Legislative Summary **LS-383E**

BILL C-6: AN ACT TO AMEND THE INTERNATIONAL BOUNDARY WATERS TREATY ACT

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LEGISLATIVE HISTORY OF BILL C-6

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
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Second Reading:	8 May 2001	Second Reading:	20 November 2001
Committee Report:	30 May 2001	Committee Report:	12 December 2001
Report Stage:	4 June 2001	Report Stage:	
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Royal Assent: 18 December 2001

Statutes of Canada 2001, c.40

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BACKGROUND

On 5 February 2001, Bill C-6, an Act to amend the International Boundary Waters Treaty Act, was introduced in the House of Commons on behalf of the Minister of Foreign Affairs, the Hon. John Manley.(1) The bill would provide for a clearer Act and more effective implementation of the 1909 *Treaty relating to Boundary Waters and Questions arising along the Boundary between Canada and the United States* (commonly referred to as the *Boundary Waters Treaty*) by: a) prohibiting the bulk removal of boundary waters from the water basins in which they are located; b) requiring persons to obtain licences from the Minister of Foreign Affairs for water-related projects in boundary or transboundary waters that would affect the natural level or flow of waters on the United States side of the border; and c) providing clear sanctions and penalties for violation. The prohibition on boundary water removals would apply principally to the Great Lakes but would also affect other boundary waters, such as part of the St. Lawrence River, the St. Croix and Upper St. John Rivers, and the Lake of the Woods.

The amendments to the *International Boundary Waters Treaty Act* proposed in Bill C-6 are part of a larger three-pronged strategy announced by the federal government on 10 February 1999 to prohibit bulk water removals, including those for export, from all Canadian water basins. The provinces have primary responsibility for the management of water resources; however, the *Boundary Waters Treaty* gives the federal government clear jurisdiction over boundary waters to the extent stipulated in the Treaty. Pursuant to section 132 of the *Constitution Act, 1867*, only the federal government has the authority to fulfil the Treaty's obligations with respect to boundary waters.

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(1) Bill C-6 is similar to Bill C-15 which was introduced in the 2nd Session of the 36th Parliament but died on the *Order Paper* with the dissolution of Parliament.

In addition to proposing amendments to the *International Boundary Waters Treaty Act* and thereby prohibiting bulk water removal from Canadian boundary waters, including the Great Lakes, the federal strategy also announced that there would be a joint reference, with the United States, to the International Joint Commission (IJC) to study the effects of water consumption, diversion and removal (including for export) from boundary waters, with an initial emphasis on the Great Lakes. The IJC's final report *Protection of the Waters of the Great Lakes*, (February 2000) concluded that the Great Lakes require protection, especially in light of the uncertainties, pressures and cumulative impacts from removals, consumption, population and economic growth, and climate change.

Among other things, the report concluded that:

- "the waters of the Great Lakes are a critical resource; on average, less than one percent of the waters of the Great Lakes is renewed annually."

- "If all the interests in the [Great Lakes] Basin are considered, there is never a "surplus" of water…every drop of water has several potential uses…"

- "International trade law obligations – including the FTA, NAFTA, WTO and GATT – do not prevent Canada and the U.S. from taking measures to protect their water resources and preserve the integrity of the Great Lakes Basin ecosystem … so long as there is no discrimination by decision makers against persons from other countries in their application … Canada and the U.S. cannot be compelled by trade laws to endanger the waters of the Great Lakes…"

Recommendations for action to protect the ecological integrity of the Great Lakes Basin were directed by the IJC to all levels of government in Canada and the United States, and provided a basis for developing a consistent approach to protecting the waters of the Great Lakes on both sides of the border. These recommendations, if implemented, would effectively prevent large-scale or long-distance removals of water from the Great Lakes.

According to federal government sources, the proposed amendments to the *International Boundary Waters Treaty Act* contained in Bill C-6 are consistent with and supportive of the IJC's conclusions and recommendations.

As noted above, water management in Canada is a shared responsibility. Therefore, as the third part of the federal government's strategy, the federal Minister of the

Environment, the Hon. David Anderson, sought endorsement by the provinces and territories of a Canada-wide Accord prohibiting bulk water removals from all major Canadian water basins. According to federal government sources, as a result of this initiative, all provinces have put into place or are developing legislation or regulations to accomplish this goal. Similarly, the territories, in conjunction with the federal Department of Indian Affairs and Northern Development, are implementing policy measures to achieve this objective.

