

News Release

November 22, 1999

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No. 250

AMENDMENTS TO INTERNATIONAL BOUNDARY WATERS TREATY ACT TO PROTECT GREAT LAKES FROM BULK WATER REMOVALS

Foreign Affairs Minister Lloyd Axworthy introduced amendments to the International Boundary Waters Treaty Act today to prohibit bulk removal of water from Canadian boundary waters, including the Great Lakes.

The announcement was made as part of a larger strategy to prohibit bulk water removals, including water for export, from all Canadian water basins.

"We're taking decisive action within our jurisdiction to protect critical boundary waters, for future generations. These amendments will give us the authority to prevent the damage that bulk water removals can cause our environment," said Minister Axworthy.

Environment Minister Anderson said, "These amendments represent an important step towards the protection of Canada's freshwater resources. We know that single and cumulative bulk removals of fresh water can have serious impacts on the environmental, social and economic health of communities and ecosystems that depend on these watersheds. I will be seeking agreement on a Canada-wide accord for the prohibition of bulk water removal from all of Canada's major watersheds when I meet with my provincial and territorial colleagues later this month. This is an environmental issue to be decided by Canadians. We will stop bulk removals at the source, not at the border."

The prohibition on removals will apply principally to the Great Lakes and other boundary waters, such as part of the St. Lawrence River in Ontario, the St. Croix and Upper St. John rivers, and Lake of the Woods. Apart from the prohibition, the amendments introduced today will also set in place a licensing regime for boundary waters projects such as dams, obstructions or other works that can affect water levels and flows.

The amendments are part of a three-pronged strategy announced in February 1999 to prohibit bulk water removals from Canadian water basins. The International Joint Commission (IJC) was asked to examine water uses in the Great Lakes, including bulk water removal. The IJC interim report, released in August, supported an environmental approach, urged a cautious approach to bulk water removal, and also recommended an



Government
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du Canada

Canada

Immediate moratorium on bulk water removal from the Great Lakes. Additionally, a Canada-wide accord prohibiting bulk removal of water is being developed with the provinces and territories to ensure protection of Canadian waters.

The International Boundary Waters Treaty Act was passed in 1911, implementing the Canada-U.S. Boundary Waters Treaty signed in 1909. Canada's border is the longest in the world, with over 300 lakes and rivers that either form, cross or straddle it.

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A backgrounder on the amendments is attached.

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Background

AMENDMENTS TO THE INTERNATIONAL BOUNDARY WATERS TREATY ACT (IBWTA)

Canadians are looking to all levels of government to take action to assure the long-term security and integrity of Canada's freshwater resources. As we pass into the 21st century, federal, provincial and territorial governments need to co-operate to ensure a coherent and effective policy that preserves freshwater resources. Today the federal government is taking action in its area of jurisdiction.

What Do the Amendments Do?

The principal effect of the proposed amendments to the International Boundary Waters Treaty Act is to prohibit bulk water removal from boundary waters between Canada and the U.S., especially the Great Lakes. The Great Lakes and other boundary waters will now have protection from bulk removals under federal law. This is significant because the Great Lakes are of sufficient size to attract developers of bulk removal, including for the purposes of export, or diversions schemes. The federal government is taking action within its jurisdiction to ensure that the freshwater resources of Canadians are protected from exploitation and environmental damage caused by bulk removal of water.

Under the 1909 Canada-U.S. Boundary Waters Treaty and the International Boundary Waters Treaty Act, the federal government has jurisdiction over boundary waters, such as the Great Lakes, in order to fulfill Canada's obligation under the Treaty not to affect unilaterally the level and flow of waters on the U.S. side of the boundary. The amendments would give the Minister of Foreign Affairs the authority to:

- Impose a prohibition on removals of boundary waters out of their water basins. Exceptions will be considered, such as ballast water, short-term humanitarian purposes and water used in the production of food or beverages (e.g. bottled water);
- Introduce a licencing system, separate from the prohibition, formalizing a 90-year-old process under which the federal government and the International Joint Commission (IJC) have examined and approved certain projects, such as dams and obstructions, under the provisions of the Treaty. The licencing system would not cover ordinary municipal, industrial or agricultural uses.

What About Protecting All of Canada's Water Resources?

On February 10, 1999, the federal government announced a three-part strategy to prohibit the bulk removal of water from all Canadian water basins. Over the past eight months there has been significant progress:

- The federal government promised to take action within its jurisdiction by introducing the amendments to the ISWTA. This was done today.
- A proposal was made to develop, in co-operation with the provinces and territories, a Canada-wide accord to prohibit bulk water removals. This would apply to all waters. Each level of government would take appropriate action within its jurisdiction. Some provinces have already taken, or are in the process of taking, similar measures. The Minister of the Environment will be seeking endorsement of the accord by all provinces and territories at the end of November.
- Canada and the U.S. agreed to a joint reference to the IJC on consumptive uses, diversions and removals of Great Lakes waters, including for the purposes of export. An interim report on the Great Lakes, released in August 1999, was generally supportive of an environmental approach, urged a cautious approach to bulk water removal or export projects, and called for an immediate six-month moratorium pending the final report in February 2000. The amendments to the Act and the federal strategy are consistent with these recommendations.

Prohibition of Bulk Water Removal from Water Basins Versus an Export Ban: Which is the Better Approach?

There is a consensus among Canadians that freshwater resources need protection from bulk removals. What is the best way of achieving this goal?

Prohibiting bulk water removal from water basins is 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. This is an environmental protection measure of general application, aimed at preserving the integrity of ecosystems.
- Under the Canada-wide accord, each level of government has a responsibility and each level must take action. Sovereign control over water as a natural resource rests with Canadian, not foreign, governments.
- Water is regulated in its natural state, before it has become a commercial good or a saleable commodity. This is consistent with Canada's international trade obligations.

An export ban may appear to be a quick and simple solution. However, it does not focus on the environmental dimension, has possible constitutional limitations, and may

be vulnerable to a trade challenge. 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.



