Legislative Summary

Bill C-26:
Transboundary Waters Protection Act

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Legislative Summary of C-26

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

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LEGISLATIVE SUMMARY OF BILL C-26: TRANSBOUNDARY WATERS PROTECTION ACT

1 BACKGROUND

On 13 May 2010, Bill C-26, An Act to amend the International Boundary Waters Treaty Act and the International River Improvements Act (short title: Transboundary Waters Protection Act), was introduced in the House of Commons by the Minister of Foreign Affairs, the Honourable Lawrence Cannon. The current *International Boundary Waters Treaty Act* was amended in 2001[1] to prohibit the bulk removal of boundary waters (as defined in the *Boundary Waters Treaty*, which is included as a schedule to the Act) from the Canadian portion of the water basins that are described in the *International Boundary Waters Regulations* made pursuant to the Act.

Bill C-26 strengthens existing protections by bringing the waters that fall under federal jurisdiction under a more comprehensive prohibition against bulk water removals: Transboundary waters (waters that are defined in the bill as waters that flow *across* the international boundary between Canada and the United States) are now included, in addition to boundary waters, which are those waters that run *along* the boundary. According to the departmental news release accompanying the bill, "Rivers and streams that cross international borders will now receive the same protection already in place for waters, such as the Great Lakes, that straddle them."[2]

Certain provisions that are currently found in the Regulations – notably the definitions of "removal of boundary waters in bulk" (which is replaced by a definition of "bulk removal") and a "non-commercial project"; the identification of the water basins to which the Act applies; and the exceptions to the prohibition against bulk removals from waters covered by the Act – are moved to the Act. Consequently, any future changes to those provisions would have to be approved in legislation passed by Parliament.

The bill also gives the federal government new powers of inspection and enforcement and introduces stiff new penalties for violations. These provisions are generally consistent with amendments that were made in 2009 to nine environmental statutes, pursuant to the *Environmental Enforcement Act*.[3]

Finally, the bill makes a consequential amendment to the *International River Improvements Act*.

The departmental news release issued when Bill C-26 was introduced quoted the Honourable Jim Prentice, Minister of the Environment:

> Protection of our freshwater resources is a key priority under the government's Action Plan for Clean Water. We are working to make sure that our water is accessible, clean and safe for Canadians today and in the

> future. … This important legislation makes it clear that we are not in the business of exporting our water. Canadian water is not a commodity. It is not for sale.[4]

Minister Cannon added, "The federal government will continue to work with provincial and territorial governments to ensure that Canadian water is protected." Under the Canadian constitution, the provinces have primary jurisdiction over the management of freshwater resources within their boundaries.

2 DESCRIPTION AND ANALYSIS

2.1 DEFINITIONS (CLAUSE 3)

Clause 3(2) adds a number of new definitions to section 10 of the *International Boundary Waters Treaty Act*.

The current Act, in section 13(1), prohibits a person from using or diverting boundary waters by removing water from the boundary waters (which the Act defined to mean waters along the international boundary between Canada and the United States) and taking it outside the water basin in which the boundary waters are located. Section 13(3) further provides that section 13(1) applies only in respect of the water basins described in the regulations, and section 13(4) states that section 13(1) does not apply in respect of the exceptions specified in the regulations. Section 21(1) permits the Governor in Council, on the recommendation of the Minister of Foreign Affairs, to make regulations regarding certain prescribed matters, including describing the water basins to which section 13 applies and specifying exceptions to the application of section 13(1).

Accordingly, section 5 of the *International Boundary Water Regulations*, made pursuant to section 21(1) of the above Act, provides that the prohibition against water removal from boundary waters (and taking it outside the water basin in which the boundary waters are located) provided for in section 13(1) of the Act applies only in respect of the Canadian portion of the following water basins:

> (*a*) Great Lakes–St. Lawrence Basin, which is the area of land from which water drains into the Great Lakes or the St. Lawrence River;
>
> (*b*) Hudson Bay Basin, which is the area of land from which water drains into Hudson Bay; and
>
> (*c*) Saint John–St. Croix Basin, which is the area of land from which water drains into the St. John River or the St. Croix River.

