Water Grab #1 City of Toronto's Plans for a Water Board Pose Significant Trade Risks

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Executive Summary:

This first in a series of three Case Studies by the Canadian Institute for Environmental Law and Policy (CIELAP) examines the current NAFTA and the expected GATS obligations and dispute settlement mechanisms should the City of Toronto council vote to change the governance structure of the present Department of Water and Wastewater Services into the Toronto Water Board, a Municipal Service. The focus is on trade obligations concerning public monopolies, free trade in services and investor state disputes. The second Case Study builds upon the first but the focus is on the constitutional aspects, including the public trust doctrine, of two Bills pending before the Ontario legislature concerning the Safe Drinking Water Act (Bill 195) and the Sustainable Water and Sewer Act (Bill 175). The third paper in the series examines the water resource and quality standards required in any event.

The third paper recalls Justice O'Connor's recommendations from the Walkerton Inquiry which emphasized that all of them were premised on the continued public ownership of local water systems. Indeed, the case has yet to be made by governments that the risk involved with the restructuring or privatization of water supplies and services is in any way in the public interest. The rationale to both the provincial Bills and the City of Toronto's plans for a Toronto Water Board would benefit from further examination and public debate, perhaps during the upcoming local and provincial elections. Given the irrevocable governance consequences that could flow from hasty decision-making and the lack of a clear public mandate to proceed, the series concludes that the public interest is best served by retaining public ownership and control of water resources as well as the related water works system and services.

Having reviewed the October 21st Chief Administrator's Office Staff Report on "The Establishment of the Toronto Water Board", this first Case Study examines the current NAFTA and the expected GATS obligations should the City of Toronto council vote to change the governance structure of the present Department of Water and Wastewater Services into a Municipal Service Board, to be called the Toronto Water Board (TWB). The Staff Report recommends: that control of the Department of Water and Wastewater Services be given to an appointed Municipal Services Board; that City Council maintain the right to set the water rate and the budget for the new Board; and that the City continues to be the employer of the water and wastewater workforce. Despite the Staff Report's acknowledgement of uncertainty about the trade implications of the various governance structures proposed, it recommends removing these services from an in-house Department to a third party Municipal Service Board, pursuant authorizing provincial legislation, the Municipal Act (2001).

Based upon earlier CIELAP submissions, the Staff did obtain a legal opinion from the City Solicitor on the trade implications should Council approve this significant governance change to the City's water system. While this opinion was helpful in identifying the issues, unfortunately it is based upon an underlying assumption that water services would continue to be provided completely within the public sector. Given the most current description of the Staff proposal that is reviewed below, it is understandable

how that opinion might have come to the incorrect conclusion that no trade obligations would be triggered by the establishment of the TWB.

The purpose of this first in a series of Case Studies is to compare the October 21st City of Toronto proposal that would permit the Board to purchase new and additional services, including water extraction, from outside of the public sector with the current and emerging trade and investment obligations that could be triggered by this significant governance change. We recommend that the City of Toronto's decision to restructure be delayed until after the City Solicitor reexamines the trade implications, based upon the description of the proposed powers of the TBW in the October 21st proposal and the public accountability gap and trade concerns are adequately addressed, with new public consultations, and with due regard to the public and national interests at stake.

Having conducted our review of the new TWB proposal with current trade obligations, our main findings are as follows:

- It would be prudent to conduct a new trade review, subject to peer review and public consultations, based upon the October 21st Staff Report that contemplates the Toronto Water board entering into 20 year contracts and leases with the private sector for the provision of water and wastewater services, including the extraction of water from Lake Ontario, prior to the Council taking a decision on governance that would be difficult and costly to reverse.

- While the TWB might still be considered to be within the public sector, according to NAFTA Chapter 15 (Competition Policy, Monopolies and State Enterprises), trade obligations are triggered as soon as a government "designates" a new public monopoly service. Presumably this governance change also includes the "redesignation" of a service from a Department of Water to a municipal service board such as the proposed TWB.

- A new public monopoly under NAFTA Chapter 15 must operate based on commercial considerations alone in the supply of services, and provide non-discriminatory treatment to all NAFTA service providers and investors, while the current, directly accountable to Council Water Department is able to require the best level of service at an affordable price, the best laboratories to detect new pathogens, and the best training for its workers. A redesignation locks in a business-orientated, strictly commercial approach that does not necessarily address wider public interests.

- NAFTA's Chapter 11 ("Investment, Services and Related Matters") specifically links obligations under Chapter 15 and Chapter 12 (Services) with a powerful investor-led dispute settlement mechanism. These rights and claims are only available to foreign-service providers and investors and not domestic corporations. NAFTA investor disputes do not take place in an open court but rather behind closed doors away from public and media oversight.