Minister of Foreign Affairs

Ministre des Affaires étrangères

Ottawa, Canada K1A 0G2

November 22, 1999

Le 22 novembre 1999

Dear Sir/Madam,

Madame, Monsieur,

I was pleased today to introduce in the House of Commons an *Act to Amend the International Boundary Waters Treaty Act* (IBWTA). The principal effect of the proposed amendments is to prohibit removal of water out of boundary water basins between Canada and the U.S., especially the Great Lakes. The Great Lakes and other boundary waters will now have protection from bulk removals under federal law. This is significant because the Great Lakes are of sufficient size to attract developers, including for the purposes of export, or diversions schemes.

J'ai eu le plaisir de présenter aujourd'hui à la Chambre des communes un projet de loi amendant la *Loi du Traité des eaux limitrophes internationales* (LTELI). Les amendements proposés auront pour principal effet d'interdire le prélèvement d'eau des bassins hydrographiques limitrophes entre le Canada et les États-Unis, particulièrement dans les Grands Lacs. Les Grands Lacs et d'autres eaux limitrophes bénéficieront dorénavant, en vertu de la législation fédérale, d'une protection en ce qui concerne les prélèvements. Cette mesure est importante puisque les Grands Lacs sont assez vastes pour attirer des promoteurs de projets de prélèvement de l'eau, notamment à des fins d'exportation ou de dérivation.

*Amended
this is unconstitutional??*

The IBWTA is Canada's implementing legislation for the 1909 Canada-U.S. *Boundary Waters Treaty*. Through the Treaty, Canada and the U.S. are mutually obliged to protect natural levels and flows of waters shared by the two countries.

La LTELI est la loi canadienne de mise en oeuvre d'un traité Canado-américain de 1909, le *Traité des eaux limitrophes*. En vertu de ce traité, le Canada et les États-Unis ont l'obligation réciproque de protéger les niveaux et les débits naturels des eaux que les deux pays ont en commun.

Separate from the prohibition, the amendments will introduce a licencing system, formalizing a 90 year old process under which the Government of Canada and the International Joint Commission (IJC) have examined and approved certain projects, such as dams and obstructions, under the provisions of the Treaty.

Outre l'introduction, les amendements mettront en place un régime de permis, qui donnera un caractère officiel à un processus vieux de 90 ans en vertu duquel le gouvernement du Canada et la Commission mixte internationale (CMI) ont examiné et approuvé certains projets, par exemple, des barrages et des obstacles, à la lumière des dispositions du traité.

Canadians have long expressed concerns about the environmental impact of removals of water from Canadian water basins. The Government of Canada's action today is part of a strategy to ensure the long-term security of Canada's freshwater resources. I and the Minister of the Environment, the Honourable David Anderson, are pleased to announce this initiative as an important part of the federal government's approach to prohibit bulk water removal out of all Canadian water basins.

On February 10, 1999, the Government of Canada announced a three part strategy to prohibit the removal of water, including for the purposes of export, out of major Canadian water basins. Along with the proposed amendments to the Act introduced today, this includes a joint Canada-U.S. reference to the IJC on consumptive uses, diversion and removal of Great Lakes water. An interim report on the Great Lakes, released in August 1999, was generally supportive of an environmental approach, urged a cautious approach to bulk water removal or export projects and called for an immediate six month moratorium pending the final report in February 2000. The amendments to the Act and the federal strategy are consistent with these recommendations.

Les citoyens canadiens expriment depuis longtemps des inquiétudes quant aux incidences sur l'environnement de prélèvements d'eau provenant des bassins hydrographiques canadiens. La mesure prise aujourd'hui par le gouvernement du Canada s'inscrit dans le cadre d'une stratégie destinée à assurer la sécurité à longue échéance des ressources en eau douce de notre pays. Le ministre de l'Environnement, l'honorable David Anderson, et moi-même sommes heureux d'annoncer cette initiative, qui constitue une composante importante de l'approche suivie par le gouvernement fédéral en vue d'interdire les prélèvements en vrac d'eau dans tous les bassins hydrographiques canadiens.

Le 10 février 1999, le gouvernement du Canada a annoncé une stratégie à trois volets visant à interdire les prélèvements d'eau, y compris à des fins d'exportation, dans les grands bassins hydrographiques canadiens. Parallèlement aux amendements à la Loi déposés aujourd'hui, cette stratégie comprend un renvoi conjoint canada-américain à la CMI à propos des utilisations de l'eau à caractère consommptif, les dérivations et les prélèvements des eaux des Grands Lacs. Un rapport provisoire sur les Grands Lacs, publié en août 1999, a soutenu, de manière générale, une approche reposant sur des considérations écologiques et a demandé instamment qu'on adopte une approche prudente des prélèvements en vrac d'eau ou des projets d'exportation d'eau; ce rapport contient également un appel à l'instauration immédiate d'un moratoire de six ans, dans l'attente du rapport final, en février 2000. Les amendements à la Loi et la stratégie fédérale sont conformes à ces recommandations.

As you know, water management in Canada is a shared responsibility. Therefore, the third part of the strategy seeks the endorsement by provinces and territories of a Canada-wide Accord prohibiting bulk water removals to ensure that all of Canada's watersheds are protected. The Minister of the Environment will be seeking endorsement of the accord by all provinces and territories at the end of November.

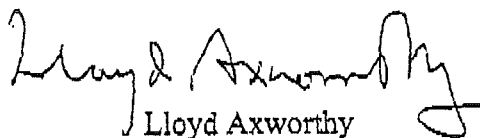
Attached is a copy of the news release, backgrounder and other information regarding these amendments.

Sincerely,

Comme vous le savez, la gestion des eaux au Canada est une responsabilité partagée. C'est pourquoi, dans le troisième volet de la stratégie, on cherche à obtenir l'adhésion des provinces et territoires à une entente pan-canadienne interdisant les prélèvements en vrac d'eau de manière à garantir la protection des bassins hydrographiques du Canada. Le ministre de l'Environnement s'efforcera d'obtenir l'approbation de l'accord par toutes les provinces et tous les territoires à la fin de novembre.