Section 6(1) of the Regulations further provides that section 13(1) of the Act does not apply to the removal of boundary waters other than the "removal of boundary waters in bulk," a term currently defined in section 2 of the Regulations for purposes of the Regulations as follows:

> 2. (1) In these Regulations, "removal of boundary waters in bulk" means the removal of water from boundary waters and taking the water, whether it has been treated or not, outside the water basin in which the boundary waters are located

> (*a*) by any means of diversion, including by pipeline, canal, tunnel, aqueduct or channel; or
>
> (*b*) by any other means by which more than 50,000 L of boundary waters are taken outside the water basin per day.
>
> (2) The removal of boundary waters in bulk does not include taking a manufactured product that contains water, including water and other beverages in bottles or packages, outside a water basin.

Bill C-26 introduces a new definition – "bulk removal" – in the Act which replaces the above definition of "removal of boundary waters in bulk" currently found in the Regulations. Because, as will be seen subsequently, the bill amends the Act to prohibit bulk removals from transboundary waters as well as boundary waters, a new definition is also being introduced into the Act for "transboundary waters," as follows:

> "transboundary waters" means those waters that in their natural channels flow across the international boundary between Canada and the United States, including those set out in Schedule 3.

"Bulk removal" is accordingly being defined in the Act as follows:

> "bulk removal" means the removal of water from boundary or transboundary waters and the taking of that water, whether it has been treated or not, outside the Canadian portion of the water basin set out in Schedule 2 in which the waters are located
>
> (*a*) by any means of diversion, including by pipeline, canal, tunnel, aqueduct or channel; or
>
> (*b*) by any other means by which more than 50,000 L of water are taken outside the water basin per day.
>
> Bulk removal does not include the taking of a manufactured product that contains water, including water and other beverages in bottles or other containers, outside a water basin.

As previously noted, section 5 of the Regulations currently describes the water basins to which the prohibition against the bulk removal of boundary waters applies. The proposed new definition of "bulk removal" in the Act makes clear that the prohibition now applies to both boundary and transboundary waters and to the removal of those waters from the Canadian portion only of the following water basins set out in proposed Schedule 2 to the Act:

- Arctic Ocean
- Atlantic Ocean
- Gulf of Mexico
- Hudson Bay
- Pacific Ocean

The water basins to which the Act applies are therefore being expanded from those currently set out in section 5 of the Regulations.

The moving of the definition of what will now be referred to as "bulk removal" from the Regulations to the Act itself is significant in that it means that, unlike in the current situation relating to the definition of "removal of boundary waters in bulk," any future change to the definition will have to be approved by legislation passed by Parliament. The same holds true for the description of the Canadian portions of the water basins to which the prohibition applies. Not only does Bill C-26 propose to expand the list of water basins to which the prohibition against bulk removal applies; it does so by moving the list to proposed Schedule 2 to the Act rather than placing it in section 5 of the Regulations.

Definitions are also added in proposed section 10 of the Act for an "analyst," an "inspector" and a "non-commercial project." The last is currently defined in the Regulations.

2.2 Prohibitions (Clause 4)

Reference was previously made to the current section 13(1) of the Act which, despite section 11 (regarding licences), prohibits a person from using or diverting boundary waters by removing water from the boundary waters and taking it outside the water basin in which the boundary waters are located.

Among other things, clause 4 adds to section 13, which prohibits the bulk removal of boundary waters (section 13(1)), a prohibition against the bulk removal of transboundary waters (section 13(2)). These proposed provisions under which bulk water removals are prohibited are not to be confused with the licensing provisions in current sections 11 (in respect of boundary waters) and 12 (in respect of transboundary waters). The licensing provisions are strictly for projects that use, obstruct or divert boundary or transboundary waters (for example, a dam), either temporarily or permanently, in a manner that affects, or is likely to affect, the natural level or flow of waters on the other side of the international boundary. The effect of these provisions is, therefore, that a licence cannot be issued under the Act for bulk water removal because, as under the current section 13(1), proposed sections 13(1) and 13(2) expressly prohibit the bulk removal of both boundary and transboundary waters respectively, despite the licensing provisions in sections 11 and 12.

In addition, clause 4 replaces the "deeming" provision in current section 13(2) (for purposes of the application of the *Boundary Waters Treaty*) with new section 13(3), reflecting the fact that transboundary waters are included in the bill. It reads:

> (3) For the purposes of subsections (1) and (2) and the application of the treaty, bulk removal is deemed, given its cumulative effects on boundary waters and transboundary waters that flow to the United States, to affect the natural flow of those waters on the other side of the international boundary.