- NAFTA agreements would allow direct foreign investor disputes about how any new public monopoly operates, as well as about what level of environmental and public health standards are acceptable or requiring financial compensation.

- Under NAFTA Chapter 11, investors can sue governments if a future environmental regulation on water quality standards, set by City Council for example, reduces the profit the investor anticipated. The current Methanex dispute by a Canadian corporation against the State of California for banning the gas additive MTBE because it contaminates water supplies is a case in point. The expropriation claim is for billions of dollars.

- Current Canadian reservations from NAFTA free trade in service and investment obligations risk being lost once a particular public service, such as water services, is supplied in whole or in part by a private firm, even if it was provided on a not-for-profit, i.e., non-commercial, basis.

- It is unlikely that government and corporate partnerships or concession agreements can contract out of NAFTA or the domestic legislation that implements these trade obligations. These contracts are governed not only by the rules of domestic contract law, but also by international treaties.

- The general exception to trade obligations for government standards and measures related to the conservation of exhaustible natural resources found in the 1947 GATT has been removed from the NAFTA and GATS agreements. Therefore, government regulation of services to conserve water supplies would not likely be protected and would in any event be subject to state-to-state disputes from over 144 member states of the GATS.

- Given the GATS limited exception for services provided under "government authority", and without the benefit of a "conservation of exhaustible natural resources" exception, a host of government measures - including robust drinking water quality testing, stream habitat protection and water export controls - would have no safeguard whatsoever from trade and investment disputes at a trade forum. This would create a creating a "chilling effect" on otherwise responsive elected officials to the public interest.

- Absent provision otherwise, the necessity for government measures, the adequacy of afforded due notice and process and the rationale for deviations from lower international standards or for determinations of non-equivalency all become disputable under the GATS. Even non-discriminatory domestic regulations could be challenged unless they are no more "burdensome than necessary".

- Despite the purported trade and investor-rights constraints, the International Joint Commission (IJC) recognizes that the waters of the Great Lakes are, for the most part, a non-renewable resource. The waters and water quality of the Great Lakes are already suffering from climate change impacts.

- Water is the subject of human rights and a possible public trust. The 1867 Constitution Act recognizes that the provinces hold non-renewable resources subject to any Trusts, putting into doubt the constitutional authority of a province or local government to transfer the effective ownership and control of local water works and systems and thus in fact actual public access to and use of the water resource to the private sector. Clear legislative intent would likely be required to exhaust such a public trust.

- As responsibility moves from a directly elected governance system to a third party water utility board, commission or corporation, without provision otherwise, the opportunity to ensure timely public access to information and public accountability diminishes accordingly. It would also be contrary to the public interest to diminish rather than to enhance public accountability in any governance change.

In short, the likely and significant trade and investment consequences that are triggered by a hasty and ill-considered governance change to the City's Water Department are contrary to the public interest and the environmental protection mandate of governments. Given the tragedy in Walkerton, the Hamilton experience with private operators, and the fact that NAFTA and at least 144 foreign service providers and investors could compete for Toronto's water service operations at the lowest possible level of environmental and public health protection, it is incumbent upon City Staff and Council to undertake a thorough analysis of the trade and investment implications of restructuring Toronto's water service system based upon the latest October 21st Staff Report, ***before Council takes a decision to restructure.***

Indeed, it was the threat that NAFTA could limit the region's ability to set water standards that caused the Greater Vancouver District Water Board to reject a June 2001 plan to allow a public-private partnership to design, build and operate a $117 million filtration plant. Moreover, given the anticipated governance changes at the provincial level to local water systems, the public interest is best served by more not less local control over exhaustible water supplies and services.

Based upon the risks that the Walkerton tragedy made clear and almost ten years of experience with NAFTA investor-state disputes, our preliminary findings indicate serious public interests' about the most precious of all exhaustible natural resources - water -are at stake both at the City and provincial levels, requiring more public accountability, not less.

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1.0 Introduction

This first in a series of three Case Studies examines the current NAFTA and the expected GATS obligations should the City of Toronto council vote to change the governance structure of the present Department of Water and Wastewater Services into the Toronto Water Board, a Municipal Service. The focus is on trade obligations concerning public monopolies, free trade in services and investor state disputes. The second Case Study builds upon the first but the focus is on the constitutional aspects, including the public trust doctrine, of two Bills pending before the Ontario legislature concerning the Safe Drinking Water Act (Bill 195) and the Sustainable Water and Sewer Act (Bill 175). The third and final Case Study in the series examines what water resource and quality standards might apply, in any event.