Vous trouverez en annexe le texte du communiqué de presse, le document d'information et d'autres renseignements relatifs à ces amendements.

Veuillez croire, Madame, Monsieur, à l'expression de mes sentiments les meilleurs.



Lloyd Axworthy

BACKGROUNDER

Amendments to the *International Boundary Waters Treaty Act*

Canadians are looking to all levels of government to take action to assure the long-term security and integrity of Canada's freshwater resources. As we pass into the 21st century, federal, provincial and territorial governments need to cooperate to ensure a coherent and effective policy which preserves freshwater resources. Today the federal government is taking action in its area of jurisdiction.

What do the amendments do?

The principal effect of the proposed amendments to the *International Boundary Waters Treaty Act* is to prohibit bulk water removal out of boundary waters between Canada and the U.S., especially the Great Lakes. The Great Lakes and other boundary waters will now have protection from bulk removals under federal law. This is significant because the Great Lakes are of sufficient size to attract developers of bulk removal, including for the purposes of export, or diversions schemes. The federal government is taking action within its jurisdiction to ensure that these freshwater resources of all Canadians are protected from exploitation and environmental damage caused by bulk removal of water.

Under the 1909 Canada-U.S. *Boundary Waters Treaty* and the *International Boundary Waters Treaty Act*, the federal government has jurisdiction over boundary waters, such as the Great Lakes, in order to fulfill Canada's obligation under the Treaty not to affect unilaterally the level and flow of waters on the U.S. side of the boundary. The amendments would give the authority to the Minister of Foreign Affairs to:

- impose a prohibition on removals of boundary waters out of their water basins. Exceptions will be considered, such as ballast water, short-term humanitarian purposes and water used in the production of food or beverages (e.g. bottled water);
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What about protecting all of Canada's water resources?

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- a proposal to develop, in cooperation with the provinces and territories, a Canada-wide accord to prohibit bulk water removals. This would apply to *all* waters. Each level of government would take appropriate action within its jurisdiction. Some provinces have already taken, or are in the process of taking, similar measures. The Minister of the Environment will be seeking endorsement of the accord by all provinces and territories at the end of November.
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OVERVIEW OF LEGISLATION AMENDING THE INTERNATIONAL BOUNDARY WATERS TREATY ACT

SUMMARY

The purpose of the amendments to the *International Boundary Waters Treaty Act* is to implement more effectively the 1909 *Treaty relating to Boundary Waters and Questions arising between the United States and Canada* by:

- 1) prohibiting the removal of boundary waters out of the water basin in which they are located;
- 2) requiring a licence from the Minister of Foreign Affairs for any activity 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;
- 3) providing clear sanctions and penalties for violations.

BACKGROUND

Water is an integral part of Canada's boundaries. More than 300 rivers and lakes form and run along or across this boundary. Over time, Canada and the United States together have developed a structure to manage this common resources. The 1909 *Boundary Waters Treaty* is a cornerstone of this cooperative relationship. Through the Treaty, Canada and the US are mutually obliged to protect natural levels or flows of waters shared by the two countries.

The Treaty established principles and procedures to prevent and resolve disputes, especially those dealing with the quantity and quality of boundary waters between Canada and the United States. The Act to implement the Treaty, the *International Boundary Waters Treaty Act*, was passed on May 19, 1911. Its main object was to establish the International Joint Commission, a binational organization. The 1999 amendments provide for a clearer Act and a better implementation of the Treaty.

INTERNATIONAL BOUNDARY WATERS TREATY ACT: BASIS OF FEDERAL JURISDICTION

The *International Boundary Waters Treaty Act* establishes principles and mechanisms for dispute prevention and settlement, particularly with respect to the quantity and quality of boundary waters between Canada and the U.S.

The Treaty was signed in 1909 by Great Britain, on behalf of Canada. Section 132 of the *Constitution Act, 1867* gives the federal Parliament the power to implement treaties of this type. The federal government therefore has jurisdiction over boundary waters and transboundary waters to the extent stipulated in the Treaty.

AMENDMENTS

Licences

The amendments provide that uses, obstructions, diversions and the construction or maintenance of works or other obstructions that affect the natural level or flow of water on the other side of the border are not permitted unless they have been approved by the Minister of Foreign Affairs.

Until now, the Government of Canada has reviewed applications and approved or denied them using a less formal system. The amendments will improve the existing approval system, making it more transparent and structured.

The licensing system will be developed through regulations, in accordance with Canadian administrative law.

Prohibition on removal of boundary waters

The prohibition is an environmental measure designed to preserve the integrity of water basin ecosystems. Removal of water out of a water basin, carried out once or repeatedly, is deemed to have an impact on the natural level or flow of U.S. boundary waters and is therefore prohibited, save for exceptions stipulated in the regulations.

Powers of the Minister of Foreign Affairs

The Minister of Foreign Affairs has the authority to issue, renew or modify a licence required under the Act, in accordance with the conditions, form and terms stipulated in the Act and the regulations.

If there are reasonable grounds to believe that a person has violated the Act or the conditions of the licence, the Minister may suspend or revoke the licence. The Minister must, however, give the person written notice explaining the reasons for suspending or revoking the licence. The alleged violator must also be given the opportunity to provide an explanation.

The Minister has the authority to order the removal of works or obstructions and to stop the work, uses or diversions that constitute a violation. The Minister also has powers of confiscation and may remove or destroy the forfeited objects.

If the violator fails to comply with a ministerial order, the Minister may have the object involved in the violation removed or altered. The violator will be required to reimburse the government's costs.

Agreements or arrangements with the provinces

Subject to the approval of the Governor in Council, the Minister may enter into agreements or arrangements with the provinces with respect to the licensing system and the prohibition.

Offences and penalties

Any person who violates the prohibition, acts without a licence or violates the terms and conditions of a licence is liable to a fine or imprisonment.