Proposed section 13(4) moves the exceptions to the prohibition against bulk removals of boundary waters currently found in sections 6(2) and (3) of the Regulations into the Act itself and applies them to the prohibition against bulk removal of both transboundary and boundary waters, in light of the proposed extended application of the Act to transboundary waters. It reads:

> (4) Subsections (1) and (2) do not apply in respect of boundary waters or transboundary waters that are used
>
> (*a*) in a vehicle, including a vessel, aircraft or train,
>
> (i) as ballast,
>
> (ii) for the operation of the vehicle, or
>
> (iii) for people, animals or goods on or in the vehicle; or
>
> (*b*) in a non-commercial project on a short-term basis for firefighting or humanitarian purposes.

The significance of moving these exceptions from the Regulations to the Act itself is that any future changes to those exceptions will have to be approved in legislation passed by Parliament, rather than by amending the Regulations.

2.3 Schedules to the Act (Clauses 11 and 12)

The current schedule to the Act, which sets out the *Boundary Waters Treaty*, becomes Schedule 1 (clause 11) in light of the proposed new Schedules 2 and 3 being added to the Act (clause 12).

Proposed Schedule 2 to the Act, referred to in the proposed definition of "bulk removal" in section 10, lists the water basins to which the Act will apply. Any change to Schedule 2 will require parliamentary approval through legislation.

Proposed Schedule 3 to the Act, to which reference is made in the proposed definition of "transboundary waters" in section 10 of the Act, contains a list of transboundary waters. It is not intended to be an all-inclusive list: "transboundary waters" are defined in the bill to mean those waters that in their natural channels flow across the international boundary between Canada and the United States, *including* those set out in Schedule 3.

Proposed section 21.01(1) of the Act (in clause 9 of the bill) provides that the Governor in Council may, by order, on the Minister's recommendation, amend Schedule 3 by adding, deleting or amending the name of any transboundary waters. According to proposed section 21.01(2), before recommending that Schedule 3 be amended, the Minister must consult with the appropriate Minister of the province where the transboundary waters are located.

In short, proposed Schedule 2 (describing the water basins covered by the Act) can only be amended following the passing of legislation by Parliament, whereas Schedule 3 (listing transboundary waters) can be amended by Order of the Governor in Council in accordance with proposed section 21.01.

2.4 Administration and Enforcement (Clause 6)

Clause 6 of the bill adds sections 20.1 to 20.9 regarding administration and enforcement. As previously noted, the proposed enforcement provisions are consistent with those added to a number of other environmental statutes by the *Environmental Enforcement Act* in 2009.

2.4.1 Power to Designate

Proposed section 20.1 empowers the Minister to designate persons or classes of persons to exercise powers in relation to any matter referred to in the designation, including, with the approval of a provincial government, persons or classes of persons who are authorized by that government to exercise powers and functions with respect to bodies of water in the province. This would permit the designation of provincial officials as enforcement officers under this legislation.

2.4.2 Powers of Inspector

Proposed section 20.2(1) empowers an inspector, for the purpose of verifying compliance with the Act, to enter a place in which he or she has reasonable grounds to believe that an object to which the Act applies is located or an activity regulated by the Act is taking place. Proposed section 20.2(2) sets out the powers of the inspector for that purpose. According to proposed section 20.2(3), if the place is a dwelling-house, the inspector may enter it without the occupant's consent only with the authority of a warrant issued under proposed section 20.2(4). In executing a warrant to enter a dwelling-house, the inspector may use force only if the use of force has been specifically authorized in the warrant and the inspector is accompanied by a peace officer (proposed section 20.2(5)).

On "ex parte" application,[5] a justice of the peace may issue a warrant authorizing an inspector to enter a place other than a dwelling-house if the justice is satisfied that the conditions prescribed in proposed section 20.2(6) are met. The justice may waive the requirement to give notice under proposed section 20.2(6)(*d*) (regarding reasonable attempts having being made to notify the owner, operator or person in charge of the place) if he or she is satisfied that attempts to give the notice would be unsuccessful because the owner, operator or person in charge is absent from the justice's jurisdiction or that it is not in the public interest to give the notice (proposed section 20.2(7)).