DESCRIPTION AND ANALYSIS

A. Background

The *Boundary Waters Treaty* ("the Treaty"), signed by Great Britain (on behalf of Canada) and the United States in 1909, established principles and procedures to prevent and resolve disputes, primarily those concerning the quantity and quality of boundary waters between Canada and the United States. To help implement its provisions, the Treaty also created the International Joint Commission (IJC). Through the Treaty, Canada and the United States are mutually obliged to protect natural levels or flows of waters shared by the two countries. With some exceptions, Article III of the Treaty provides that there shall be no use, obstruction or diversion of boundary waters on either side of the boundary line affecting the natural flow on the other side of the line, except by the authority of the United States or Canada within their respective jurisdictions and with the approval of the IJC. According to Article IV of the Treaty, the countries agree that, except in cases provided for by special agreement between them, or unless with the approval of the IJC, they will not permit, on their respective sides of the boundary, the construction or maintenance of any remedial or protective works, or any dams or other obstructions, in waters flowing from boundary waters, or in waters at a lower level than the boundary in rivers flowing across the boundary, resulting in a rise in the natural level of waters on the other side of the boundary.

Parliament enacted the *International Boundary Waters Treaty Act* in 1911 to implement the Treaty. The Act gives the federal government jurisdiction over boundary waters, such as the Great Lakes, in order to fulfil Canada's obligation under the Treaty not to affect unilaterally the level and flow of waters on the U.S. side of the boundary.

Bill C-6 consists of two clauses. Clause 1 would add proposed sections 10 to 26 to the Act, while clause 2 concerns the coming into force of the bill.

B. Definitions

Proposed section 10 would define certain terms for purposes of proposed sections 11 to 26 of the Act.

The term "boundary waters" would mean boundary waters as defined in the Treaty:

> For the purposes of this treaty, boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

For example, boundary waters include the Lake of the Woods, the Great Lakes, the section of the St. Lawrence River from the outlet of Lake Ontario to Cornwall, Ontario – Massena, New York, the Upper St. John River (Quebec/New Brunswick) and the St. Croix River (New Brunswick). A river that runs along the boundary, as opposed to crossing it, is a boundary water (for example, a section of the St. Lawrence River).

A "licence" would be a licence issued under proposed section 16. "Minister" would mean the Minister of Foreign Affairs.

C. Licences

The amendments to the *International Boundary Waters Treaty Act* proposed in Bill C-6 would formalize a 90-year process under which the federal government (and the IJC, through its own process) has, under the terms of the *Boundary Waters Treaty*, informally examined and approved or rejected certain projects in boundary or transboundary waters that would have the effect of altering the natural level or flow of waters on the United States side of the border. These projects have always required federal approval. The federal government has

in this way met its international obligations under the Treaty. In light of increasing pressures on freshwater resources, however, the federal government now believes that stronger protections are required and that the licensing arrangements need to be formalized. Hence, Bill C-6 proposes that these projects would now require a licence from the Minister of Foreign Affairs (proposed section 16).

Except in accordance with such a licence, no person would be permitted to use, obstruct or divert any boundary waters in a manner that affected, or would be likely to affect, the natural level or flow of the boundary waters on the U.S. side of the international boundary (proposed section 11(1)). This proposed provision would not apply, however, in respect of the ordinary use of waters for domestic or sanitary purposes (in accordance with Article III of the Treaty) or the exceptions specified in the regulations (proposed section 11(2)). Traditional uses, such as agricultural and industrial withdrawals that remained within the basin, would not be covered by the licensing system. The above provision would more effectively implement Article III of the *Boundary Waters Treaty*.

Also, except in accordance with a licence issued under proposed section 16, no person would be permitted to construct or maintain any remedial or protective work or any dam or other obstruction in waters flowing from boundary waters, or in downstream waters of rivers flowing across the international boundary, where the effect would, or would be likely to, raise the natural level of waters on the U.S. side of the international boundary (proposed section 12(1)). The above would not apply in respect of the exceptions specified in the regulations (proposed section 12(2)). The provision involves neither water removal nor boundary waters. It would more effectively implement the first paragraph of Article IV of the Treaty.