A violator is deemed to have committed a distinct violation every day during which the violation was committed or continued.

If the violator realized a financial benefit as a result of the act or activity that constituted a violation, the violator may be subject to an additional fine equal to the financial benefit.

Injunction

If the Minister of Foreign Affairs files a motion for an injunction and the court finds that a person has done or is about to do or is likely to do any act constituting or directed toward the commission of an offence, the court may grant the motion and order the person to cease any activity which constitutes or is directed toward an offence.

The court will give the person 48 hours to act, unless the public interest and the urgency of the situation requires a shorter notice or none at all.

Regulations

The amendments provide for the power to issue regulations, which the existing Act does not. This power will make it possible to establish a licensing system, stipulate exceptions to the application of the Act, define terms, and so forth.

ACTIVITIES OTHER THAN THE AMENDMENTS

The federal government is working with provinces and territories to develop a Canada-wide approach prohibiting removal of water from major drainage basins. This will complement the proposed amendments to the IBWTA protecting boundary waters, by extending protection to all of Canada's waters.

The International Joint Commission is an independent bi-national body whose mandate is provided by the Boundary Waters Treaty. The Commission is performing its responsibilities under the Treaty and has its own rules of procedures. Canada will continue to honour its international commitments by working and co-operating with it.

The International Joint Commission is currently studying consumption, use and diversion of waters in boundary water basins, including water removal. This matter was referred to it by Canada and the U.S. in 1999. An interim report was released in August 10th 1999 and the final report is expected in February, 2000.

It should be noted that the Commission has dealt with over 100 references in its 90 years of existence about 60 of which concerned levels or flows in boundary and transboundary waters.

Bulk Water Removal and International Trade Considerations

Introduction

On February 10, the federal government announced a strategy to protect the integrity of Canadian water resources by prohibiting the bulk removal of water from Canadian water basins, including for purposes of export. Canadians are concerned about the long-term security of freshwater and want governments to act to conserve and protect this precious resource. To achieve this objective the federal government has proposed a Canada-wide approach which is environmentally sound, respects the key role played by provinces as the managers of natural resources and is consistent with Canada's international trade obligations. There are three components to this approach:

- a Canada-wide accord between the federal and provincial-territorial levels of government to prohibit the bulk removal of water from Canadian water basins. This would apply to *all* Canadian waters. The accord will be discussed at the end of November at a meeting of the Canadian Council of Ministers of the Environment (CCME).
- amendments by the federal government to the 1911 *International Boundary Waters Treaty Act* (IBWTA), which implements the 1909 Canada-U.S. *Boundary Waters Treaty*. The amendments will give the Minister of Foreign Affairs the authority to prohibit bulk removals from *boundary* waters. The amendments will be introduced in Parliament soon; and,
- a joint Canada-U.S. reference to the International Joint Commission, the independent, binational agency charged, under the *Boundary Waters Treaty*, with overseeing boundary waters. The reference concerns the effects of water consumption, diversion and removal, including for export, from *boundary* waters. The Interim Report (*Protection of the Waters of the Great Lakes*) was released in August. The final report is due in February 2000.

This comprehensive environmental approach ensures that both the federal and provincial governments will do their part within their jurisdictions to preserve the integrity of the ecosystem within the water basins.

The federal government's strategy is based on a careful analysis of all of the legal, trade and environmental factors, and is well-grounded in policy and law. At the federal level, the amendments to the *International Boundary Waters Treaty Act* will prohibit the bulk removal of water from boundary waters. The Preliminary Article of the *Boundary Waters Treaty* defines

What's Environmental Consideration??
What's environmental consideration of resources

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boundary waters as "...the waters from main shore to main shore of the lakes and rivers and connecting waterways,...", i.e. water is unambiguously defined as in its natural state. The federal government, through discussions on a Canada-wide accord, will be asking the provinces to take similar measures within their areas of jurisdiction.

In summary, the federal strategy to prohibit bulk removals of water from Canadian water basins is an environmental measure of general application aimed at preserving the integrity of the ecosystem within the water basin. The approach of prohibiting removal of water from its natural state outside of its water basin has been chosen because it is more comprehensive environmentally, it respects provincial jurisdiction, and it is consistent with international trade obligations. An export ban would be a less comprehensive approach as it would not address environmental dimensions (e.g. the prohibition of bulk removal from all Canadian water basins) and may be vulnerable to a trade challenge.

International Trade Considerations

The issue of whether water is subject to international trade agreements, such as the North American Free Trade Agreement (NAFTA) and the World Trade Organization's agreements (WTO), has been raised in some quarters.

This question raises three separate but related issues:

- whether these trade agreements apply to water;
- whether allowing the removal and export of some water creates a precedent, compelling Canada or any province to allow the removal and export of all water; and,
- the relationship between bulk water removal and Chapter 11 of the NAFTA.

1. Water as a Natural Resource; Water as a Good¹

The NAFTA and the WTO generally prohibit restrictions on the exportation of goods, subject to certain exceptions, none of which are likely to be applicable for present purposes. Therefore, it is necessary to determine whether and when water would be considered a "good" and subject to these trade agreements.

In the absence of a definition of good in the NAFTA or the WTO, recourse may be had to the ordinary meaning of the word "good" as defined, for example, in dictionaries. Based on the

¹ Trade agreements variously use the terms "good" and "product" and, in the case of the NAFTA, the two are treated as interchangeable. For ease of reading, this document will use the term "good" as indicative of both terms.

ordinary meaning of the word good, that is, something that can be traded for value, or a saleable commodity, water in its natural state is not a good.

Some observers have suggested that, because Canada's (and most other countries') tariff schedule includes "natural waters" as a tariff heading, this means that all water must be considered to be a good. This is a mistaken view of the purpose of the tariff schedule. The tariff schedule does not define what is a good; it merely provides an organizational structure for the purposes of tariff negotiations and customs administration. In other words, it does not tell us if and when water is a good; it only tells us that *when* water is classified as a good, it falls under a particular tariff heading.