For the purpose of verifying compliance with the Act, an inspector may, at any reasonable time, direct that any vehicle be stopped or moved to a specified place and he or she may, for a reasonable time, detain that vehicle (proposed section 20.2(8)).

An analyst may, at an inspector's request, accompany him or her into a place for the purpose of assisting him or her to verify compliance with the Act (proposed section 20.3(1)). In so doing, the analyst may examine, take samples of, and conduct tests on (or take measurements of), anything in the place (proposed section 20.3(2)).

An inspector or analyst may dispose of a sample taken in the place in any manner that he or she considers appropriate (proposed section 20.4).

In order to gain entry into a place referred to in proposed section 20.1, an inspector and an analyst accompanying him or her may enter private property and pass through it, and are not liable for doing so. Furthermore, no person has a right to object to that use of the property and no warrant is required for the entry, unless the property is a dwelling-house (proposed section 20.5(1)). Another person may, at the inspector's request, accompany the inspector to assist him or her in gaining entry to the place and is not liable for doing so (proposed section 20.5(2)).

The owner or person in charge of the place and every person in the place must provide assistance that is reasonably required to enable the inspector to verify compliance with the Act and must provide any documentation that is reasonably required for that purpose (proposed section 20.6).

The Minister must provide every inspector and analyst with a certificate of designation and, on entering a place, they must, on request, provide the certificate to the person in charge of the place (proposed section 20.7).

An inspector and an analyst are not personally liable for anything they do or omit to do in good faith in carrying out their functions (proposed section 20.8).

Finally, in enforcing the legislation, the Minister has the power to require any person, by registered or personally served letter, to produce samples or documents, or to conduct tests or take measurements or samples (proposed section 20.9(1)). Whoever is required to do any of these things, under proposed section 20.1(1), must comply with the requirement (proposed section 20.9(2)).

2.5 Obstruction and False Information (Clause 10)

Clause 10 of Bill C-26 adds sections 22 (regarding obstruction) and 23 (regarding false information) to the Act, along with a number of other provisions. These provisions are consistent with provisions that were added to a number of other environmental statutes by the *Environmental Enforcement Act* in 2009.

Proposed section 22 establishes a prohibition against obstructing a person designated under proposed section 20.1 or hindering him or her in carrying out his or her functions under the Act.

Proposed section 23(1) creates a prohibition against knowingly providing false or misleading information, results or samples, or filing a document that contains false or misleading information.

Proposed section 23(2) creates a prohibition against negligently providing false or misleading information, results or samples, or filing a document that contains false or misleading information.

2.6 Offences and Punishment (Clause 10)

Among other things, clause 10 repeals the current "Offences and Punishment" provisions set out in sections 22 to 25 of the Act and replaces them with new provisions set out in proposed sections 24 to 40. As previously noted, the proposed extensive amendments regarding enforcement and penalties are in line with those added to nine other environmental statutes by the *Environmental Enforcement Act* in 2009, ensuring a consistent approach for offences in federal environmental legislation.

2.6.1 More Serious Offences

Proposed section 24(1) provides that an offence is committed by a person who contravenes any of the following: section 11(1) or 12(1) regarding requisite licences, proposed sections 13(1) or 13(2) regarding bulk removals from both boundary and transboundary waters, or proposed section 22 regarding obstruction (proposed section 24(1)(*a*)); a Ministerial order made under section 19 (proposed section 24(1)(*b*)); proposed section 23(1) regarding knowingly providing false or misleading information, etc. (proposed section 24(1)(*c*)); or an order made by a court under the Act (proposed section 24(1)(*d*)). These are considered to be the more serious offences under the Act.

Proposed section 24 sets out the penalties on both conviction on indictment and summary conviction for a first offence and for a second or subsequent offence for violation of any of the more serious offences set out in proposed section 24(1) by an individual (proposed section 24(2)); a person other than an individual or a small revenue corporation[6] (proposed section 24(3)); or a small revenue corporation (proposed section 24(4)).

2.6.2 Less Serious Offences

Proposed section 25(1) provides that the contravention of any provision of the Act or the Regulations constitutes an offence, with the exception of the contravention of a provision which is an offence under proposed section 24(1). Offences in this category are considered to be less serious offences.