D. Prohibition on Removal of Boundary Waters

The federal government believes that a definite prohibition on bulk water removal from boundary waters is necessary to protect the ecological integrity of these shared basins. Hence, the bill provides that, notwithstanding proposed section 11, no person would be permitted to remove boundary waters from the water basin in which they were located (proposed section 13(1)). For the purposes of the above provision and the application of the Treaty, removing water from boundary waters and taking it outside its water basin would be deemed, given the cumulative effect of such removals, as affecting the natural level or flow of the boundary waters

on the U.S. side of the international boundary (proposed section 13(2)). The above would apply only in respect of the water basins described in the regulations (proposed section 13(3)). Also, it would not apply in respect of the exceptions specified in the regulations (proposed section 13(4)); possible exceptions might be ballast water, water required for short-term humanitarian purposes and water used to make manufactured products within the water basin.

According to government background documentation, the above proposed prohibition would recognize that bulk removal of water out of drainage basins should be managed differently from removal of water for use within the basin. Bulk removal involves the permanent loss of water from the basin. In view of the fact that the ecosystems and communities within the basin are dependent on this supply of water, bulk removal is considered to represent an unsustainable use of the resource. The government maintains that a prohibition on bulk removal of boundary waters is also consistent with our international trade obligations as set out in the 1993 Joint Declaration by the governments of Canada, Mexico and the United States. At the time, the three countries stated that water in its natural state is not a good or a product and is not subject to any trade agreement, including the NAFTA.

E. General

The licensing system and prohibition contained in proposed sections 11 to 13 would be binding on both the federal and provincial Crowns (proposed section 14).

Proposed sections 11 to 13 would not apply in respect of uses, obstructions or diversions that were in existence immediately before these provisions came into force, but would apply in respect of such uses, obstructions or diversions that were significantly changed after these provisions came into force (proposed section 15).

F. Powers of the Minister of Foreign Affairs

Subject to the regulations, the Minister would be empowered to, on application, issue, renew or amend a licence required under the Act, subject to any terms or conditions the Minister considered appropriate (proposed section 16). It is expected that the licensing system would be consistent with existing informal procedures relating to the required approval of water-related projects in boundary waters.

A licence would not be transferable except with the consent of the Minister (proposed section 17). The Minister could suspend or revoke any licence whenever he or she believed on reasonable grounds that the licensee had contravened the Act or a condition of the licence; however, the Minister would first have to give the licensee written notice of the reasons for the suspension or revocation and a reasonable opportunity to provide an explanation (proposed section 18(1)). The Minister could also suspend or revoke a licence with the consent of, or on application by, the licensee (proposed section 18(2)).

If a person contravened proposed section 11(1), 12(1) or 13(1), the Minister could either: a) order the person to remove or alter any obstruction or work to which the contravention related; or b) order the person to refrain from proceeding with any construction or other work, or to cease the use or diversion, to which the contravention related (proposed section 19(1)). If the person failed to comply with such an order, the Minister could remove or alter the obstruction or work, or anything used in relation to it, or order it to be forfeited to the federal Crown (proposed section 19(2)). Anything so forfeited could be removed, destroyed or otherwise disposed of as the Minister directed (proposed section 19(3)). The Minister's cost of removing or altering anything under proposed section 19(2) and the costs relating to the removal, destruction or disposition of anything forfeited under proposed section 19(3), less any sum that might be realized from its disposition, would be recoverable in a court of competent jurisdiction by the federal Crown from the person who had contravened the order as a debt due to the Crown (proposed section 19(4)).

According to proposed section 20, the Minister could, with the approval of the Governor in Council, enter into an agreement or arrangement with the government of one or more provinces respecting the activities referred to in proposed sections 11 to 13. The provision would thus enable co-operative understandings with the provinces in order to reduce duplication and costs in connection with reviewing projects under the licensing/prohibition scheme.

G. Regulations

The amendments to the *International Boundary Waters Treaty Act* proposed in Bill C-6 would provide for the power to make regulations, something not provided in the current Act. According to proposed section 21(1), the Governor in Council (Cabinet), on the

recommendation of the Minister, would be given broad powers to make regulations. These regulations would cover a wide range of functions, including:

- specifying what would constitute a use, obstruction, diversion, or work for purposes of the Act;
- defining any word or expression in proposed sections 11 to 26 that is not already defined in the Act;
- describing the water basins to which proposed section 13 would apply;
- specifying exceptions to the application of proposed sections 11(1), 12(1) and 13(1);
- prescribing classes of licences;
- respecting applications for, and the form of, licences;
- prescribing licensing fees;
- prescribing the duration of licences;
- respecting the renewal and amendment of licences;
- prescribing uses, obstructions, diversions and works for which a licence could not be issued; and
- (generally) carrying out the purposes and provisions of the Act.

