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The Government's Groundwater Grab: An Attack on Property Rights in Quebec

Main Conclusions

- Quebec's water supplies are not threatened. The renewable reserves of groundwater in Quebec's inhabited regions total an estimated 200 cubic kilometres (200 trillion litres).
- If enacted, Bill 92 would abolish all private property rights to water and thus constitute a massive transfer of wealth from citizens to the government.
- The proposed legislation would authorize regulators to dictate who may use water, how much they may use, and how they may use it, thereby granting virtually limitless power over water to the minister of sustainable development, environment and parks.
- The proposed legislation is structured for imposition of water royalties.
- A market in water would establish the true value of water and thus better encourage efficiency and conservation.



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Introduction

The government of Quebec is proposing to abolish all private property rights to water and to empower regulators to dictate who may use water, how much they may use, and how they may use it. Proponents claim that such measures are necessary to protect the natural resources of the province. But such overzealous regulation offers no guarantee that water will be apportioned wisely. Instead, it promises to politicize every aspect of water use, dissuade industrial investment, and deprive citizens of basic rights.

If enacted, Bill 92 would declare both surface water and groundwater to be “part of the common heritage of the Quebec nation” and off limits to appropriation “except under the conditions defined by law” (Bill 92, Quebec, 2008). Currently, surface water is considered to be a public resource, but legal precedent in the province holds that property owners have a claim to the groundwater beneath their land.

This is no small matter for several million Quebecers whose private wells constitute their primary source of drinking water. Indeed, nearly half the population of the province relies on the groundwater beneath their property (Quebec, Ministry of Sustainable Development, Environment and Parks, 2003). To terminate these private property rights would constitute a massive transfer of wealth from citizens to the government.¹

Economic growth and investment in Quebec are also at stake. Industry and agriculture—both of which require ready access to water supplies—are staples of the provincial

economy. The imposition of a costly regulatory scheme would thus dissuade investors and undercut the economy.

The proposed legislation is riddled with vague and arbitrary provisions, and it grants virtually limitless regulatory power to the minister of sustainable development, environment and parks. For example, all water withdrawals of 75,000 litres or more per day would require authorization from the minister who, at her discretion, may “refuse to issue or renew an authorization, or, on the minister’s own initiative, modify the conditions to which it is subject” (Quebec, Ministry of Sustainable Development, Environment and Parks, 2003: 1).

There already exist prohibitions on bulk water withdrawals and diversions under provincial, federal, and international law. However, the proposed legislation is specifically structured for subsequent imposition of water royalties. Indeed, at the press conference following her introduction of Bill 92 last year, Line Beauchamp, minister of sustainable development, environment and parks, announced that water royalties would be imposed in the near future (Radio-Canada, 2008, June 8).

Agriculture and industry do siphon hundreds of millions of litres of water from the Great Lakes-St. Lawrence River Basin. But Canadian withdrawals have declined by 30 percent since the mid-1990s (Environment Canada, 2003). Moreover, the vast majority of withdrawn water is returned to the basin, often after treatments that improve water quality. Only about 5 percent is actually “consumed” (depleted) by

Table 1: Uses of Water Withdrawals in Quebec in 2002

	Million litres per day
Public	4,164
Domestic	271
Irrigation	34.9
Livestock	72.3
Industrial	475
Fossil Fuel	178
Hydro Power	1,150,371
TOTAL	1,155,566

Source: Great Lakes Commission, *Great Lakes Regional Water Use Database* at <http://www.glc.org/wateruse/database/search.html>

human activity (Environment Canada, 2003: 5). According to researchers at Environment Canada, “[a] loss of this magnitude does not appear to be placing significant pressure on water resources” (2003: 5) (see table 1).

The legislation prescribes the application of the “prevention principle” to water regulation—that is, the principle that environmental quality is best achieved by avoiding pollution rather than mitigating impacts. But it is possible to ascribe risk to almost any use of water and thereby to prohibit many perfectly legitimate, and economically beneficial, activities.

Quebec’s water supplies are hardly threatened. The province contains 20 percent of Canada’s freshwater land area and encompasses more than 3 percent of the world’s freshwater reserves (Environment Canada, 2004). The *renewable* reserves

of groundwater in Quebec's inhabited regions total an estimated 200 cubic kilometres (200 trillion litres), according to the Ministry of Sustainable Development, Environment and Parks (2000). Still, 75 percent of Quebecers are concerned that provincial water reserves will be commercialized (Girard, 2007, Oct. 14). Moreover, 66 percent of Canadians surveyed in 2004 opposed the idea of water sales to the United States (EKOS Research Associates, cited in Lasserre, 2005: 7).

Large parts of the world—including the southwestern United States—are thirsty for fresh water. (In a number of instances, government has induced farming and development of communities in the desert.) Proponents of water trading say that conditions are ripe for Quebec to profit from its vast supply of “blue gold,” according to Prof. Frédéric Lasserre of Laval University.

