

CANADA'S WATER LAW
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Margot Hurlbert*

*B. Admin., LL.B., LL.M., Assistant Professor, Joint Appointment, Department of Justice Studies and Department of Sociology and Social Studies, University of Regina.

Abstract:

Canadian water law is a complex, multifaceted area as diverse on a provincial, regional and local bases as the cultural mosaic of Canada. Water management is comprised of numerous government departments, programs and institutions in the provincial, federal and municipal level. This stems partly from Canada's British colonial legacy and from the historical constitutional division of powers which didn't deal with water explicitly but assigned topics with significant water consequences (i.e. fish) to either the provincial or federal level of government. This has and still is causing challenge for understanding the governance of water in Canada.

This paper will review the major models of provincial water governance, and the constitutional underpinnings of topics significantly affecting water in an attempt to explain the myriad of provincial, federal and municipal institutions with significance to water. Some of the major milestones and issues in the development of Canada's water law will be outlined and some concluding comments provided of the federal water policy.

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A. Introduction

Canada's water law heralds from many different sources and influences. Water law was initially determined by court decision, or common law, which is referred to as the riparian water laws (mostly based on cases in Britain) where laws developed on a case by case basis over several hundred years, in a land of relative water abundance. Because the common law riparian doctrine couldn't meet the development needs of Canada and British Columbia, and meet the challenge of a semi-arid climate, Canada, British Columbia and later the Prairie

Provinces, enacted statutes replicating portions of the United States' judicially established prior appropriation system of "first come, first right".¹ Canada codified these priorities in statute under a government allocation by way of license.² It wasn't until 1930 that Manitoba, Alberta and Saskatchewan had natural resources transferred to them by the federal government in the Natural Resources Transfer Agreements and water was confirmed as part of the transfer in these Agreements by *The Natural Resources Transfer (Amendment) Act*.³ In 1931 the Prairie provinces enacted their own provincial water laws. Many of the main features of the original federal water law still apply. These include Crown ownership and allocation of interest by license.⁴ However, all provinces have diverged in some respects in specifics of water management especially in the last five decades.

Although it is often stated that the provinces are responsible for establishing water law, this is somewhat misleading. Provinces have jurisdiction which allows them to legislate water interests, allocations and in respect of water quality issues. However, the federal government is not without any role in respect of water. Some of the important aspects of the overlapping and in some cases shared jurisdiction of the provinces and federal government in relation to water will be discussed.

Water management was not treated as a single topic in the Canadian Constitution. Unlike some resources, like "fisheries", water wasn't specifically allocated to one level of government. Further, although the Alberta and British Columbia boundary follows a watershed boundary, most provincial boundaries and that of Canada and the United States do not. As a result, laws applicable to one watershed may not only involve all three levels of government (provincial, federal and municipal) but also multiple provincial or national governments.

1 Percy, David R., "Water Rights in Alberta", (1977) *Alta L. Rev.* XV 142.

2 *North-West Irrigation Act*, S.C. 1894, c. 30. This is consistent as well with the *Territories Real Property Act*, S.C. 1886, c.51. In B.C. similar provisions were made in the *Land Ordinance*, 1865, and the *Water Privileges Act*, 1892, S.C. 1894, c.30.

3 S.C. 1938, c.36.

4 S. 2 of *The Water Rights Act*, C.C.S.M. c. W80, s. 3 of *The Water Act*, R.S.A. 2000, c. W-3, s. 2 of *The Water Act*, R.S.B.C. 1996, c. 483., s.38 of *The Saskatchewan Watershed Authority Act*, 2005, S.S. 2005, c. S-35.03. These acts will be cited by name hereafter except to differentiate between B.C. and Alta the title *The Water Act (B.C.) supra* and *The Water Act (Alta.) supra* will be used respectively.

This paper will attempt to shed some light on water law, on how the various levels of government involved in water arise from the Canadian constitution, and what some of the characteristics of the relationships are between these various players. The paper will conclude with a look at a few examples of interprovincial and international water cooperation and the current state of federal water policy.

B. Models of Water Governance Employed by the Provinces

There are three major alternatives to the governance of water rights and interests. Generally these models relate to the bundle of property rights associated with water, i.e. whether it is owned privately, as public property or common property. In Canada, because the Crown owns all water, and water rights are allocated by license, this property ownership distinction isn't applicable. However, the property distinction is illustrative as parallels can be seen in the characteristics of bundles of water rights received by way of water license. Based on the three models of property rights, the three institutional models are:

- Government agency management (generally associated with water regarded as public property) – Government defers its authority for the management of water to an agency which assumes authority for directing who does and does not receive water rights in accordance with bureaucratic policies and procedures.
- User-based management (generally associated with water regarded as common property) - Water users, or those with license or rights to water join together and coordinate their actions in managing water resources. Decision making is collective among users.