H. Aboriginal and Treaty Rights

The House of Commons Standing Committee on Foreign Affairs and International Trade added a non-derogation clause similar to that found in a number of other federal statutes. Proposed section 21.1 provides that nothing in the Act should be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

I. Offences and Punishment

A person who contravened proposed section 11(1), 12(1) or 13(1) would be guilty of an offence and liable: a) on conviction on indictment, to a fine not exceeding $1,000,000 or to imprisonment for a term of not more than three years, or to both; or b) on summary conviction, to a fine not exceeding $300,000 or to imprisonment for a term of not more than six months, or to both (proposed section 22(1)). Any such contravention that was continued on more than

one day would be deemed to constitute a separate offence for each day during which the violation was committed or continued (proposed section 22(2)).

If a person were convicted of an offence of having contravened proposed section 11(1), 12(1) or 13(1), the convicting court could, if satisfied that the person had thereby acquired monetary benefits, order the person to pay a fine (in addition to the fine imposed under proposed section 22) in an amount equal to those monetary benefits (proposed section 23).

An officer, director, agent or mandatary of a corporation who directed, authorized assented to, acquiesced in or participated in an offence committed by the corporation would be a party to and guilty of the offence and would be liable on conviction to the punishment provided for the offence, regardless of whether the corporation had been prosecuted (proposed section 24).

In any prosecution of an offence under the Act, it would be sufficient proof of the offence to establish that it was committed by an employee, agent or mandatary of the accused, regardless of whether the employee, agent or mandatary was identified or had been prosecuted for the offence, unless the accused exercised all due diligence to prevent the commission of the offence (proposed section 25).

J. Injunctions

On application by the Minister, a court of competent jurisdiction that believed a person had performed, was about to perform, or would be likely to perform any act or thing constituting, or directed toward the commission of, an offence under the Act, could issue an injunction ordering the person: a) to refrain from doing any such act or thing, or b) to do any act or thing that the court believed might prevent the commission of the offence (proposed section 26(1)). However, no injunction could be issued unless 48 hours' notice had been given to the party or parties named in the application, or unless the urgency of the situation was such that delay until the notice had been served would not be in the public interest (proposed section 26(2)).

K. Coming into Force

According to clause 2 of the bill, clause 1 (proposed sections 10 to 26 of the *International Boundary Waters Treaty Act*), or any of the proposed sections to be enacted by

clause 1, would come into force on a day or days to be fixed by order of the Governor in Council.

The bill was enacted into law, having received Royal Assent on 18 December 2001 but has not yet been proclaimed into force. It is expected to be proclaimed into force in the spring of 2002, once the necessary regulations to further implement the legislation have been promulgated.

COMMENTARY(2)

On 23 November 1999, the day after Bill C-15 (Bill C-6's predecessor) was introduced in the House of Commons, Mr. Bill Blaikie, M.P. drew the attention of the government to the following motion, which had been adopted by the House on 9 February 1999:

> That, in the opinion of this House, the government should, in co-operation with the provinces, place an immediate moratorium on the export of bulk freshwater shipments and inter-basin transfers and should introduce legislation to prohibit bulk freshwater exports and inter-basin transfers, and should not be a party to any international agreement that compels us to export freshwater against our will, in order to assert Canada's sovereign right to protect, preserve and conserve our freshwater resources for future generations.

Noting that the proposed legislation did not accurately reflect this motion, Mr. Blaikie asked the government why it was now abandoning "its commitment to a national ban on bulk water exports…. which it supported only short months ago? … Why are the Liberals in full denial about the fact that they cannot act the way they said they would act because of NAFTA?"

The then Minister of Foreign Affairs, the Hon. Lloyd Axworthy, responded in part:

> … the legislation does provide for a prohibition of bulk removal. What it does not do is follow the recommendation of the hon. member and some of his party on the west coast, which is to turn this into a trade issue which would result in a series of trade actions that would totally impede the capacity of Canada to protect its waters.

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(2) A more detailed discussion of some of these following points can be found in: David Johansen, *Bulk Water Removals, Water Exports and the NAFTA*, Parliamentary Research Branch, Library of Parliament, PRB 00-41E, 20 February 2001.