First, bulk transfers exist in North America, especially in Canada, something that Canadian public opinion is often unaware of. Second, water is abundant and under-used, and exists in surplus amounts in Canada. Third, water is increasingly scarce in the western United States, which faces an imminent crisis and would provide demand that Canada could turn to its profit. (Lasserre, 2005: 2)

But Lasserre and others also contend that large-scale water exports aren't feasible at present. Such exports would require multi-billion-dollar investments for infrastructure and operating costs (Lasserre, 2005: 6).

Brief chronology of modern regulation

Restrictions on water diversions have been on the books for more than a decade. In 1999, for example, the Quebec government instituted a temporary moratorium on the transfer of surface water or groundwater outside of the province (Law 73). The moratorium ended on January 1, 2001, but a permanent prohibition was enacted thereafter (Law 58).²

According to *Le Devoir*, the moratorium was intended to allay two major concerns of the government.

First, it did not want bulk water to become merchandise in the meaning found in NAFTA so that it could close the door to bulk exports of potable water by truck, train, ship or perhaps even by pipeline. Once bulk water becomes merchandise, Quebec could no longer turn back and would, according to many jurists, be obliged to share its water resources with foreign interests, even at a time of scarcity. In addition, Quebec wanted to limit exports to commercial container sizes so that operators could not siphon away the resource and convert it to a commercial product elsewhere. (Francoeur, 2008, June 2004)

In June 2000, the province adopted a framework for water management following a report by the Water Management Commission, held under the aegis of the Bureau d'audiences publiques sur l'environnement (Quebec, Ministry of Sustainable Development,

Environment and Parks, 2002a). Two years later, the government unveiled its *Quebec Water Policy*, a document intended to guide future legislation (Quebec, Ministry of Sustainable Development, Environment and Parks, 2002a). Provisions included recognition of water as the “collective heritage” of Quebecers, ensuring the protection of public health and aquatic ecosystems, and managing water with a view to “sustainable development.”

The Quebec government also sought to implement royalty payments for water use. Proponents argued that a user-pay system (other than existing taxes) would reveal the actual costs of water and thus encourage conservation.

The substance of Bill 92

Many elements in *Quebec Water Policy* are included in Bill 92. For example, the legislation, if enacted, would establish in law that “both surface water and groundwater are a collective resource that is part of the common heritage of the Québec nation” (Bill 92, Quebec, 2008). The following provisions also are incorporated in the pending legislation:

- Require that water withdrawals of 75,000 litres or more per day receive authorization from the minister of sustainable development, environment and parks.
- Give the minister and the government the power to restrict or revoke any water withdrawal that presents “a serious risk to public health or to aquatic ecosystems,” with no indemnity from the

government (Quebec National Assembly, 2008).

- Implement the Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement, which would prohibit the transfer of water withdrawn from the Basin (with limited exceptions).
- Require the minister to establish a “Water Master Plan,” under which the minister would be empowered to restrict or prohibit water use if it were considered to be in the public interest. Moreover, authorize the minister to impose water conservation or efficiency measures when necessary.
- Require the minister to establish an office of water resources (*bureau des connaissances sur l’eau*), the mission of which would be to develop an information system for data on water resources, aquatic ecosystems, and water uses.
- Authorize the attorney general to lodge civil suits for reparation following any damage to water resources, including restoration and compensation. Revenues resulting from such civil actions would be deposited in a new “Green Fund.”

Taken together, these provisions constitute a dramatic—and unwarranted—expansion of government power over water use.

Who owns the water?

The policy framework adopted by the province in 2000 noted “a

certain ambiguity with respect to defining the legal status of water, leading to many debates as to its ownership” (Quebec, Ministry of Sustainable Development, Environment and Parks, 2002b).

The government of Quebec, in its 2002 publication *Quebec Water Policy*, attempted to end the debate with a simple declaration: “Water, both surface and groundwater, is recognized in the Civil Code of Quebec as something whose use is common to all, subject to rights of use or limited appropriation rights that may be recognized” (Quebec, Ministry of Sustainable Development, Environment and Parks, 2002a). The status of water as “common to all” effectively empowered the provincial government to regulate all water use.

Bill 92 is an attempt to codify that declaration as well as other elements of the government’s water policy. The bill is contrary, however, to legal precedence in the province that suggests that landowners do have property rights to the groundwater beneath their land. As Robert Dutrisac, writing in *Le Devoir* noted:

The ownership of groundwater is not as clearly established as is the ownership of surface water or of underground mineral resources. The water in rivers and lakes is owned by the state, more specifically by the provincial government, as are all natural resources. But the jurisprudence suggests that water taken from the water table belongs to the owner of the land lying above it, even if this water table is not often confined to a single

lot or a single piece of land.
(Dutrisac, September 11, 2002)

The ministry of sustainable development, environment and parks likewise recognizes landowners’ rights to groundwater, stating on its website: “Under the Civil Code of Quebec, groundwater is considered to be property under private ownership linked to the ownership of immovable property” (Quebec, Ministry of Sustainable Development, Environment and Parks, 2000).