Market (generally associated with water owned as private property) – Water is allocated and reallocated through private transactions. Users can trade water through short term or long term agreements or temporary or permanent transfers, reallocating rights in response to prices.⁵

⁵ Bruns, Bryan Randolph and Ruth Meinzen-Dick, “Frameworks for Water Rights: An Overview of Institutional Options” in *Water Rights Reform; Lessons for Institutional Design*. eds Bryan Randolph Bruns, Clausia Ringler and Ruth Meinzen-Dick, (Washington, D.C.: International Food Policy Research Unit, 1995) (ISBN 0896297497) available at www.loc.gov/catdir/toc/ecip062/2005030412.html

All of these models are used in Canada in a variety of combination. No one model is used exclusively. This is consistent with water management in other countries where within the same river basin or even within an irrigation system there may be common property management within and between some groups of users, transfers between individual farmers occurring through market-type mechanisms and government agencies administering allocation of water resources. In Alberta, all three models are utilized; in Saskatchewan the government agency model is predominant. It is evident that the diversity within the provinces and the choice of model would be an extremely sensitive political question.

A. Federal/Provincial Areas of Jurisdiction

In 1867 when the *British North America Act* was negotiated and agreed to it is safe to say that water, and water scarcity in the Prairie Provinces, was not a known or planned for topic in the negotiations. In addition, pollution and environmental degradation was not an issue at the time either. As such, the *British North America Act* did not specifically deal with these issues. The process for understanding the network of provincial and federal laws and institutions requires a constitutional assessment of the legislative jurisdiction in respect of these laws and institutions and an assessment of whether there are any conflicts between the various laws and institutions and what the result of a legal challenge to this conflict might be.

First, it is necessary to ascertain which level of government has the right to regulate an aspect of the environment or water. This is accomplished by reviewing the various head of power allocated in the Constitution to the provinces and the federal government. If both the provincial and federal government have jurisdiction over differing aspects of an issue (i.e. The federal government over fish (and their habitat which would include the quality of their water) and the provincial government over water and its quality), it is necessary to apply rules of

constitutional paramountcy and inter-jurisdictional immunity to determine which level ⁶of government has the right to legislate in respect of the particular topic.

The topic of water spans several heads of legislative power assigned to the federal and provincial governments in the Canadian Constitution. Specifically the provincial government has the following powers which relate to water:

⁶ s.92(13) of the *Constitution Act*

- (1) (s. 109 of the *Constitution Act, 1867*⁷ assigned the provinces jurisdiction or the constitutional authority to make laws concerning all publicly owned “lands, mines, minerals and royalties.” The Natural Resources Transfer Agreements granted identical rights to the prairie provinces in 1930;
- (2) property and civil rights;
- (3) (local works and undertakings;⁸
- (4) s. 92A of the *Constitution Act, 1982*, granted the provinces specific rights in relation to natural resources which included the right to make laws in relation to the development, conservation and management of non-renewable natural resources and forestry resources in the province.

It is through the heading “lands” in s. 109 and the natural resource sections that the provincial jurisdiction to water primarily resides. In traditional Canadian common law, water rights transferred with the land with which it was associated. “Land” is defined as “every species of ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furs and heath.”⁹ Water wasn’t capable of ownership but was a “common property resource” and rights and obligations to its use by dwellers supported by a water system evolved over time through the common law. These rights were termed “riparian” rights and accrued to a landowner whose land was adjacent to water.¹⁰ In addition the provincial heading of “local works and undertakings” helps support water structures located within a province on a particular body of water.

The federal government has certain powers in relation to water, albeit historically somewhat more limited than the provinces. These include:

- (1) federal lands (national parks, Indian reserves) would be subject to federal legislation and not provincial land or water legislation (unless in the absence of provincial legislation);

⁷ *Constitution Act, 1867*, U.K., 30 & 31 Victoria, c.3, now *The Constitution Act, 1982*

⁸ (ss.92(16) and 92(10))

⁹ Earl Jowitt, “*The Dictionary of English Law*”, (London: Sweet & Maxwell Limited 1959), p.1053.

