



## **Debates of the Senate (Hansard)**

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**Tuesday, June 12, 2007  
The Honourable Noël A. Kinsella, Speaker**

### **International Boundary Waters Treaty Act**

#### **Bill to Amend—Second Reading—Debate Adjourned**

**Hon. Pat Carney** moved second reading of Bill S-225, to amend the International Boundary Waters Treaty Act (bulk water removal).—(*Honourable Senator Carney, P.C.*)

She said: Honourable senators, Canadians are under the illusion that our precious freshwater resources are protected from our neighbours. My grandfather, John Joseph Carney, who homesteaded in the Okanagan in the 1890s, was under the same illusion. He was wrong.

John Joseph's log cabin was built on an arid side hill overlooking the sun-scorched Ellison Valley, cattle country back then, before the orchards and the vineyards. The homestead's prime asset was a big bubbling spring, called the Punch Bowl, nestled amid a thicket of willows next to the cabin.

When the issue of water rights was introduced, John Joseph was indignant. Why did he need a licence for a water source next to his home? He complained to his wife, Bridget, but at her urging he saddled up his horse, Billy, and rode to town to apply for the licence.

The son of Irish immigrants, John Joseph liked his rye whiskey. He stopped at a bar for refreshments and to debate the issue with his drinking buddies. He did not get to the

water office in time. His neighbour did. He won the rights to the Punch Bowl right next door to the Carney home. That was the end of the homestead.

I have told the Senate this before. When old John Joseph died, there was no grain in the barn, no cattle on the range; there was nothing because he had no water for the homestead. Water rights and water licences became gut issues for our family. A couple of weeks ago I drove past the old homestead. I did not trespass, but the willow thicket is there. I was unable to determine if the punch-bowl still had its water.

When I served as the Minister Responsible for the Canada-U.S. Free Trade Agreement, in 1986, I monitored water issues like a hawk. My chief negotiator, Simon Reisman, was an early proponent of a scheme, the North American Power and Water Alliance, called NAPAWA, that would dam virtually every river in Alaska and British Columbia and divert water down B.C.'s 500-mile Rocky Mountain Trench south to Texas, California and Mexico. It would be the largest engineering project in the world. Canadian opposition sunk NAWAPA. The reference to water in the FTA is minimal. It is contained in Tariff Schedule 22.01, which deals with natural or artificial mineral waters, aerated waters not containing added sugar, sweetening matters or flavours. At some point, the ambiguous phrase "ice and snow" was added.

The FTA and its sequel NAFTA, which included Mexico in the pact, also includes the provision that if any commodity such as water becomes a tradable good, Canada could be required to award U.S. and Mexican companies national treatment. Essentially, Canada would be obligated to provide Americans and Mexicans the same access Canadians enjoy to our fresh water resources if water ever became a tradable good.

Clearly, the safeguard is to prohibit bulk water exports, which the Mulroney government did with its National Water Policy that has since been upheld by the Harper government. However, a policy is not law and can be changed without parliamentary process. That is why in 2001, as Conservative critic in the Senate, I became concerned about Bill C-6, an act to amend the International Boundary Waters Treaty Act introduced by the Liberal government.

This sleeper of a bill, presented as a prohibition of bulk water removals, passed through the House of Commons without anyone noticing the bill actually permitted bulk water removals where no such permission then existed. Liberal Senator Corbin from New Brunswick claimed that Bill C-6 would establish in law "an unambiguous prohibition of bulk water removal in waters under federal jurisdiction."

Specifically, although Bill C-6 was cast as a housekeeping bill to give legislative context to the treaty and to clarify the government's opposition to the removal of bulk water, in fact it was drafted in a manner whereby it could actually be used to permit bulk water removals.

The intent of Bill C-6 was never contained in the legislation itself but merely suggested in regulations, which we as legislators know, can be changed without Parliament.

First among its flaws, the bill did not define bulk water in the legislation. It prohibited something that it did not define. The definition was subsequently included in the regulations, which can be changed, and banned the removal of more than 50,000 litres per day in a continuous flow, which is about a truck tanker of water.

Second, there were exceptions to the prohibition on bulk water removals. Under certain conditions, the Minister of Foreign Affairs could licence such bulk water removals by regulation. Numerous experts consistently shared my concerns about Bill C-6 during the proceedings before the Standing Senate Committee on Foreign Affairs and International Trade.