The government has specifically addressed this issue in its background documentation on Bill C-6 and, previously, on Bill C-15. The government has publicly stated that it agrees that measures need to be taken to protect the integrity of Canada's water resources but feels that this would be best achieved by its strategy of prohibiting the bulk water removal from all major drainage basins in Canada. In the government's view, such a prohibition would be better than an export ban because "it is more comprehensive, environmentally sound, respects constitutional responsibilities and is consistent with Canada's international trade obligations…. water is protected in its water basin before the issue of exporting arises." The government views this as an environmental protection measure of general application, aimed at preserving the integrity of ecosystems. It would protect water at its source from bulk removal outside the water basin by any party, Canadian or foreign. As noted earlier, all jurisdictions in Canada have put in place or are currently developing legislation or policies to prohibit bulk water removals out of Canada's major watersheds. In this way, water is regulated in its natural state, before it becomes a commercial good or a saleable commodity. The federal government maintains that this is consistent with Canada's international trade obligations and the statement made by the three NAFTA countries in 1993 that:

> The NAFTA creates no rights to the natural water resources of any Party to the Agreement. Unless water in any form has entered into commerce and become a good or a product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would oblige any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state in lakes, river, reservoirs, aquifers, waterbasins and the like is not a good or product, is not traded, and therefore is not and has never been subject to the terms of any trade agreement.

In response to the argument that it should place an outright legislative ban on all water exports from Canada, the federal government claims that this apparently quick and simple solution "does not focus on the environmental dimension, has possible constitutional limitations, and may be vulnerable to a trade challenge." The government maintains that an export ban "would focus on water once it has become a good and therefore subject to international trade agreements. Because these agreements limit the ability of governments to control the export of

goods, a ban on exports is likely to be contrary to Canada's international trade obligations. This contrasts sharply with the federal government's approach."

Federal government sources point out that Canada's views on the trade issues have been supported by a wide range of expert opinion. They note that the IJC came to similar conclusions in its final report, *Protection of the Waters of the Great Lakes* (February 2000) after exhaustive public hearings and submissions that included governmental and independent experts representing every point of view. They also note that the principle that governments have full sovereignty over the management of water in its natural state was reconfirmed by the Deputy U.S. Trade Representative, in a formal submission to the IJC, where he stated that under customary international law:

> … water resource management rights belong to the country or countries where the watercourse flows. We are not aware of any government having challenged this principle in any forum, let alone before on international trade body such as the World Trade Organization. … This is not to say that the WTO rules could never apply to water which has been extracted from watercourse and actually traded in international commerce. But the WTO simply has nothing to say regarding the basic decision by governments on whether to permit the extraction of water from lakes and rivers in their territory.

Maude Barlow, national chairperson of the Council of Canadians(3) argues that certain key provisions of the NAFTA place Canada's water at risk. She maintains that if a single province revoked its ban on bulk water removals and began exporting water, bans in other provinces would become subject to challenges from companies wanting to buy Canadian water. She maintains that the federal government "… needs to bring in a full, binding, federal ban on bulk-water exports. And it must work to exempt water from pernicious trade deals [such as the NAFTA and GATT] that would privatize, commodify and put our precious water on the open global market for the highest bidder."

The federal government takes the opposite view, arguing that nothing in Canada's international trade obligations would require approval to be given to future projects for the bulk removal of water for export, just because previous projects of this kind had received approval. It

(3) The Council of Canadians – a citizens' watchdog organization – came to prominence in 1985 in its fight against free trade.

notes that Canadian governments, federal and provincial, retain full sovereignty over the management of Canadian water in its natural state. According to the government, water in its natural state is not a good and therefore is not subject to trade obligations. The government maintains that "From the standpoint of trade obligations, the fact that a government has allowed the extraction and transformation of some water into a good, including for export, does not mean it (or another government within Canada) must allow the extraction and transformation of other water into a good in the future." Federal government sources note that the NAFTA does not require all provinces to adopt the same regulatory regime. It merely requires that each province, within its regulatory regime, not treat foreign goods or investors less favourably than it treats its own goods or investors.

During the deliberations on Bill C-6 in both the Senate and the Senate Transport Committee, Conservative Senators who spoke on the bill expressed a number of concerns. Although they agreed with its principal objective, i.e., a ban on bulk water removals from boundary waters, the Senators were concerned about what they referred to as "blanket authority" for the Governor in Council to make exceptions to both the licensing and prohibition provisions of the bill (proposed sections 11-13). They felt that those exceptions could effectively negate the intent of the bill. As a result, the Senators proposed a number of amendments at both the Committee stage and at Third Reading in the Senate, but all of their amendments were defeated.