¹⁰ Alastair R. Lucas, *Security of Title in Canadian Water Rights* (Canadian Institute of Resources Law, 1990, Calgary) at p. 4.

- (2) trade and commerce;
- (3) revenue generation through taxation;
- (4) navigation and shipping;
- (5) seacoast and inland fisheries;
- (6) Indians and lands reserved for Indians;
- (7) criminal law;
- (8) extra-provincial works and undertakings, which includes the regulation of pipelines and other means of inter-provincial transportation;
- (9) works for the general advantage of Canada;
- (10) entering into treaties;
- (11) (matters not specifically assigned to the provinces).¹¹

The federal government is responsible for ensuring the safety of drinking water within areas of federal jurisdiction, such as national parks and Indian reserves. The federal government also protects water quality by regulating toxic substances, conducting water quality research, and promoting pollution prevention. Further, the federal government has legislative supremacy in relation to navigation and shipping (s. 91(10)), sea coast and inland fisheries (s. 91(12)). The first may grant powers in relation to quantity in order to facilitate navigation, and the latter quality and quantity to maintain and preserve fish and their habitat.

The federal government takes control of water once it crosses an inter-provincial or international boundary in accordance with the federal head of power relating to inter-provincial works and undertakings (s. 91(29) and 91(10)). Further the federal government could utilize its declaratory power (s.91 (29) and 91(10)), its “spending power” and lastly its “peace, order and good government” power in the introductory words of s.91 to assert jurisdiction to water.¹²

Municipalities are not given any powers by the Constitution. Their authority derives from delegated provincial legislation. Therefore, the municipalities can have no

¹¹ s.91 of the Constitution Act, 1982

¹² Steven A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (1991, Canadian Institute of Resources Law, Calgary), p.23-28.

greater authority to manage environmental matters than the provinces, and only in respect of matters or issues specifically delegated or provided for in the Municipalities Acts.

If a matter does not fall within any of the heads of power of the provinces or the federal government, the federal government will have jurisdiction either through the opening words of s.91 which assign the federal government power over all matters not expressly assigned to the provinces, or through the broad heads of power of peace, order and good government (“POGG”), or matters of a national concern.¹³

The POGG power has been illustrated by the courts as having three possible descriptions. The first is the “national concern branch”. The national concern branch enables Parliament to enact legislation to deal with matters that go beyond local or provincial concern or interest and from their inherent nature concern the country as a whole. In order to qualify as a matter of national concern, a matter must be “distinct” or be something that is clearly distinguished from a matter of provincial concern. From this, the federal government couldn’t take a matter that was clearly within a head of provincial power and argue that it was of “national concern” and something which should now be federal. Marine pollution is an example of a matter which has been found to qualify as a matter of national concern as it is not part of something within provincial powers and it met the second test, of a provincial inability to deal with the matter in a comprehensive manner. Failure of one province to act would injure the residents of other cooperating provinces.¹⁴

The other two branches of the POGG test are the “emergency branch” and relate to matters of such emergency that the federal parliament must act and the “gap branch” which relates to matters which the federal government must enact laws to fill the gaps between federal and provincial jurisdiction.

13 s. 91 provides, “It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures for the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated...”

14 These tests were outlined in *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401 and see *Canada (A.G.) v. Hydro-Quebec*, [1997] 3 S.C.R. 213. See also *Interprovincial Co-operatives Ltd. v. The Queen* [1976] 1 S.C.R. 477 in which the federal jurisdiction to regulate the dumping in provincial

water of substances that were shown to have a pollutant effect in extra-provincial waters were upheld.

A. Reconciling Federal/Provincial Jurisdiction

It is clear certain aspects of an environmental or water issue may relate to several of the heads of power. For instance, the regulation of a toxic spill on provincial land would firstly relate to the Province's head of power of property and civil rights. However, as the spill leached down into the shore bed it would remain under the provincial authority of property and civil rights but when it entered a river and traveled inter-provincially or internationally and harmed fish it would now be in the jurisdiction of the federal government and its inter-provincial and international water powers, and fish habitat powers, and criminal power to inflict penalties in relation to the release of toxic chemicals.¹⁵ In many practical examples of water and environmental problems a clear determination of federal or provincial jurisdiction is unavailable unless referred to a court of law. In fact, the regulation of toxic substances and their release into the environment has been justified as a valid exercise of the criminal law power by the federal government granted pursuant to section 91(27) of the *Constitution Act, 1867*.¹⁶

