

Water Grab #2 Province of Ontario's Plans to Transfer Local Water Systems and Services to the Private Sector: A Breach of the Public Trust?

A Review of Bills 175 and 195 (2002)

Executive Summary:

November 27, 2002

This second in a series of three Case Studies builds upon the first that examined the City of Toronto's unsuccessful plans to change the governance structure of the present Department of Water and Wastewater Services into the Toronto Water Board, a Municipal Service Board pursuant to provincial legislation. That Study focused on the anticipated NAFTA and the GATS obligations likely triggered by the new designation of a public monopoly, including free trade in services and investor state disputes. This second Case Study relies upon the first but shifts to a review of two Bills pending before the Ontario legislature, the Safe Drinking Water Act (Bill 195) and the Sustainable Water and Sewage Act (Bill 175). The third and final Case Study examines what water resource and quality standards apply, in any event.

In addition to the trade aspects that flow from the governance change to local water system and services, this Study considers whether provincial legislative jurisdiction over water, water works and related services are also subject to a public trust, either under the Canadian constitution and/or by virtue of a provincial statute. In other words, is water and the effective access to it part of the commons? and if so, under what legislative authority or other public mandate would the current Progressive Conservative government proceed and what might be the implications for the wider public interest and environmental protection? The urgency of the matter is that if the provincial government is successful in transferring ownership of local water works and services to the private sector, including the extraction of water supplies, then if there were a public trust, would it not be extinguished forever if reviewing courts found clear legislative intent to permit private property rights to attach to these public resources and assets?

The Public Trust Doctrine

It is argued that both the 1867 Constitution Act as well as the Ontario 1998 Environmental Bill of Rights recognize that the province holds non-renewable resources "subject to any Trusts", including a public trust, putting into doubt the lawful authority of the province to transfer the ownership and effective control of local water works and services to the private sector. Some may argue that even if there is a public trust, it is limited to the actual waters of the province, and does not extend to the water-related capital assets and operations. However, this position fails to consider the water system as a whole from extraction, to distribution, to waste water treatment and discharge. If the public loses the actual public access to and wise use of the water resource, the enjoyment of the public trust could be seriously diminished. According to current public trust doctrine, clear legislative intent, in addition to a public mandate, would be required to exhaust such a public trust. Possible legal strategies are considered to respond to this significant governance change directed from the province to the most precious of all resources – water.

Given the irrevocable nature of the governance consequences that could flow from hasty decision-making and the lack of a clear public mandate to proceed with the transfer of ownership

of local water systems, the series concludes that the public interest is best serviced by retaining public ownership in and effective access to and control of water resources and related water works and services. Based upon the risks that the Walkerton tragedy made clear and almost ten years of experience with NAFTA investor-state disputes, our preliminary findings indicate the need for more public accountability, not less. We welcome a more thorough examination of the issues raised in this series and recommend that legal strategies be developed to test the authority of the current provincial government to proceed with legislating Bills 175 and 195. Recall that in July of 2002, the Ontario Superior Court found that the government had no authority to proceed with the \$5.5-billion sale of Hydro One under the *Electricity Act*, forcing the government to change its plans on privatization. Consideration might be given to seeking a declaration from the Ontario courts that the waters and related works and services are subject to a public trust and that clear legislative intent is required to extinguish it. It must be observed that this proceeding would need to be commenced BEFORE the Bills become law, **expected not later than December 12, 2002**. Having considered the provincial Bills 175 and 195 together with a comparative review of the public trust doctrine in Canada, the United Kingdom and the United States, our main findings are as follows: **Review of the Bills**

While Justice O'Connor in the Walkerton Inquiry observed the need for municipalities to ensure that their water systems and assets are adequately financed but all of these recommendations were premised upon continual municipal ownership. He saw no need for the provincial government to prescribe specific changes to the municipal governance or municipal ownership structure. He found most municipalities are well within their borrowing limit to publicly finance future capital costs and that over 80% of Ontarians are served by municipally owned water systems.

Rather than accepting the Walkerton Inquiry results, Bills 195 and 175 sets out a role for the NAFTA-wide private sector in the ownership, operation and financial management of local Ontario water supplies, systems and services. Bill 175 would require municipalities to file a "full cost report" and submit a "cost-recovery plan" outlining how it intends to pay the full costs of water and wastewater services to the public. Importantly, the Minister may require joint reports, providing power to the government to require that a municipality prepare a full cost report with a private sector regulated entity. Moreover, the Minister may impose its own report or delegate that power to the private sector to file and approve the report and plan, despite an alternative local approach, and public expectations otherwise. The Minister may delegate other powers, including the extraction of water supplies, to the private sector.

Such a sweeping delegation to the private sector is contrary to the Walkerton recommendations concerning public accountability. There were no public consultations regarding these Bills that revealed the extent of the provincial government deregulation and privatization agenda. Rather the claim has been that the government is faithfully implementing the Walkerton Inquiry recommendations, which is clearly not the case. Water and especially freshwater is the subject of human rights and a possible public trust. Meeting a basic water requirement for all humans, as well as ecological function takes precedence in government decision-making and allocation priorities over other water management, trade and investment decisions.