Water in its natural state can be equated with other natural resources, such as trees in the forest, fish in the sea, or minerals in the ground. While all of these things can be transformed into saleable commodities through harvesting or extraction, until that crucial step is taken they remain natural resources and outside the scope of the trade agreements.

The NAFTA countries reinforced this viewpoint in December 1993 when they issued a joint statement, in the context of the NAFTA coming into force, which indicated that "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...".

Furthermore, the International Joint Commission stated in its August 1999 interim report on bulk water removal from the Great Lakes that, "it would appear unlikely that water in its natural state (e.g., in a lake, river, or aquifer) is included within the scope of any of these trade agreements since it is not a product or good...".

Water does not become a good until it is removed from its natural state and enters into commerce as a saleable commodity, such as in bottles or in bulk containers. It would not include water provided by licence, or as a service by municipalities or a province for domestic, industrial and agricultural uses where the charge for such water reflects the cost of supplying it rather than a price for it as a commodity. Even if that water were considered a good, it would only be in respect of that particular water and not water remaining in its natural state. Likewise, the issuance of a licence to withdraw some water for a limited purpose, such as a temporary use, is not sufficient to transform that water into a good. In that situation, it is more accurate to speak of a right of use, rather than a right in goods.

Because water in its natural state is not a good and therefore outside the scope of the trade agreements, the proposed Accord on bulk water removal, and any federal or provincial measure regulating the extraction of water in its natural state, would not be subject to international obligations concerning trade in goods.

2. Exports of Water as a Precedent

A second issue is whether allowing some water to be extracted and put into commerce as a good, including for export, would create a precedent requiring that all other requests to extract water and transform it into a good for commercial purposes, including for export, be granted, anywhere in Canada.

There is nothing in international trade agreements which would require that future projects for the bulk extraction or removal of water, including for export, be approved just because previous bulk water removal projects have been approved. 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.

This point is readily illustrated by looking at the fishing industry for a parallel example of a natural resource that can be transformed into a good. In that context, governments have a discretionary power to decide not only whether to allow fishing as a general policy, but also where and when fishing may take place, and the total quantity of fish that may be caught. From the standpoint of trade agreements, that discretion is not affected by previous decisions that allowed some fishing to take place.

3. Bulk Water Removals and NAFTA Chapter 11

Chapter 11 only applies to measures adopted or maintained by a NAFTA country relating to investors, and investments of investors, of another NAFTA country in its territory. It also provides a mechanism for dealing with investor-state disputes relating to a NAFTA country's alleged breach of its obligations under Chapter 11.

The principal obligations of Chapter 11 most often cited as relevant to bulk water removals are:

- providing national treatment; and,
- paying compensation in cases of expropriation.

National Treatment

The national treatment obligation requires that any measure adopted or maintained by Canada relating to an investor, or the investment of an investor, of another NAFTA country, must accord treatment no less favourable than that it accords, in like circumstances, to its own domestic investors and investments.

For example, a regulatory measure relating to an investor, or an investment of an investor, of another NAFTA country, would be consistent with the national treatment obligation if it prohibited the removal of bulk water from water basins in a manner that did not discriminate between investors, in like circumstances, on the basis of nationality. Canada's proposed strategy with respect to the prohibition on bulk water removals from water basins is in keeping with this obligation.

Expropriation and Compensation

The NAFTA provides that the Parties may not nationalize or expropriate an investment of an investor of another Party, either directly or indirectly, or take measures tantamount to expropriation, unless it satisfies certain criteria, including the payment of compensation. A claim for compensation could only arise where there was an investment that had been expropriated. A regulatory measure designed to conserve and manage water resources, if properly implemented, should not constitute an expropriation. Any claim for compensation would have to be examined in light of the details of the individual case.

4. Conclusion

In so far as trade in goods is concerned, the NAFTA and the WTO do not impose disciplines on the ability of governments to regulate the extraction of water from its natural state, nor do they create obligations that would compel Canada or any province to allow the extraction of bulk water, including for export, without any limits. Because the proposed Accord relates to water in its natural state, it would not be subject to the provisions of these trade agreements with respect to trade in goods.

Furthermore, as long as regulations governing the extraction of water from its natural state do not discriminate among NAFTA investors, or investments of investors, in like circumstances, on the basis of nationality, such regulations will be consistent with the national treatment obligation of Chapter 11 of the NAFTA. Also, such measures, if properly implemented, should not constitute an expropriation under the NAFTA.

November 16, 1999

SECRET

**UNTIL INTRODUCED IN PARLIAMENT
C-**

Second Session, Thirty-sixth Parliament,
48 Elizabeth II, 1999

THE HOUSE OF COMMONS OF CANADA

BILL C-

An Act to amend the International Boundary Waters Treaty
Act

First reading, , 1999

THE MINISTER OF FOREIGN AFFAIRS

90082—22-11-99

SECRET

**JUSQU'À DÉPÔT AU PARLEMENT
C-**

Deuxième session, trente-sixième législature,
48 Elizabeth II, 1999

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-

Loi modifiant la Loi du traité des eaux limitrophes interna-
tionales

Première lecture le 1999

LE MINISTRE DES AFFAIRES ÉTRANGÈRES

SUMMARY

The purpose of this enactment is to better implement the *Treaty relating to Boundary Waters and Questions arising along the Boundary between Canada and the United States* by prohibiting the removal of boundary water from the water basins in which the boundary waters are located and requiring persons to obtain licences from the Minister of Foreign Affairs for water-related projects that affect the natural level or flow of waters on the United States side of the border.

SOMMAIRE

Le texte a pour objet d'aider à la mise en œuvre du *Traité relatif aux eaux limitrophes et aux questions originant le long de la frontière entre le Canada et les États-Unis*, d'une part, en prohibant le captage et le transfert des eaux limitrophes hors de leur bassin hydrographique et, d'autre part, en assujettissant à l'obtention d'une licence auprès du ministre des Affaires étrangères les activités qui ont pour effet de modifier le débit ou le niveau naturels des eaux du côté américain de la frontière.