The basic rule of constitutional law is that when a law is challenged constitutionally, a court will make a determination of the primary characteristic of the regulated subject matter. Once this is identified the court will determine if the matter falls clearly under provincial or federal authority. If a provincial government has legislated in respect of a matter the court finds to be primarily of a subject matter within federal jurisdiction, the court will make a determination that the provincial law is *ultra vires*, or not within the legislative competence of the province, and strike it down as unconstitutional or invalid.¹⁷

It is possible that a court will hold both the provincial government and federal government have jurisdiction in respect of a subject matter, like the toxic spill example. Both the federal and provincial laws will be allowed to operate concurrently as long as

¹⁵ *R. v. Northwest Falling Contractors Ltd.* [1980] 2 S.C.R. 292 upheld a federal *Fisheries Act* provision prohibiting the deposit of deleterious substances into water frequented by fish despite arguments that this measure invaded provincial responsibility of property and civil rights.

¹⁶ *R. v. Hydro-Quebec*[1997] 3 S.C.R. 213

¹⁷ This occurred in *Alberta Bank Taxation Reference* where a provincial law imposing tax on banks was struck down as not within the jurisdiction of the province as it related to banking more so than direct taxation. *A.-G. Alta. V. A. -G. Can (Bank Taxation)* [1939] A.C. 117

the laws are not conflicting.¹⁸ In the event of a conflict of the specifics in the laws the federal law will generally prevail. If for example the federal government passed water quality legislation to preserve fish habitat and these laws conflicted with provincial water quality laws, the federal laws would prevail.

Lastly, if a province has passed legislation which significantly harms a federal person (i.e. Indian or postal worker), thing or undertaking, even without federal legislation, the provincial legislation may be found to be inoperative. The formal test is that the provincial legislation affects a vital part or essential aspect of the federal person, thing or undertaking.¹⁹

B. Cooperative Federalism

Because of the risk, delay, cost and expense of court challenges it is not usual that matters of federal and provincial jurisdiction are resolved in the courts of law. Increasingly governments will cooperate to avoid inefficiencies and potential conflicts from having two jurisdictions regulate the same matter directly.²⁰ In this way they will be cooperatively managing an issue. Often the provincial and federal governments will jointly establish environmental standards such as those relating to drinking water or other environmental issues.²¹

18 This is referred to as the “double aspect” which acknowledges some matters have both a federal and a provincial matter and are therefore competent to both the federal government and the provinces. Highway offences and securities regulation has been found to qualify for this doctrine. *Multiple Access v. McCutcheon* [1982] 2 S.C.R. 161 and *Smith v. The Queen* [1960] S.C.R. 804

19 The inter-jurisdictional immunity test is very troubling and contentious for both academic commentators and courts alike. Some such as Professor Hogg argue that a lesser test of “impairment” is possible in the even the legislation only indirectly affects the federal head of power. See Hogg, *Constitutional Law of Canada*, Student Edition (2002, Carswell, Toronto). This seems improbable in light of decision such as *Ordon Estate v. Grail* [1998] 3 S.C.R. 437.

20 The *Canadian Environmental Protection Act, 1999*, provides in ss. 9 and 10 and the Environmental Protection and Enhancement Act s. 19 provide where provincial and federal laws are equivalent, the governments can agree the federal requirements will not apply in the province. See the Agreement on the Equivalency of Federal and Alberta Regulation for the Control of Toxic Substances, C. Gaz. 1994.I.3462 in Alberta were certain regulations under the federal Canadian Environmental Protection Act, 1999 would no longer apply in Alberta. See also the federal and provincial Canada-Wide Accord on Environmental Harmonization which has a stated objective of achieving greater effectiveness, efficiency, accountability, predictability and clarity of environmental management for issues of Canada-Wide interest by among other things preventing inter-jurisdictional disputes. www.mbnet.mb.ca/ccme

21 The Canadian Council of Ministers of the Environment (CCME) is a forum of provincial and federal ministers promoting intergovernmental cooperation developing national guidelines,

This is consistent with the traditional constitutional rules of law that the federal government is the only jurisdiction able to enter into international agreements such as treaties and conventions.²² However, treaty obligations can only be legislated by the level of government with jurisdiction over the appropriate head of power. As such if the federal government entered into a treaty which could only be implemented by the provinces using their jurisdictional power over property and civil rights, this treaty would require provincial cooperation in order to be successfully implemented. Because of the potential for political impasse in respect of important international issues, and also environmental or water issues as well (amongst others) there is much support for a notion of “cooperative federalism” as a more realistic and authentic form of Canadian federalism.²³ Peter W. Hogg defines cooperative federalism as follows:

The essence of cooperative federalism is a network of relationships between the executives of the central and regional governments. Through these relationships mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process.²⁴

The PPWB is an example of provincial and federal cooperation in managing a natural resource. Sometimes this is termed “cooperative federalism.”²⁵ To resolve conflicts between upstream uses and downstream needs, Alberta, Saskatchewan, Manitoba and Canada signed the Prairie Provinces Water Board Agreement on July 28, 1948. This agreement was particularly important as all three provinces rely on runoff from the eastern slopes of the Rocky Mountains which flows through major rivers

standards and objectives. These are non binding and decisions to comply are made by each jurisdiction.

22 S. 132 of the Constitution Act, 1867 provides that “[t]he Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.” In *A.G. Canada v. A.G. Ontario (“Labour Conventions”)*, [1937] 1 D.L.R. 673 the Privy Council held that although the federal government may enter into treaties but if the subject matter related to provincial jurisdiction, only the provinces could pass the legislation implementing the treaty. This would then require co-operation between the Dominion and the Provinces.

23 G. La Forest, “The Labour Conventions Case Revisited” (1974) *Can. Y.B. Int. L.* 137 at 148, J. Ziegel, “Treaty Making and Implementing Powers in Canada: The Continuing Dilemma” in *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger* (Sweet and Maxwell, 1986) at 346, and I. Bernier, *International Legal Aspects of Federalism* (Longman Group, 1973) at 201.

24 P.Hogg, *Constitutional Law of Canada, Student Edition* (Carswell, 2002) at 146.

eastwards across these provinces and ending in Hudson Bay. The SSRB is one of the rivers which are the subject of this agreement.

The four governments entered into the Master Agreement on Apportionment on October 30, 1969, which provided an apportionment formula for eastward flowing inter-provincial streams, gave recognition to the problem of water quality, and reconstituted the PPWB. The Master Agreement was amended in 1992 to add a Water Quality Agreement. The current mandate of the Prairie Provinces Water Board is to ensure eastward flowing inter-provincial streams are, in accordance with the provisions of that Agreement, shared equitably, that water quality at inter-provincial boundaries is maintained at acceptable levels (due to a 1992 amendment to the agreement), and to facilitate a cooperative approach for the integrated development and management of inter-provincial streams and aquifers to ensure their sustainability.²⁶

The PPWB is made up of one representative each from Alberta, Saskatchewan and Manitoba, and two from the federal government. Apart from preparing reports and recommendations on water sharing, the Board is also responsible for promoting continued cooperation and consultation among the three provinces and Canada on water matters.

The Master Agreement on Apportionment has enabled the equitable sharing and protection of inter-provincial streams while developing a consensus approach to preventing inter-provincial surface and groundwater problems. Because of the PPWB's consensus approach, provincial governments, as the primary regulator of water supplies, have always complied with the Agreement. Therefore, the Master Agreement could be referred to as a model of “cooperative federalism” for dealing with inter-jurisdictional issues.

C. International Issues

Conflict between the United States and Canada over water started as early as the 19th century but was resolved amicably in the Boundary Waters Treaty which established principles governing the use of “boundary waters” and created the International Joint Commission to control the use of boundary waters and protect interests on both sides of

25 Steven Kennett, *Managing Interjurisdictional Waters in Canada* (1991, Canadian Institute of Resources Law, Calgary)

the border.²⁷ A Great Lakes Charter was a regional cooperative initiative which was drafted and agreed to by Manitoba, Ontario and seven U.S. States in response to requests to divert massive amounts of water in the 1980s. Further in 2001, specific Annex of the Agreement was drafted to deal with the Great Lakes and the issue of withdrawals and the obligation for governments to provide notice and consult in respect of the issue.²⁸ These agreements are reflective of cooperative international relations managing water demands and conflicts.