For instance, trade lawyer Barry Appleton said:

If the bill were to deal with fresh water issues as part of an overall strategy, I would say that Bill C-6 is flawed. Rather than create the opportunity to develop some environmentally sustainable comprehensive water policy, this bill has created a mechanism to actually license, in certain circumstances, water going from Canada to the United States. I am sure that is not the intention; however, under the wording of this bill, it is clearly the effect.

Dr. Howard Mann, another expert in this field, said:

There is a serious risk . . . Once exports begin, the government, federal or provincial, cannot arbitrarily deny further exports . . . You are into the game as soon as you start down that road.

University of Calgary law professor, Nigel Bankes, said:

I think the answer is yes to the question of whether Bill C-6, which gives discretionary power to the Governor-in-Council and also to the regulatory process, be used to licence the export of bulk water from boundary waters. Would removal of waters for irrigation purposes to the United States be allowed in this case if you could show, by an environmental assessment or other means, that it did not affect boundary levels?

Some of my Conservative colleagues, including at that time Senator Murray, a Conservative at that time and still, sought to introduce amendments to Bill C-6 to respond to these concerns but to no avail.

I am pleased to introduce Bill S-225 to finally address the perceived weaknesses in the existing act. It will provide strengthened protection of our fresh water, which is increasingly our most precious resource.

Bill S-225 is short and simply seeks to amend the International Boundary Waters Treaty Act to prohibit the bulk removal of boundary waters from the water basins in which the boundary waters are located. The prohibition applies to all boundary waters as defined in the International Boundary Waters Treaty Act. Limited exceptions to the prohibition for

specified uses, such as firefighting, are set out in the act. However, regulation-making authority to specify other exceptions to the prohibition is no longer provided, and that is very important. It is even more important that the bill also requires that certain proposed regulations to the act be laid before each House of Parliament and that those regulations may not be made if either House adopts a motion disapproving the proposed regulations.

Clause 1 amends section 10 of the existing act by defining the phrase "removal of boundary waters in bulk" as opposed to the regulations, where the phrase is currently defined. I have stated that regulations are easily changed while legislation is not. I use the same definition that is currently in the regulations, which is the removal of more than 50,000 litres of water, treated or untreated, per day from boundary waters by any means of diversion, whether by pipeline, canal, tunnel, aqueduct or channel. However, it does not include taking a manufactured product that contains water, such as water and other beverages in bottles or packages, outside the water basin.

Clause 2 amends section 13 of the act and provides the prohibition against the removal of bulk water. It prohibits the removal of boundary waters in bulk, whether through use or diversion, except where the former is "for use in a conveyance, including a vessel, aircraft or train," or, as I mentioned, for "firefighting or humanitarian purposes on a short-term and non-commercial basis."

For these purposes in the application of the treaty,

. . . the removal of boundary waters in bulk is deemed, given the cumulative effect of such removals, to affect the natural flow or level of the boundary waters on the other side of the international boundary.

Clause 3 addresses the issue of parliamentary participation where, under the existing act, the Governor-in-Council on the recommendation of the minister enjoys wide authority to regulate, for example, by defining any word or expression used in sections 11 to 26 pursuant to paragraph 21(1)(c).

Proposed new section 21(3) of Bill S-225 requires that any such proposed regulation be tabled before each House of Parliament for examination, after which it might be referred to the appropriate committee of that House. Subsequently, the committee may, within 30 sitting days, report to the House that it disapproves of the proposed regulation, in which case a motion to concur with the report shall be put to the House in accordance with the procedures.

Finally, the proposed regulation may be made if no report disapproving the proposed order is presented or if the motion to concur in the report is denied.

It has been suggested by the Department of Foreign Affairs and International Trade that the Statutory Instruments Act already allows Parliament to review regulations. This act only allows the Standing Joint Committee on Scrutiny and Regulations to examine regulations that have already come in force once they are a *fait accompli*. There is no

mechanism to compel a regulation changing the meaning of "removal of boundary waters in bulk" to be brought to the attention of Parliament before it is passed. It is not unusual for such a process before this committee to take up to 18 years.