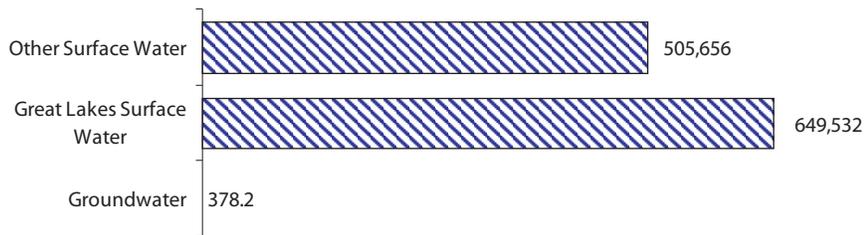
As previously noted, enacting Bill 92 in its current form would extinguish those private property rights. While for some this may seem justified for the sake of protecting the water table, there is abundant evidence that private property rights, in many cases, result in superior environmental stewardship than government regulation (Anderson and Leal, 2001).

The bottled water exemption

Bill 92, if enacted, would prohibit the out-of-province transfer of any water withdrawn in Quebec. However, the legislation does exempt “water withdrawn ... to be marketed for human consumption, if packaged in Quebec in containers of 20 litres or less.”

Quebec’s water-bottling industry is undergoing rapid growth; it currently generates sales of \$75 million a year (Agriculture and Agri-Food Canada, 2000). However, the industry is already tightly regulated by the province. As Daniel Colpron, former president of the Quebec Water Bottlers’ Association, has explained:

**Figure 1: Types of Water Withdrawals in Quebec in 2002
(in millions of litres per day)**



Source: Great Lakes Commission, *Great Lakes Regional Water Use Database* at <http://www.glc.org/wateruse/database/search.html>

Since 1994, nobody can take water for bottling purposes without first obtaining a certificate of catchment authorization from the Quebec environment department. To get this catchment authorization, environmental and hydro-geological studies must be conducted and must show that water catchment will not have harmful effects on the environment or on the quantity of water available for neighbouring activities. This legal supervision ensures the public that there will not be excessive pumping by bottlers that could degrade the resource or deprive neighbours of access to the resource. The fears of local communities when a bottling plant is installed are thus unfounded. (Colpron, 2003)

Among some environmental activists, bottled water is Public Enemy No. 1. For example, the municipality of London, Ontario, has banned the sale of bottled water in municipal buildings. The City of Toronto is slated to consider such a ban this fall. Vancouver, Kitchener, and Ottawa also have shown interest in

a similar prohibition (Tison, 2008, August 22). But in reality, withdrawals related to the beverage industry, in general, and bottled water specifically, do not approach those of industry and agriculture (Côté, 2006). According to the Quebec Water Bottlers' Association, spring-water bottlers use only 0.08 percent of the annual total volume of groundwater extracted in Quebec.

Conclusion

Proponents of Bill 92 may be sincere about ensuring the sustainability of Quebec's water supplies. However, given the actual rates of withdrawal and consumption, any fears of water depletion are overblown (see figure 1).

To the extent that local action might be warranted, government officials have wholly ignored market-based incentives, such as tradable water rights, as a stewardship method. But as noted earlier, property rights and market incentives have proven far more effective than regulation in protecting the environment. As noted by researchers Clay J. Landry and Laurel E. Phoenix (2003), "there is a broad recognition and understanding among researchers

and policy makers that well defined property rights to resources such as water are fundamental to giving people the proper incentives for sustainable management."

A water market would allow farmers, industry, municipalities, and even environmental groups to buy and sell water rights as dictated by supply and demand. The prices would reflect the true value of water with far more accuracy than any government royalty scheme and thus better encourage efficiency and conservation.

Unfortunately, Bill 92 ignores the power of market forces in favour of government force. In so doing, the legislation, if enacted, will rob Quebecers of their property rights and discourage investment in the province.

Notes

- 1 For discussions on the environmental, public health, and economic benefits of property rights and water markets see T. Anderson and P. Snyder, *Water Markets: Priming the Invisible Pump* (Cato Institute, 1997); T. Anderson (ed.), *Water Rights: Scarce Resource Allocation, Bureaucracy and the Environment* (Pacific Institute for Public Policy Research, 1983); and F. Segerfeldt, *Water for Sale, How Business and the Market Can Resolve the World's Water Crisis* (Cato Institute, 2005).
- 2 The law does not allow the export of water in containers of more than 25 litres or for purposes other than hydroelectric production (Lasserre, 2005: 9).

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