their importance in the policy process. Second, individuals may have their own political reasons for identifying or not identifying other individuals as key players. Given these factors, as an outsider, it is very difficult to assess exactly how influential a given respondent’s contribution was in comparison to another’s.

### *Problem definition*

Kingdon argues that a change in government or in key personnel will have an impact in the political stream (Kingdon 1995 p. 153). However, his conception of the problem stream does not address this change. In the case of BC, the two governments involved in the bulk water export issue had different problem definitions. While the issue came on to the agenda under the Social Credit government and remained on the agenda with the change to the NDP government, the NDP conceived of the problem differently and therefore potentially had a different policy response than the Social Credit government would have had if they had stayed in power. It was awkward in this paper to

describe the relationship between these two problem definitions and the impacts that they had on each other. However, Kingdon also makes explicit the importance of values in problem definition, which helped to explain the differences in problem definitions between the Social Credit government and the NDP government (Kingdon 1995 p. 110).

### *Assumption of clearly defined streams*

As outlined in chapter 3, critics of Kingdon have noted that his assumption of independent streams denies the overlap of certain factors. One of the major factors that made bulk water export a problem was the uncertainty about jurisdiction and trade implications. In this case, there were not clearly defined conditions around which to form problem definitions and in fact this uncertainty was part of the problem. Again, the articulation of this complexity was awkward within Kingdon's problem stream. It was difficult to separate the conception of bulk water exports as a problem in the problem stream from the ideological factors outlined in the politics stream.

Similarly, while Kingdon does acknowledge that complaints from the public can bring attention to a problem (Kingdon 1995 p. 101), he does not discuss how public opinion can shape the government's problem definition. A government may consider public opinion to be enough of a factor to warrant defining an issue as a problem. Conversely, depending on its theory of governance, a government may not respond to public opinion in this way. The lack of interaction between the politics and problem streams in Kingdon's framework made the discussion of the influence of public opinion on problem definition difficult.



### *Narrative flow*

One final challenge that I found with the Multiple Streams framework was the necessity to break up the narrative flow in the discussion of the policy making process. Addressing each stream individually required that the chronological order be disrupted. As an analyst, the distinction of the three streams made the organisation of information easier, but I am not sure that this is the best format in which to present the information.

## 7 Conclusions

Through an in depth analysis of BC and a cross-provincial comparison, this analysis has shown that the *Accord for the Prohibition of Bulk Water Removal from Drainage Basins* has not established and is not likely to establish a “Canada-wide approach for the protection of Canadian waters, by prohibiting bulk removal of surface and ground water from the Canadian portions of major drainage basins” (Environment Canada 1999a).

The Multiple Streams analysis of BC illustrated that BC’s policy approach was based on a confluence of factors in the three streams. The ideological conviction of the BC NDP strongly motivated their policy decision to prohibit bulk water export. Their values influenced their definition of bulk water export as a problem based on the potential environmental impacts and the potential implications for BC’s sovereignty posed by NAFTA. The inheritance of a policy agenda from the Social Credit government laid the groundwork for their policy decisions. Both the politics and problem streams were then coupled to a favoured policy solution: prohibition. The result was the *Water Protection Act*.

The provincial comparison supports this pattern of stream convergence by illustrating the variety of policy responses from the various jurisdictions of Canada. Each jurisdiction was influenced to make its policy decision by unique, local factors. While there were similarities in the experiences of the different jurisdictions, it was the specific combinations of these factors that ultimately led to each policy decision.

Contrary to the argument that policy emulation has created an effective network of policies (Heinmiller 2003), the variety among the policy responses, and the potential for policy change, indicate that the existing policies are an inconsistent and ineffective net that will not hold water. To date, five jurisdictions have signed the Accord and nine have bulk water export policies. Six of the nine jurisdictions with policies have policies that contain clauses that make them relatively easy to amend by authorizing Ministers or cabinet to make changes to the definition of acceptable water export. Three specify watersheds as the area from which water should not be removed, while six specify political boundaries: an important distinction when watersheds are shared with the US. The variety in the preambles indicates that different jurisdictions have based their policies on different intentions: further indication that each jurisdiction is acting independently of the others.

This analysis has shown that the Accord has not been effective, either on its own or as a component of a process of policy emulation, at inspiring a uniform, on-going commitment to bulk water export prohibitions among the provinces and territories of Canada. This is evidenced by the fact that two jurisdictions have already considered removing their prohibitions on bulk water export. Newfoundland, a signatory to the Accord, re-opened debate on bulk water export in 2001, but retained their prohibition because bulk water exports were not found to be economically viable. Québec, a non-signatory, is reconsidering its prohibition beginning in 2005. In both cases, it was a new government that re-opened the debate.

Despite these findings, the Accord has not been completely ineffective. As the provincial comparison revealed, the Accord did bring the issue of bulk water exports to

the agenda of jurisdictions that may not have otherwise given it serious policy attention. From Kingdon's agenda setting perspective, the Accord may even be thought of as a success. But from the perspective of achieving real policy protection for Canada's water, the Accord has clearly fallen short.

The Accord calls for the prohibition of water removal from the Canadian portions of major drainage basins. Had all jurisdictions enacted policies in accordance with the goal of the Accord, it is arguable that inter-basin, cross-border export would still have been permitted. While the Accord was crafted to prevent trade challenges under NAFTA by using ecological integrity as the basis for prohibition, the Accord fails to prohibit the bulk export of water from Canada. However, an outright ban of water export might be challenged under NAFTA, leaving the federal government in a difficult situation. This analysis has shown that while the federal government may have the constitutional authority to regulate bulk water exports, it may not have the ability to do so under NAFTA. NAFTA also poses threats to sovereignty in jurisdictions that begin the export of water, especially under Chapter 11. It also raises the possibility that allowing export from one jurisdiction in Canada could require other jurisdictions to do the same. Expressly exempting water from NAFTA is one option that would eliminate these constraints on Canada's ability to manage its water.