As in the case of proposed section 24 setting out the penalties for the more serious offences, proposed section 25 sets out the penalties on conviction on both indictment and summary conviction for a first and for a second or subsequent offence. Section 25 sets out the penalties for an individual (proposed section 25(2)); a person other than an individual or a small revenue corporation (proposed section 25(3)); and a small revenue corporation (proposed section 25(4)).

2.6.3 Due Diligence Defence

According to proposed section 26 a person is not to be convicted of an offence under proposed sections 24(1)(*a*), (*b*) or (*d*) or proposed section 25(1) if he or she establishes that he or she exercised due diligence to prevent the commission of the offence. This provision means that the listed offences are strict liability offences, a type of offence that is not unusual in environmental protection legislation in Canada.

2.6.4 Continuing Offence

If an offence under the Act is committed or continued on more than one day, it is considered to constitute a separate offence for each day on which it is committed or continued (proposed section 27).

2.6.5 Deemed Second and Subsequent Offences

For the purposes of proposed sections 24 and 25, a conviction for a particular offence under the *International Boundary Waters Treaty Act* is deemed to be a conviction for a second or subsequent offence if the court is satisfied that the offender has been previously convicted of a substantially similar offence under either a federal or a provincial statute relating to water resource management (proposed section 28(1)). The above provision applies only to previous convictions on indictment and summary conviction, and to previous convictions under any similar procedure under a provincial statute (proposed section 28(2)).

2.6.6 Determination of a Small Revenue Corporation

According to proposed section 29, for the purposes of proposed sections 24 and 25, a court may determine that a corporation is a small revenue corporation if it is satisfied that the corporation's gross revenues for the 12 months immediately before the day on which the subject matter of the proceedings arose were $5 million or less.

2.6.7 Relief from Minimum Fine

In the case of a conviction for the more serious offences under the Act set out in proposed section 24(1), the court may impose a fine that is less than the amount provided for in proposed sections 24(2) to (4) if it is satisfied, on the basis of the evidence submitted to it, that the minimum fine would cause undue financial hardship. In such a case, the court must provide reasons (proposed section 30).

2.6.8 Additional Fine

If a person is convicted of an offence under the Act and the court is satisfied that, as a result of the commission of the offence, the person acquired any property, benefit or advantage, the court must order the person to pay an additional fine in an amount equal to the court's estimation of the value of the property, benefit or advantage. The additional fine may exceed the maximum amount of any fine that may otherwise be imposed under the Act (proposed section 31).

2.6.9 Notice to Shareholders

Where a corporation is convicted of an offence under the Act, the court must make an order directing the corporation to notify its shareholders, in the manner and within the time directed by the court, of the facts relating to the offence and the punishment imposed (proposed section 32).

2.6.10 Liability of Directors, Officers, etc., of Corporations

If a corporation commits an offence under the Act, a director, officer, agent or mandatary (the civil law term for an "agent") of the corporation who "directed, authorized, assented to, acquiesced or participated in the commission of the offence" is considered guilty of the offence and is liable on conviction to the penalty provided for in the Act for an individual, even if the corporation is not prosecuted or convicted (proposed section 33).

2.6.11 Offences by Employees or Agents of Corporations

Proposed section 34 of the Act provides that, in any prosecution for an offence under the Act, it is sufficient proof of the offence to establish that it was committed by the accused's employee acting within the scope of his or her employment or the accused's agent (or mandatary) acting within the scope of his or her authority, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the accused exercised due diligence to prevent the commission of the offence.

2.6.12 Fundamental Purpose of Sentencing and Sentencing Principles

Proposed section 35 sets out the fundamental purpose of sentencing for offences under the Act, while proposed section 36(1) makes reference to the principles a court must consider when sentencing a person. Those principles include the aggravating factors set out in proposed section 36(2). A court must give reasons if it decides not to increase a fine when there are aggravating factors (proposed section 36(5)).

2.6.13 Order of Court

Where a person is convicted of an offence under the Act, in addition to any other punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing one or more of the enumerated prohibitions, directions or requirements spelled out in proposed section 37(1).

If a person fails to comply with an order made under proposed section 37(1)(*g*) directing the person to publish (in the manner specified by the court) the facts relating to the commission of the offence and the details of the punishment imposed, the Minister may, in the manner that the court directed the person to do so, publish the same and recover the publication costs from the person (proposed section 37(2)).