While it is true that the removal of water in bulk is prohibited, it is only to the extent as it is defined in the regulations. The 50,000 litres could become 1 million litres through regulations, without parliamentary overview.

It seems to come down to semantics because section 21(1) allows the Governor-in-Council, on the recommendation of the minister, to make regulations or changes to the present regulations and, thus, the definition of the expression "removal of boundary waters in bulk" may be drastically modified at any time without engaging parliamentarians.

There are other interpretations of the current wording of the International Boundary Waters Treaty Act in dealing with the regulations as well, so Bill S-225 presents a golden opportunity to debate all these issues. It should be considered with an open mind.

Earlier today, I met with officials from the Department of Foreign Affairs and International Trade to discuss the proposed bill. I found their views fascinating, if sometimes confusing, and look forward to hearing them elaborate their concerns when the bill reaches committee stage.

Essentially, these officials state the proposed bill is unnecessary. They reject the premise that the International Boundary Waters Treaty Act as amended in 2001 is flawed. In fact, they argue that it provides "a very high level of protection," to quote from the letter written by Deputy Minister Leonard Edwards. Therefore, they find no need for the amendments I propose.

Here is their reasoning on bulk water issues: The IBWTA does not deal with the issue of bulk water exports at all. Instead, it prohibits the removal of bulk water, subject to certain exceptions, from boundary basins within Canada. Since such removals are prohibited, they argue, the issue of exports does not arise. Again quoting from the deputy minister's letter, "This approach was taken rather than an export ban specifically to ensure that water would not trigger NAFTA requirements."

This treatment of water as a resource in its natural state rather than a tradable commodity is widely recognized by world trade regulations in other jurisdictions, they argue. It is my understanding that this is correct to the present time, but it is subject to challenge.

The IBWTA applies only to basins that comprise the boundary between Canada and the U.S., they argue. This is confusing to me, since the act applies to the Canadian portion of the Great Lakes-St. Lawrence Basin, the Hudson Bay Basin and the Saint John-St. Croix Basin. I was unaware that the international boundary runs through Hudson Bay, but officials explained that the Lake of the Woods, which is bisected by the international boundary, is deemed to be included in the Hudson Bay Basin. However, this reasoning

does not apply to Lake Champlain, which the Canadians say is a boundary water and the Americans say is a river. You can see the ambiguities caused by the present legislation.

International rivers, such as the Columbia and Kootenay in my home province of B.C., are not covered by the IBWTA because they are not boundary waters but transboundary waters. They are, in fact, bulk water exporters themselves because they flow between the two countries. These transboundary waters are covered by other international treaties, officials say.

The provinces have the jurisdiction over water basins within their boundaries, and all provinces have legislation dealing with bulk water removal with the exception of New Brunswick, which has a policy in place banning bulk water exports, they argue, and plans to introduce legislation, which is what they said several years ago.

My concerns in regard to the wide discretionary powers of the minister under the IBWTA to licence exemptions to ban the removal of bulk water are unfounded, officials say, because such licences must be within the spirit of the act. However, the spirit of the act provides for licensing, I counter-argue.

My suggestion is that the definition of "removal of boundary waters in bulk" should be written into the legislation rather than left to regulations, which can be changed without recourse to Parliament, but officials say this would prevent the definition to be altered or to reflect changing technology, such as the use of bladders to hold water, and to allow the government to respond quickly to possible transgressions in the law. In fact, they could add a clear and unspoken reason, which is that officials do not like laws by parliamentarians; they prefer regulations by officials. In fact, I reject their rejection because legislation can be passed very quickly, should the need arise, and the regulatory process can take months or years, as we have seen.

Finally, they suggest that the necessary oversight of regulations is already in place through the existing Statutory Instruments Act. To me, this is an alarming red flag because, as I have mentioned, senators familiar with this process know it takes place after the fact and can take years to conclude. There is no standard timeline.

Officials argue that the department, six years after the original amendments were made, is now taking steps to strengthen the further licensing regime by the IBWTA to the "Law List Regulations" made under the Canadian Environmental Assessment Act. This would mean that any project requiring a licence under the International Boundary Waters Treaty Act would automatically trigger an environmental assessment when certain standards have been met. Those who have been the subject of this process will find it unpredictable at best.