2nd Session, 36th Parliament,
48 Elizabeth II, 1999

2^e session, 36^e législature,
48 Elizabeth II, 1999

THE HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

BILL C-

PROJET DE LOI C-

An Act to amend the International Boundary
Waters Treaty Act

Loi modifiant la Loi du traité des eaux limi-
trophes internationales

R.S., c. I-17

Her Majesty, by and with the advice and
consent of the Senate and House of Com-
mons of Canada, enacts as follows:

1. The *International Boundary Waters
Treaty Act* is amended by adding the fol-
lowing after section 9:

LICENCES AND PROHIBITIONS

Interpretation

Definitions

10. The definitions in this section apply in
sections 11 to 26.

"boundary
waters"
« eaux
limitrophes »

"boundary waters" means boundary waters as
defined in the treaty. 10

"licence"
« licence »

"licence" means a licence issued under sec-
tion 16.

"Minister"
« ministre »

"Minister" means the Minister of Foreign Af-
fairs.

"water basin"
« bassin
hydrogra-
phique »

"water basin" means a water basin as defined 15
by the regulations.

Licences

Boundary
waters

11. (1) Except in accordance with a li-
cence, no person shall use, obstruct or divert
boundary waters, either temporarily or per-
manently, in a manner that affects, or is likely 20
to affect, in any way the natural level or flow
of the boundary waters on the other side of
the international boundary.

Sa Majesté, sur l'avis et avec le consente-
ment du Sénat et de la Chambre des com-
munes du Canada, édicte :

1. La *Loi du traité des eaux limitrophes
internationales* est modifiée par adjonc- 5
tion, après l'article 9, de ce qui suit :

LICENCES ET PROHIBITIONS

Définitions

L.R., ch. I-17

Définitions

10. Les définitions qui suivent s'appli-
quent aux articles 11 à 26.

« bassin hydrographique » S'entend au sens
des règlements. 10

« eaux limitrophes » S'entend au sens du trai-
té.

« licence » Licence délivrée en vertu de l'ar-
ticle 16.

« ministre » Le ministre des Affaires étran- 15
gères.

Licences

11. (1) Nul ne peut, sauf en conformité
avec une licence, utiliser, obstruer ou dériver,
de façon temporaire ou permanente, des eaux
limitrophes d'une manière qui modifie ou est 20
susceptible de modifier, de quelque façon que
ce soit, le débit ou le niveau naturels de ces
eaux de l'autre côté de la frontière internatio-
nale.

« bassin hydro-
graphique »
"water basin"

« eaux
limitrophes »
"boundary
waters"

« licence »
"licence"

« ministre »
"minister"

Eaux limi-
trophes

Exceptions	(2) Subsection (1) does not apply in respect of the ordinary use of waters for domestic or sanitary purposes or in the cases provided for by the regulations.	(2) Le paragraphe (1) ne s'applique pas lorsque les eaux sont utilisées normalement à des fins domestiques ou sanitaires ni dans les cas d'exception prévus par règlement.	Exceptions
Other waters	12. (1) Except in accordance with a licence, no person shall construct or maintain, either temporarily or permanently, 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, the effect of which is or is likely to raise in any way the natural level of waters on the other side of the international boundary.	12. (1) Nul ne peut, sauf en conformité avec une licence, établir ou maintenir de façon temporaire ou permanente, dans des eaux qui sortent des eaux limitrophes ou dans des eaux en aval de la frontière internationale des rivières transfrontalières, des ouvrages de protection ou de réfection, ou des barrages — ou autres obstacles faisant obstruction — de nature à exhausser, de quelque façon que ce soit, le niveau naturel des eaux de l'autre côté de la frontière.	5 Autres cas
Exceptions	(2) Subsection (1) does not apply in the cases provided for by the regulations.	(2) Le paragraphe (1) ne s'applique pas dans les cas d'exception prévus par règlement.	15 Exceptions
Prohibition — water removal	<i>Prohibition</i> 13. (1) Despite section 11, no person shall use or divert boundary waters by removing water from the boundary waters and taking it outside the water basin in which the boundary waters are located.	<i>Prohibition</i> 13. (1) Malgré l'article 11, nul ne peut utiliser ou dériver des eaux limitrophes d'un bassin hydrographique en les captant et en les transférant à l'extérieur du bassin.	Prohibition : captage d'eau
Deeming	(2) For the purpose of subsection (1) and the application of the treaty, removing water from boundary waters and taking it outside the water basin in which the boundary waters are located is deemed, given the cumulative effect of removals of boundary waters outside their water basins, to affect the natural level or flow of the boundary waters on the other side of the international boundary.	(2) Pour l'application du paragraphe (1) et du traité, le captage et le transfert d'eaux limitrophes à l'extérieur de leur bassin hydrographique sont réputés, étant donné l'effet cumulatif de ce type d'activité sur les eaux limitrophes, modifier le débit ou le niveau naturels de ces eaux de l'autre côté de la frontière internationale.	Présomption
Exceptions	(3) Subsection (1) does not apply in the cases provided for by the regulations.	(3) Le paragraphe (1) ne s'applique pas dans les cas d'exception prévus par règlement.	Exceptions
Binding on Her Majesty	<i>General</i> 14. Sections 11 to 13 are binding on Her Majesty in right of Canada or a province.	<i>Dispositions générales</i> 14. Les articles 11 à 13 lient Sa Majesté du chef du Canada ou d'une province.	Obligation de Sa Majesté
Application	15. Sections 11, 12 and 13 do not apply in respect of uses, obstructions or diversions in existence immediately before the respective coming into force of those sections, but those sections do apply in respect of such uses, obstructions or diversions if significant changes occur to them after their respective coming into force.	15. Les articles 11, 12 et 13 ne s'appliquent pas aux utilisations, dérivations ou obstructions antérieures à la date de leur entrée en vigueur respective, sauf en cas de modification importante de celles-ci après cette date.	Application

