Going from bad to worse with out water.

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In 1999, the House of Commons voted close to unanimously in favour of a federal ban on water exports. In response, the Canadian government has taken three actions:

a) participation with the US in a joint reference before the IJC, the result of which was a report recommending further action;

b) encouragement to the provinces to take "collective" individual action (failed "Voluntary Provincial Accord", November 1999; while some provinces have imposed voluntary bans on water exports, such bans, if challenged under NAFTA, would be struck down or trigger compensation, see pending Sun Belt Chapter 11 case); and

c) Bill C-6, An Act to Amend the International Boundary Waters Treaty.

Several weeks ago, I was asked to travel to Ottawa to appear as a witness before the House of Commons Committee on Foreign Affairs and International Trade on Bill C-6, An Act to amend the International Boundary Waters Treaty Act, then in First Reading.

As I told to the Honourable Committee, the legislation resembles the Emperor's New Clothes: there's nothing there... In fact, Bill C-6 will likely make things worse.

1. As the third "plank" — and sole legislative initiative — in the Federal Government's strategy to protect Canada's water from the trade threats imposed by NAFTA, Bill C-6 fails dramatically.

2. The Bill offers NO PROTECTION WHATSOEVER to Canadians west of the Ontario border, in Quebec and much of the Maritimes. It only applies to the Great Lakes and those very few bodies of water which are considered "boundary waters" under the International Boundary Waters Treaty (Lake of the Woods, portions of the St. Lawrence, Upper St. John and St. Criox rivers). And, as noted below, even this limited "protection" is ephemeral.

3. Clause 11 — the Bill's establishment of federal government licensing system under the direction of the Minister of Foreign Affairs for the "use, obstruction or diversion of boundary waters" — would clearly fall under the investment and goods provisions of NAFTA, invoking rights including national treatment, proportional sharing and the inability to interrupt "normal channels of supply" (which water transfers quickly become because there are no substitutes for water nor alternate suppliers).

4. In Article VIII of the International Boundary Waters Treaty, Canada and the United States agreed upon an "order of precedence" — domestic and sanitary, navigation, power and irrigation — governing any "use, obstruction or diversion of boundary waters". Clause 11's exception for water for "domestic, or sanitary purposes or [any] exceptions specified in the regulations..." suggests licensing for navigation, power and irrigation. With US interest in Canada's water for irrigation and power generation (rural economics, global warming, oversubscribed river systems, aquifer depletion, food security, continental power sharing agreements), Clause 11 could be seen as setting up the licensing system for NAFTA access.

5. Clause 12 of the Bill extends the proposed federal licensing scheme beyond "boundary waters" to include all Canadian transboundary waters (all north-south running rivers). The same concerns expressed with respect to Clause 11 (points #3 and #4 above) apply to Clause 12.

6. Although Clause 13 of the Bill appears to prohibit the export of water from boundary water drainage basins, the same clause explicitly contemplates exceptions to this prohibition at the discretion of the Minister of Foreign Affairs. Further, although Clause 12 extends licensing to transboundary waters, Clause 13's export prohibition — such as it is — does not extend to north-south running rivers.

7. The Bill also leaves to the Minister of Foreign Affairs the definition of drainage basins. This allows for the definition of macro-basins fully supportive of a North American water grid and a continental water market. (The federal government's failed "Voluntary Provincial Accord" noted that "Canada has five major drainage basins: the Atlantic, the Pacific, the Hudson's Bay, the Arctic and the Gulf of Mexico.")

8. Because the Bill is "binding on the Provinces" it raises the risk of constitutional challenge. The issuance of licenses for resources is clearly within provincial jurisdiction. While the feds can wade in under federal treaty making powers, Bill C-6's imposition of licensing system is not necessary to the purposes and operation of the 100 year old Boundary Waters treaty.

The Committee asked for comments on amendments to the bill. I replied that I did not see any way in which the above concerns could be addressed by legislative amendment.

ENDNOTE

While it is true that water in its natural form — in free-flowing rivers and lakes — is not the subject of NAFTA, it is correspondingly true that each and every time water becomes the subject of a market transaction, NAFTA provisions apply. What sort of market transaction? The issuance of licenses (the right to withdraw). The building of dams and related works for municipal use (residential and industry) and for irrigation. The harnessing of water for hydro-electric power. Coastal outflows of water exported by tankers from Giesborne Lake or other sources. Water is useless when there is a surplus and priceless when there is a scarcity. Each and every time we capture and release water in a timely manner to meet the application/delivery needs not accommodated by nature, we invoke the goods, services and investment provisions of NAFTA.

The government should be ashamed of themselves putting forward Bill C-6 as an answer to anything. If anything, it makes things worse.

It's pretty plain and simple: Until water is explicitly exempted from the goods, services and investment provisions of the NAFTA - of course this is possible, see my July 2000 column - our water resources are up for grabs. To the highest bidder.

How stupid can we get?

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The above is excerpted from my written notes to the committee. If anyone would like a copy of the actual submission, please send me an email <holm@pinc.com>.