Key Elements of the Public Trust doctrine:

From the time of the codification of law in the Roman Empire by Emperor Justinian, in the mid-sixth century, certain resources have been treated as so important to civic society that the exercise of private property rights cannot be allowed to interfere with public access and uses. Over time, it has been learned that there must be very strict limits on the sovereign or these resources might be sold for private gain.

From the historical public trust doctrine, American law has extracted a belief in protecting public expectations through the common law, legislation, and in many state constitutions. A court will look with considerable skepticism upon *any* government act which is calculated *either* to reallocate a natural resource to more restricted uses *or* to subject public uses to the self-interest of private parties. Since the 1971 California Supreme Court decision in *Marks*, courts have agreed that protecting recreational and ecological values is a purpose of the public trust. The 1984 New Jersey Supreme Court in *Matthews* has noted that without some means of access the public right to use resources would be meaningless. Modern American practice shows that no party can acquire a vested right to appropriate water in a way that harms the public's local social and economic expectations and interests.

Canadian courts have recognized more specific public rights to fishing and navigation. The Supreme Court of Canada in *Rhodes* noted that the "Crown, as owner of the foreshore owed a duty to the general public irrespective of the special rights of the riparian owners. It is not assumed that the Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public."

Leading legal scholars such as John Swaigen and Catherine Hunt have identified important criteria to determine if the public trust doctrine applies to a particular resource: that the subject of a trust, its limits can become certain, using an objective standard such as the ecological boundaries; that the plaintiffs show a sufficient number of people in the class of beneficiaries, not the entire class; and that statutory dedications to 'future generations' should no longer be considered overly broad or vague.

In the context of Aboriginal law, *Guerin* marks the Supreme Court's acceptance that the Crown holds reserve land in trust for Aboriginal people much as, in the American public trust doctrine, the state holds its resources in trust for the people. Le Dain J. found: "there is no absolute requirement for the capacity of the Crown to act as trustee to exist, that some statute or agreement explicitly accepts on the part of the Crown that it is a trustee. In other words, the relationship of trustee as between the Crown and the Band could arise by implication from statute or circumstances."

The Ontario *Environmental Bill of Rights* does contain language resembling trust language. It speaks of the right of the people of Ontario to a healthy environment and of their common goal to protect, conserve and restore the natural environment for the benefit of present and future generations. It includes as a purpose, "to protect the right of the present *and future generations* to a healthful environment as provided in this Act" and sets out procedural guarantees to enforce substantive rights. This important statute may have created/ and or codified into law legally enforceable public expectations in favour of a public trust in exhaustible natural resources. These EBR provisions may provide the statutory recognition and procedural guarantees necessary for a court to ensure the substantive rights of a public trust as first recognized in the 1867 Constitution Act.

Section 109 of the Constitution Act states that all lands, mines, minerals and royalties belonging to the provinces of Canada, Nova Scotia and New Brunswick at the time of Confederation belong to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same." (emphasis added)

Since the establishment of the Canadian Charter of Rights and Freedoms, enshrining the right to security of the person yet failing to entrench private property rights, Canadian courts may be more willing to strike a better balance between public expectations in the commons now and for generations yet to come and, individual economic rights to private property. A modern approach to the public trust doctrine, one that includes concern for future generations and extends to the public interest in water related environmental protection and ecological function appears to have emerged. As private corporations increasingly seek to manage or exploit public resources, the public trust doctrine still has the potential to balance these proprietary interests with public expectations.

Applying the Public Trust Doctrine to Both Bills

There is no doubt that the Canadian public expects that water and access to it remain within the public sector. Because of overwhelming public opposition to losing public control of water, the City of Toronto was unsuccessful in its attempt to create a separate third party Water Board. Residents in Toronto overwhelmingly endorsed public control of the water system as the best guarantee of safety and accountability.

Both Bills define water services as water extraction, treatment and distribution. Because Bill 175 allows the Minister to delegate any of her authority to anyone in her discretion, it could potentially allow the Minister to delegate her authority over water extraction to a private entity, privatizing a traditionally public resource. How far the trust would apply beyond the actual water resource and extend to water-related capital assets and services is an open question. The trust would appear to extend at least to the assets and operations necessary to maintain the means to the resource, in order to actually access and wisely use it, both now and in the future. Until the public accountability gap and the trade and constitutional concerns are adequately addressed, with due regard to the public and national interests at stake, the current provincial Bills are a significant departure from the recommendations of Justice O'Connor in the Walkerton Inquiry and pose significant risks to environmental protection, ecological function and the public interest now and for generations yet to come.

In advance of the Bills becoming law, we call upon the Attorney General of Ontario as the guardian of the public trust and as the advisor to government of all matters of a legislative nature, to produce a legal opinion on the constitutional authority of the current government to transfer the ownership and operations of local municipal water supplies and systems to the private sector, particularly regarding the actual extraction of water, and to identify the trade and investor state dispute consequences under NAFTA and the General Agreement on Trade in Services if Bills 195 and 175 become law.

For a full copy of this Report, please visit www.cielap.org/whatsnew and for further information please contact Christine Elwell, B.A., LL.B., LL.M., Senior Legal and Policy Analyst, CIELAP at christine@cielap.org.



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