1999

Traité des eaux limitrophes internationales

3

	<i>Powers of Minister</i>	<i>Pouvoirs du ministre</i>	
Powers of Minister	16. Subject to the regulations, the Minister may, on application, issue, renew or amend a licence to do any activity referred to in subsection 11(1) or 12(1), subject to any terms or conditions the Minister considers appropriate.	16. Sous réserve des règlements, le ministre peut, sur demande, délivrer, renouveler ou modifier une licence pour les activités visées aux paragraphes 11(1) ou 12(1) et l'assortir des conditions qu'il estime indiquées.	Pouvoir du ministre
Transfer	17. A licence is not transferable except with the consent of the Minister.	17. La licence n'est pas transférable sans le consentement du ministre.	Incessibilité
Suspension and revocation of licence	18. (1) The Minister may suspend or revoke a licence whenever the Minister believes on reasonable grounds that the licensee has contravened this Act or a condition of the licence, but the licensee must first be given notice in writing by the Minister of the reasons for the suspension or revocation and a reasonable opportunity to make representations to the Minister.	18. (1) S'il a des motifs raisonnables de croire que le titulaire d'une licence a contrevenu à la présente loi ou aux conditions de la licence, le ministre peut suspendre ou révoquer celle-ci après, d'une part, lui avoir donné un avis écrit motivant la prise de cette mesure et, d'autre part, lui avoir accordé la possibilité de lui présenter ses observations.	Suspension et révocation de licences
Consent of licensee	(2) The Minister may also suspend or revoke a licence with the consent of, or on application by, the licensee.	(2) Il peut en outre suspendre ou révoquer la licence sur demande du titulaire ou avec son consentement.	Consentement du titulaire
Ministerial orders	19. (1) If a person contravenes subsection 11(1), 12(1) or 13(1), the Minister may (a) order the person to remove or alter any obstruction or work to which the contravention relates; 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 relates.	19. (1) Dans les cas où une personne contrevient aux paragraphes 11(1), 12(1) ou 13(1), le ministre peut lui enjoindre : a) d'enlever les ouvrages ou obstacles qui font l'objet de la contravention ou de les modifier; b) d'arrêter les travaux de construction ou d'autres ou l'utilisation ou la dérivation qui font l'objet de la contravention.	Ordres ministériels
Powers of Minister	(2) If the person fails to comply with an order made under paragraph (1)(a) or (b), the Minister may remove or alter anything referred to in paragraph (1)(a) or used in relation to any activity referred to in paragraph (1)(b) or order it to be forfeited to Her Majesty in right of Canada.	(2) Si la personne n'obtempère pas, il peut soit modifier ou enlever, soit confisquer au profit de Sa Majesté du chef du Canada, toute chose visée à l'alinéa (1)a) ou ayant servi aux activités visées à l'alinéa (1)b).	Pouvoirs du ministre
Disposition	(3) Anything forfeited under subsection (2) may be removed, destroyed or otherwise disposed of as the Minister directs.	(3) Les choses confisquées peuvent être enlevées ou détruites ou il peut en être autrement disposé conformément aux instructions du ministre.	Enlèvement, destruction
Costs recoverable	(4) The Minister's cost of removing or altering anything under subsection (2) and the costs of and incidental to the removal, destruction or disposition under subsection (3) of anything forfeited, less any sum that may be realized from its disposition, are recoverable by Her Majesty in right of Canada from	(4) Les frais occasionnés par toute modification ou tout enlèvement au titre du paragraphe (2) ou par l'enlèvement, la destruction ou l'aliénation au titre du paragraphe (3), de même que tous frais connexes déduction faite du produit éventuel de toute aliénation, constituent des créances de Sa Majesté dont le	Récouvrement des frais

the person who contravened the order made under subsection (1) as a debt due to Her Majesty in any court of competent jurisdiction.

Agreements
with provinces

20. The Minister may, 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 sections 11 to 13.

Regulations

Regulations

21. (1) The Governor in Council may, on 10 the recommendation of the Minister, make regulations

(a) specifying what constitutes a use, obstruction, diversion or work for the purposes of this Act; 15

(b) defining, for the purposes of this Act, "water basin" and any word or expression used in sections 11 to 26 that is not defined in this Act;

(c) providing for cases when subsection 20 11(1), 12(1) or 13(1) does not apply;

(d) prescribing classes of licences and determining the persons who are eligible to hold licences of any particular class;

(e) prescribing the procedure governing 25 applications for licences, including the form of applications, the information to accompany them and the manner they are to be filed, processed and disposed of;

(f) respecting the form of licences and the 30 information they must include and requiring licensees to publish or otherwise make them available for public inspection;

(g) prescribing fees, or the manner of calculating fees, in respect of licences and 35 prescribing the manner in which the fees are to be paid;

(h) prescribing the duration of licences;

(i) respecting the renewal and amendment 40 of licences;

(j) prescribing uses, obstructions, diversions and works for which a licence may not be issued;

recouvrement peut être poursuivi à ce titre contre la personne visée au paragraphe (1) devant toute juridiction compétente.

20. Le ministre peut, avec l'agrément du 5 gouverneur en conseil, conclure avec une ou plusieurs provinces un accord ou une entente portant sur les activités visées aux articles 11 à 13.