A federal approach to bulk water exports is needed. Canada must have a unified and on-going strategy to protect its water. This analysis has shown that leaving the fate of Canada's water in the hands of changing governments with changing priorities and ideologies, in the context of increasing global demand for water, is not an effective strategy to protect Canada's water resources from export. If the federal government is

truly committed to prohibiting bulk water export, it should closely examine the policy options outlined in this paper. If it is not committed to prohibiting bulk water export, it should make its position clear so that Canadians are aware that water may be the next resource that Canada sells to the world.

Canada currently has the opportunity to chart a sustainable course for the use of its water. The policy choice that Canada makes now will protect or endanger Canadian water in the future. The federal government must take a leadership role and steward this precious resource not only to ensure environmental protection, but also Canada's sovereignty.

## **7.1 Areas of further research**

### **7.1.1 Social Credit government**

While this research focused on the NDP government, further research should be done on the role of the Social Credit government in bringing bulk water exports to the policy agenda. This paper has briefly outlined this process, but a full Multiple Streams analysis would be helpful in understanding why bulk water export does or does not become an issue for different governments.

### **7.1.2 Full Multiple Streams analysis of all jurisdictions**

The comparison that I completed in this research begins to reveal some of the contexts and motivations of different jurisdictions to enact bulk water export policies. A full Multiple Streams account of all the jurisdictions in Canada would provide more information about jurisdictional differences in approaches to bulk water export.

### **7.1.3 Assess Great Lakes Charter Annex Implementing Agreements**

On July 19, 2004, the Council of Great Lakes Governors, Ontario and Québec released drafts of the two implementing agreements for the Great Lakes Charter Annex, 2001, concerning the use, diversion and allocation of water from the Great Lakes. The Great Lakes Basin Sustainable Water Resources Agreement is a “a good-faith agreement among the ten Great Lakes States and Provinces” regarding management of waters in the Basin; and the Great Lakes Basin Water Resources Compact (the Compact), is an agreement among the eight Great Lakes States to engage in joint decision making about the use and diversion of Great Lakes water (*Council of Great Lake Governors Great Lakes Water Management Initiative Request for Public Comment* 2004). Of concern to this research is the Compact, which may threaten the ecological integrity of the Great Lakes and challenge Canada’s control over the Canadian portions of these waters (Shrybman 2004). Further research on these agreements in relation to the federal government’s reference to the IJC, the Amendment to International Boundary Waters Treaty Act and the Accord, should be undertaken to determine if the Compact protects Canada’s water from bulk export.

## Appendix: Interview Questions

1. What was your role in the creation of BC's bulk water export policy? During what time period were you involved?
2. Would you say that you were highly involved, moderately involved or somewhat involved?
3. What is your current position or involvement with \_\_\_\_\_?
4. Why was/is the provincial government concerned with bulk water export?
5. What factors drew the attention of policy makers to this issue when the moratorium was put in place or when the Water Protection Act was written?
  - a. Please rank the factors you identified in terms of importance.
6. Are you familiar with the Snowcap/Sun Belt case in which Snowcap/Sun Belt's license to export was revoked?
  - a. Did the Sun Belt case play a role in the creation of the Water Protection Act? In what way(s)?
7. Are you familiar with the report "Export of Water from the British Columbia Coast", otherwise known as the "Carter Report"?
  - a. Did the Carter Report play a role in the creation of the Water Protection Act? In what way(s)?
8. You didn't mention \_\_\_\_\_. Do you think that this was a factor?
9. Why did it take four years for the Water Protection Act to be enacted after the initial moratorium was put in place? What was happening in this time?
10. Did any particular interest group or interest groups play a role in the creation of the Water Protection Act? In what way(s)?
11. What was your perception of public opinion about bulk water export at the time? Why? Where did you get this impression?
12. Did public opinion play a role in the creation of the Water Protection Act? In what way(s)?
13. Are you familiar with the document "The Stewardship of the Water of BC?"

- a. Did public input in this form play a role in the creation of the Water Protection Act?
14. Was there consultation with First Nations?
    - a. What form did this consultation take?
    - b. Did input from First Nations play a role in the creation of the Water Protection Act? The moratorium?
  15. What was the economic outlook for BC's potential bulk water export industry at the time? What role did economic considerations play in making the decision to ban bulk water export?
  16. Did the forthcoming election influence the decision to put the first moratorium in place?
    - a. If yes, how?
  17. Did any individual(s) play a particularly significant role in the evolution of the Water Protection Act? In what way(s)?
  18. Where did the idea of a ban originate? Were other options considered?
  19. Why was a ban selected as the best option?
  20. Why did BC choose not to sign the federal accord?
  21. Has the federal accord had an influence on B.C.'s policy with respect to bulk water export?
    - a. If yes, how? If no, why not?
  22. Do you think that the current constitutional division of powers with respect to water and trade are appropriate? Why? or Why not?
    - a. If no, what jurisdictional division do you think would be more effective for managing trade of water? Why?
  23. What factors do you think would need to change in order for BC to lift its ban on bulk water export?
  24. What do you think would be an effective strategy for the federal government to control bulk water exports from the provinces?
  25. Is there anyone else that you would recommend that I talk to?



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