If the court makes an order under section 37(1)(*f*) (directing the person to pay the federal Crown an amount of money for the purpose of promoting sustainable water resource management) or 37(1)(*j*) (directing the person to compensate any person for the cost of remedial or preventative action taken or to be taken as a result of the act or omission that constituted the offence, including costs of assessing appropriate remedial or preventative action), or if the Minister incurs publication costs pursuant

to proposed section 37(2), the amount or the costs, as the case may be, constitute a debt to the federal Crown and may be recovered in any court of competent jurisdiction (proposed section 37(3)).

If the court makes an order under proposed section 37(1)(*j*) directing a person to compensate another person, other than the federal Crown, that person may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid and that judgment is enforceable against the person who was directed to pay the amount as though it were a civil judgment rendered against them (proposed section 37(4)).

If the court makes an order under proposed section 37(1)(*l*) requiring the person to surrender any licence issued under the Act, the relevant licence is cancelled unless the court makes an order suspending it for such period that the court considers appropriate (proposed section 37(5)).

An order made pursuant to proposed section 37(1) comes into force on the day on which it was made or any other day that the court determines, and cannot continue in force for more than three years after that day unless the court provides otherwise in the order (proposed section 37(6)).

2.6.14 Compensation for Loss of Property

In a case where a person has been convicted of an offence under the Act, the court may, at the time sentence is imposed, and on the application of the aggrieved person, order the offender to compensate the aggrieved person for loss of or damage to property suffered as a result of the commission of the offence (proposed section 38(1)). If the amount is not paid without delay, the aggrieved person may, by filing the order, enter as a judgment in the superior court of the province in which the trial was held, the amount ordered to be paid, and the judgment is enforceable against the offender as though it were a civil judgment rendered against him or her (proposed section 38).

2.6.15 Limitation Period

No proceedings by way of summary conviction for an offence under the Act may be instituted more than five years after the day on which the subject matter of the proceedings arose, unless the prosecutor and the defendant agree that they may be instituted after the five years (proposed section 39).

2.6.16 Publication of Information about Contraventions

Proposed section 40(1) requires the Minister to maintain, in a public registry, information about all convictions for corporations under the Act, the purpose being to encourage compliance with the Act. Information in the registry must be maintained for a minimum of five years (proposed section 40(2)).

2.6.17 Injunctions

Among other things, clause 10 of the bill repeals the current provision regarding injunctions contained in section 26 of the Act and replaces it in proposed section 41, with minor changes in wording that do not affect the substance of the provision.

2.7 Report (Clause 10)

Clause 10 of the bill, in addition to other things, adds proposed section 42 regarding reporting. Proposed section 42(1) requires the Minister, 10 years after the day on which the proposed section comes into force, to undertake a review of proposed sections 24 to 41 (regarding offences and punishment in proposed sections 24 to 40 and injunctions in proposed section 41).

Proposed section 42(2) requires the Minister, no later than one year after the day on which the review is undertaken, to cause a report on the review to be tabled in each House of Parliament.

2.8 Consequential Amendment to the *International River Improvements Act* (Clause 13)

Clause 13 amends the definition of an "international river improvement" in section 2 of the *International River Improvements Act* to include a pipeline, so that the definition would now read:

> "international river improvement" means a dam, obstruction, canal, reservoir, pipeline, or other work the purpose or effect of which is
>
> (*a*) to increase, decrease or alter the natural flow of an international river, and
>
> (*b*) to interfere with, alter or affect the actual or potential use of the international river outside Canada.

Section 2 of the same Act defines an "international river" as meaning water flowing from any place in Canada to any place outside Canada. Section 4 of the Act requires a person constructing, operating or maintaining an international river improvement to hold a valid licence issued by the Minister of the Environment under the Act.

Although the Act requires a licence for an international river improvement, such a licence could not be issued to permit bulk water removals, via any of the works (which would now include a pipeline) falling within the above definition, from the Canadian portion of transboundary waters flowing across the international boundary from Canada to the United States. The reason for this is that Bill C-26 adds proposed section 13(2) to the *International Boundary Waters Treaty Act* specifically prohibiting the bulk removal of transboundary waters from the Canadian portion of the water basins that would now be included in Schedule 2 to that Act.