In fact, there are several precedents for parliamentary oversight of regulations made pursuant to an act. It is this kind of parliamentary oversight that we are requesting in Bill S-225. Such regulations would deal with the key issues of what constitutes a use, an obstruction, diversion or work for the purposes of this act, the definition of any word or

expression used in sections 11 to 26 that is not defined in the act, and the exceptions to the application of subsections 11(1) and 12(1).

I have asked the officials to address the concern of many Canadians by strengthening the International Boundary Waters Treaty Act by ensuring that future Parliaments, representing all Canadians, would have oversight of any regulations and changes to regulations that could open the door to bulk water exports now and in the future. Canadians want to be part of that debate, but they are excluded from it under existing law.

To show honourable senators the complexity of this issue, I will quote from John Manley, who was the Minister of Foreign Affairs when the original amendment to the International Boundary Waters Act was made back in 2001. He said:

. . . any credible policy approach to the issue of bulk water removal must address two important elements. First, the management of Canadian waters involves multiple jurisdictions. Second, any approach should take into consideration the many factors, man-made and natural, which exert significant stresses on our water resources.

To pretend that one government can solve the issue with a wave of the legislative wand, or that the issue may be simply reduced to one aspect, such as "water export", in the words of some critics, is unrealistic, ineffective and undermines the goal we all share.

Except it is not very clear under this legislation what the goal is that we all share.

I have concluded that honourable senators should support this bill and give it second reading so we can refer it to committee for a detailed examination of the issue raised in this speech.

**Hon. Jeremiah S. Grafstein:** Would the honourable senator allow a question or two?

**Senator Carney:** Certainly.

**Senator Grafstein:** Honourable senators, I congratulate the senator on this comprehensive look at this very important subject matter. I agree with her that there is tremendous confusion and overlapping responsibilities in legislation both at the federal and provincial levels. I commend her for this speech, and I think we should get the bill to committee as soon as possible so we can have an intensive exploration of what I consider to be a confusing and muddled area when it comes to the export of bulk weather. I agree with her in principle.

Having said that, this is only one side the equation, and the other side of the equation happens to be the Americans. When we talk about a border and a treaty, we are talking about having two parties to tango. The question is: How can my honourable friend be satisfied that if this measure is adopted a similar measure or similar procedure would be available in the United States to ensure that there is no leakage in the objective we all

seek, which is to ensure that bulk water is not allowed without federal or at least governmental approval?

**Senator Carney:** Honourable senators, I cannot do that. As Minister Manley said in his original speech on second reading, there are something like eight Great Lake states and Ontario and Quebec involved in some of these issues, and we simply do not know. The answers of the bureaucrats that the other issues have been dealt with in other international treaties, such as the Colombia River act, do not give me much comfort because we are not really familiar with all of those.

I believe that an examination of my amendment would give us an opportunity to do a full overview of what our treaties are covering fresh water, boundary waters, transborder water, and even your interest in domestic fresh water so that we can find out what the protections are. There is little point in us having removal bans on our side of the border, say in the case of the Great Lakes, if there is not parallel legislation in the United States. The officials tell me that some states have reached agreement on parallel legislation; others have not. However, that is not known to the general public. This is an opportunity to explore this issue before it becomes a crisis.

**Senator Grafstein:** Honourable senators, let us assume that the bill was passed, the federal government was committed and we sorted out the jurisdictional responsibilities; that is, it was clear cut that there was a prohibition from the Canadian side on water. At the current time, my understanding is that at least one major water bottler comes to Canada, gets a pipe, draws out water, and then cleanses it or mineralizes it, or whatever it does, and then packages it in water that we use here in the Senate from time to time.

Let us assume for the moment that we are not successful in the overall objective of providing a safe and tight system to prevent bulk exports. How would this bill stop that activity, assuming the Americans would not agree? I am talking here about on our side of the border.

**Senator Carney:** Honourable senators, as I said, the FTA does permit bottled water to cross the borders, so it is not considered a bulk water removal. Again, one of my problems is that bulk water is not defined anywhere. That is one of the critical issues.

There is no intent in my bill to stop transborder shipments of bottled water for human consumption. However, I do want to ensure that any regulations which go into effect which licence bulk water removals are scrutinized by Parliament to ensure that such removals are within the intent of this act.

On motion of Senator Segal, debate adjourned.