The international environment is complicated by the existence of international trade agreements and the possible commodification of water. The International Joint Commission and governments appear satisfied that water in its “natural state” is not a product or good to which trade regimes apply.²⁹ However, there are very differing views on whether water should be treated similar to other commodities, or whether recognition should be given to its social, cultural and spiritual significance and the implications of trade obligations on governments’ ability to manage water resources.³⁰

Article XX allows exceptions to the limitations of a government in both NAFTA and GATT to restrict the export of products in the absence of critical domestic shortages. One is to allow measures “necessary to protect human, animal or plant life or health” and another is measures that “relate to the conservation of exhaustible natural resource.”³¹ As such a government would appear not able to prohibit water “export” without a legitimate

26 <http://www.mb.ec.gc.ca/water/fa01/index.en.html>

27 Treaty Between The United States and Great Britain Relating to the Boundary Waters and Questions Arising between the United States and Canada (January 11, 1909), 36 Stat. 2448 (1910), T.S. No. 548.

28 Council of the Great Lakes Governors, The Great Lakes Charter, <http://www.cglg.org/1pub2/index.asp> and the Charter, The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter, signed June 18, 2001 <http://www.cglg.org/1pdfsAmmex2001.pdf>

29 The governments of Canada, Mexico and the United States issued the following statement in December of 1993: “unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA....Water in its natural state in lakes, rivers, reservoirs, aquifers and the like is not a good or product...” Statement by the Governments of Canada, Mexico and the United States. December 2, 1993 reprinted in The Free Trade Observer, No. 51, at 855.

30 See for example, Brian D. Anderson, “Selling Great Lakes Water to a Thirsty World: Legal, Policy and Trade Considerations” (1999) 6 Buff. Env’tl L.J. 215, “Water Wars” Canada’s Upstream Battle to Ban Bulk Water Exports,” (2001) 10 Minn. J. Global Trade 109, Robert J. Girouard, “Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes,” (2003) 15 Geo. Int’l Env’t. L. Rev. 247

conservation or environmental protection purpose which must also be imposed on residents within the government's jurisdiction.

Further, NAFTA provides that investments in one NAFTA country by nationals from another NAFTA country must be accorded national treatment and receive a minimum standard of treatment. Thus domestic measures affecting investors can't discriminate on their face or in their action against an investor based on their nationality. Because chapter 11 (containing these provisions preventing discrimination against investors) is not subject to Article XX and the exceptions of conservation, successful challenges have been mounted against non-discriminatory environmental regulations as protectionist.³²

D. Federal Water Policy

In the late 1980s the federal government comprehensively reviewed Canadian water policy and wrote the 1987 Federal Water Policy. The policy states that the "overall objective of the federal water policy is to encourage the use of freshwater in an efficient and equitable manner consistent with the social, economic and environmental needs of present and future generations."³³ This policy is criticized for having never been allocated the necessary funding to implement³⁴ and for only superficially addressing issues pertaining to trade and water resources, private ownership of water, and export of water.³⁵ It would be fair to conclude that this policy needs to be reinvigorated. Many questions are being raised about such things as water quality, sustainability, the need for better scientific information, and information on methods to address scarcity.

Because of the Nova Corp application in Ontario for a permit to take water by bulk carrier and export it to Asia, the gap in water law and policy relating to export was highlighted and in response the federal government amended the International Boundary

31 GATT, Articles XX(b) and (g) respectively.

32 See Sun Belt Water Inc. v. Government of Canada, Notice of Intent to Submit a Claim to Arbitration, November 27, 1998 <http://www.dfairmaeci.gc.ca/tna-nac/documents/sunbelt.pdf> This case was eventually settled.

33 Environment Canada. 1987. *Federal Water Policy*. Ottawa: Environment Canada.

34 In fact this policy was tabled in 1987 in the House of Commons but funding to implement it was shortly thereafter eliminated. Pollution Probe, *Towards a Vision and Strategy for Water Management in Canada, Final Report of the Water Policy in Canada: National Workshop Series*. 2007.

Waters Treaty Act³⁶ with the intention of prohibiting out-of-basin transfers of boundary waters. Most provinces have passed legislation prohibiting transfers of water out of a watershed as well. Although somewhat reactive, this is a good example of public engagement and political responsiveness to a pertinent water issue. However, in the future, proactive development of policy would be ideal.

In developing future water policy it would be important for a coalition of interested organizations to involve a wide range of stakeholders in discussion across Canada. The identification of guiding principles or values initially would streamline the writing of the policy. As time, funding, and consensus permits, details in relation to water values could be developed in the policy.

35 Muldoon, Paul and Theresa McClenaghan, *A Tangled Web: Reworking Canada's Water Laws* in Bakker, Karen. 2007. *Eau Canada*. UBC Press: Vancouver and p. 248.

36 R.S.C. 1985, c. I-17.