3 COMMENTARY

As was the case with Bill C-6, An Act to amend the International Boundary Waters Treaty Act (1st Session, 37th Parliament), Bill C-26 is controversial, and opposed by those who object to any move to allow Canadian water to be sold or otherwise transferred out of Canada. In an article which appeared in the *Ottawa Citizen* on 14 May 2010, the day after Bill C-26 was introduced in the House, Joe Cressy of the Polaris Institute, a research and advocacy organization campaigning against bottled water, was quoted as saying, "Canada will continue to export water in bulk, just in small individual containers instead of giant containers … . The bill is a first step but it doesn't go far enough." The article noted that the group argues that a loophole is found in the definition of "bulk removal" as covering amounts exceeding 50,000 L per day, and the exemption for bottled water and beverages.[7]

In a news release dated 17 May 2010, the Council of Canadians expressed its concerns about Bill C-26. Council of Canadians National Chairperson Maude Barlow stated, "Canada needs a comprehensive national water policy that bans all water exports, excludes water from NAFTA [North American Free Trade Agreement] and recognizes water as a public trust in order to truly address competing commercial and public interests."[8]

On 31 May 2010, the Canadian Water Issues Council (CWIC)[9] wrote to the Honourable Lawrence Cannon, Minister of Foreign Affairs, expressing its concerns about Bill C-26 and suggesting how those concerns could be addressed by amendments to the bill. Its concerns are twofold. First, CWIC notes that while Bill C-26 prohibits most bulk removals from transboundary waters, it does not address "the most plausible threat to Canadian water resources from interbasin transfers." The Council notes that "[a]s a practical matter, it seems highly unlikely that Canadian water resources would be threatened significantly by proposals to *remove* waters from a transboundary basin within Canada … the more likely scenario would be the transfer of Canadian waters from a basin that is neither a boundary or transboundary water *into* a transboundary river flowing from Canada into the United States for export to the United States." Such proposals would not be prohibited under the legislation as amended by Bill C-26. Second, CWIC argues that the definition of transboundary waters in the bill "is narrow and refers only to waters flowing in their *natural* channels across the border. It does not include other means of accomplishing interbasin transfers across the international border – for example, a *pipeline* or *canal* from waters that are neither boundary waters nor transboundary waters." In its letter, CWIC proposes a couple of amendments to the bill that it maintains would address both of the concerns outlined above.[10]

NOTES

1. Bill C-6, An Act to amend the International Boundary Waters Treaty Act (1st Session, 37th Parliament) received Royal Assent on 18 December 2001 and became S.C. 2001, c. 40. For more information about the bill, see David Johansen, *Bill C-6: An Act to amend the International Boundary Waters Treaty Act*, LS-383E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 4 February 2002.

2. Foreign Affairs and International Trade Canada, "Minister Cannon Tables the Transboundary Waters Protection Act to Protect Canadian Waters," News release, 13 May 2010.

3. Bill C-16, An Act to amend certain Acts that relate to the environment and to enact provisions respecting the enforcement of certain Acts that relate to the environment (short title: Environmental Enforcement Act) (2nd Session, 40th Parliament) received Royal Assent on 18 June 2009 and became S.C. 2009, c. 14. For more information, see Penny Becklumb, *Bill C-16: Environmental Enforcement Act*, LS-636E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 19 June 2009.

4. Foreign Affairs and International Trade Canada (2010).

5. An "ex parte" application is one that is made for the benefit of only one party.

6. A small revenue corporation is defined in proposed section 29 for the purposes of proposed sections 24 and 25 to generally be a corporation for which the court is satisfied that its annual gross revenues are $5 million or less.

7. Juliet O'Neil, "Cross-border water plan won't plug leaks, critics say," *Ottawa Citizen*, 14 May 2010, p. A6.

8. Council of Canadians, "Council of Canadians warns of loopholes in new federal water legislation," News release, 17 May 2010.

9. **The Canadian Water Issues Council (CWIC) is a group of knowledgeable water experts and former senior water policy-makers who provide advice on transboundary water issues to the Program on Water Issues at the University of Toronto's Munk School of Global Affairs. In February 2008, CWIC released a Model Act for Preserving Canada's Waters which suggested one approach for prohibiting bulk removal of water. See Munk School of Global Affairs, *The Program on Water Issues* website, Reports, Research and Workshops, "A Model Act for Preserving Canada's Waters."**

10. **A copy of CWIC's letter to the Minister of Foreign Affairs appears on the website of the Program on Water Issues, Munk School of Global Affairs, University of Toronto.**