Accords avec
les provinces

Règlements

Règlements

21. (1) Le gouverneur en conseil, sur recommandation du ministre, peut par règle- 10 ment :

a) préciser ce qui constitue une utilisation ou un usage, une obstruction, un ouvrage ou une dérivation pour l'application de la présente loi; 15

b) définir, pour l'application de la présente loi, « bassin hydrographique » et les termes non définis des articles 11 à 26;

c) prévoir les cas d'exception à l'application des paragraphes 11(1), 12(1) ou 13(1); 20

d) établir les catégories de licences et déterminer les personnes pouvant en être titulaires;

e) exiger les renseignements devant accompagner les demandes de licence et préciser la procédure applicable à la 25 présentation de celles-ci — notamment quant à leurs modalités de forme, à leur mode de traitement et à leur sort;

f) régir la forme des licences ainsi que les 30 renseignements devant y figurer, et exiger de leur titulaire leur publication ou leur mise à la disposition du public;

g) fixer les droits à acquitter pour les licences — ou le mode de leur calcul — 35 ainsi que les modalités de leur paiement;

h) préciser la période de validité de la licence;

i) régir le renouvellement et la modification 40 des licences;

j) préciser les usages, utilisations, obstructions, ouvrages ou dérivations pour lesquels une licence ne peut être délivrée;

Ordinary meaning applies	(k) providing for inspections in respect of activities to which sections 11, 12 and 13 relate; and (l) generally for carrying out the purposes and provisions of this Act. (2) For greater certainty, regulations made under paragraph (1)(a) do not restrict the ordinary meaning of the words "use", "obstruction", "diversion" or "work".	k) prévoir un régime d'inspection en ce qui a trait aux activités visées aux articles 11, 12 et 13; l) prendre toute autre mesure nécessaire pour l'application de la présente loi. (2) Il est entendu qu'un règlement pris en vertu de l'alinéa (1)a) n'a pas pour effet de restreindre le sens normal des termes « utilisation », « usage », « obstruction », « ouvrage » ou « dérivation ».	Sens normal
Offences	<i>Offences and Punishment</i> 22. (1) Every person who contravenes subsection 11(1), 12(1) or 13(1) is guilty of an offence and liable (a) on conviction on indictment, to a fine of not more than \$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 of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both.	<i>Infractions et peines</i> 22. (1) Quiconque contrevient aux paragraphes 11(1), 12(1) ou 13(1) commet une infraction et encourt, sur déclaration de culpabilité : a) par mise en accusation, une amende maximale d'un million de dollars et un emprisonnement maximal de trois ans, ou l'une de ces peines; b) par procédure sommaire, une amende maximale de trois cent mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines.	Infractions
Continuing offences	(2) A contravention of subsection 11(1), 12(1) or 13(1) that is committed or continued on more than one day is deemed to constitute a separate offence for each day on which the contravention is committed or continued.	(2) Il est compté une infraction distincte pour chacun des jours au cours desquels se commet ou se continue toute contravention aux paragraphes 11(1), 12(1) ou 13(1).	Infractions continues
Additional fine	23. If a person is convicted of an offence of having contravened subsection 11(1), 12(1) or 13(1), the convicting court may, if satisfied that the person acquired monetary benefits or that monetary benefits accrued to the person as a result of committing the offence, order the person to pay an additional fine above the maximum amount of any fine that may otherwise be imposed under section 22, in an amount equal to the court's finding of the amount of those monetary benefits.	23. Le tribunal saisi d'une poursuite pour contravention aux paragraphes 11(1), 12(1) ou 13(1) peut, s'il est convaincu que le contrevenant a tiré des avantages financiers de la perpétration de celle-ci, lui infliger, en plus de l'amende maximale qui peut être infligée en vertu de l'article 22, une amende supplémentaire d'un montant qu'il juge égal à ces avantages.	Amende supplémentaire
Offences by corporate officers, etc.	24. If a corporation commits an offence under this Act, an officer, director, agent or mandatary of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for	24. En cas de perpétration par une personne morale d'une infraction à la présente loi, ceux de ses dirigeants, administrateurs ou mandataires qui l'ont ordonnée ou autorisée ou qui y ont consenti ou participé, sont considérés comme des coauteurs de l'infraction et encourtent, sur déclaration de culpabilité, la	Dirigeants des personnes morales

the offence, whether or not the corporation has been prosecuted.

25. In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee, agent or mandatary of the accused, whether or not the employee, agent or mandatary is identified or has been prosecuted for the offence, unless the accused establishes that the accused exercised all due diligence to prevent the commission of the offence.

Injunctions

26. (1) When, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under this Act, the court may issue an injunction ordering any person named in the application

(a) to refrain from doing any act or thing that it appears to the court may constitute or be directed toward the commission of the offence; or

(b) to do any act or thing that it appears to the court may prevent the commission of the offence.

(2) No injunction shall issue under subsection (1) unless 48 hours notice is given to the party or parties named in the application or the urgency of the situation is such that service of notice would not be in the public interest.

2. Section 1, or any provision enacted by that section, comes into force on a day or days to be fixed by order of the Governor in Council.

peine prévue, que la personne morale ait été ou non poursuivie.

25. Dans les poursuites pour infraction à la présente loi, il suffit, pour établir la responsabilité pénale de l'accusé, d'établir que l'infraction a été commise par son employé ou son mandataire, que celui-ci ait été ou non identifié ou poursuivi. L'accusé peut se disculper en prouvant qu'il avait pris les mesures nécessaires pour empêcher l'infraction.

Injonction

26. (1) Si, sur demande présentée par le ministre, il conclut à l'existence, l'imminence ou la probabilité d'un fait constituant une infraction à la présente loi, ou tendant à sa perpétration, le tribunal compétent peut, par ordonnance, enjoindre à la personne nommée dans la demande :

a) de s'abstenir de tout acte susceptible, selon lui, de constituer l'infraction ou de tendre à sa perpétration;

b) d'accomplir tout acte susceptible, selon lui, d'empêcher la perpétration de l'infraction.

(2) L'injonction est subordonnée à la signification d'un préavis d'au moins quarante-huit heures aux parties nommées dans la demande, sauf lorsque cela serait contraire à l'intérêt public en raison de l'urgence de la situation.

2. L'article 1, ou telle des dispositions édictées par cet article, entre en vigueur à la date ou aux dates fixées par décret.

ences by
employees,
agents or
mandataries

Employés ou
mandataires

Injunctions

Injonction

Notice

Préavis

Coming into
force

Entrée en
vigueur