Having reviewed the October 21st Chief Administrator's Office Staff Report on "The Establishment of the Toronto Water Board",[1] this Case Study examines the current NAFTA and the expected GATS obligations should the City of Toronto council vote to establish a Toronto Water Board (TWB). The Staff Report recommends: that control of the Department of Water and Wastewater Services be given to an appointed Municipal Services Board; that City Council maintain the right to set the water rate and the budget for the new Board; and that the City continues to be the employer of the water and wastewater workforce. Despite the Report's acknowledgement of uncertainty about the trade implications of the various governance structures proposed, it recommends removing these services from an in-house Department to a third party TWB, pursuant to the Municipal Act (2001).

Based upon earlier CIELAP submissions, the Staff did obtain a legal opinion from the City Solicitor on the trade implications should Council approve this significant governance change to the City's water system.[2] While this opinion is helpful in identifying the issues, unfortunately it is based upon an underlying assumption that water services would continue to be provided completely within the public sector. Given the most current description of the Staff proposal that is reviewed below it is understandable how it might have come to the incorrect conclusion that no trade obligations would be triggered by the establishment of the TWB.

The purpose of this first in a series of Case Studies is to compare the October 21st City of Toronto proposal that would permit the Board to purchase new and additional services, including water extraction, from outside of the public sector with the current and emerging trade and investment obligations that could be triggered by this significant governance change.

[1] For October 21st CAO Staff Report, see www.city.toronto.on.ca/involved/utilitystudy. Please note this study builds upon an earlier Staff Report dated May 31st, 2002 and also posted at that link.
[2] Toronto Staff Report, October 18th, 2002, "The Application of GATS and NAFTA to the Implementation of a Water and Wastewater Municipal Service Board", City Solicitor, ibid, Appendix 5, as reviewed by Torys LLP, in an opinion dated October 10, 2002, ibid Appendix 6.

In short, we find that the likely and significant trade and investment consequences that are triggered by a hasty and ill - considered governance change to the City's W&WW Department are contrary to the public interest and the environmental protection mandate of governments. Given the tragedy in Walkerton, the Hamilton experience with private operators, and the fact that NAFTA and at least 144 foreign service providers and investors could compete for Toronto W&WW service operations at the lowest possible level of environmental and public health protection, it is incumbent upon City Staff and Council to undertake a through analysis of the trade and investment implications of restructuring Toronto's water service system based upon the latest October 21st Staff Report, ***before Council takes a decision to restructure.***

Indeed, it was the threat that NAFTA could limit the region's ability to set water standards that caused the Greater Vancouver District Water Board to reject a June 2001 plan to allow a public-private partnership to design, build and operate a $117 million filtration plant. Moreover, given the anticipated governance changes at the provincial level to local water systems, the public interest is best served by more, not less, local control over water supplies and services.

Based upon the risks as the Walkerton tragedy made clear and almost ten years of experience with NAFTA investor-state disputes, our preliminary findings indicate serious public interests' about the most precious of all exhaustible natural resources - water - are at stake both at the City and provincial levels, requiring more public accountability, not less. We recommend that the City of Toronto's decision to restructure be delayed until after the City Solicitor reexamines the trade implications, based upon the description of the proposed powers of the TBW in the October 21st proposal and the public accountability gap and trade concerns are adequately addressed, with new public consultations, and with due regard to the public and national interests at stake.

2.0 Background

Currently Water and Wastewater Services is a division of the Toronto Works and Emergency Services Department, supplying 2.5 million Toronto residences and businesses. It collects and treats all wastewater, both sewage and stormwater, supplying wholesale water supplies to York Region. According to a City October 22, 2002 Backgrounder, "A change in governance will not affect the operations of water or waste water services or the quality of Toronto's drinking water". Moreover it is claimed that with a Council appointed Toronto Water Board "water assets and water services will continue to be owned by the City".[3]

But recall that unlike the current City of Toronto governance model with a directly accountable to Council W&WW Department, in Walkerton, Ontario there was a Public Utility Commission (PUC) in place that was appointed as a third party body by the City Council. Following the Walkerton tragedy, Justice O'Connor found in the Walkerton Inquiry that the PUC commissioners were not aware of the improper treatment and

[3] City of Toronto Water Board, Backgrounder, October 22, 2002, supra fn.1; 3.

monitoring practices of the PUC operators. In addition, the commissioners had failed to properly respond to a Ministry of Environment inspection report that set out significant concerns about water quality and that identified several operating deficiencies at the PUC.[4] Indeed as responsibility moves from a directly elected system of W&WW to a third party utility commission or corporation, without provision made otherwise, the opportunity to ensure timely access to information and public accountability diminishes. It would be contrary to the public interest to diminish rather than to enhance public accountability in any City governance change.

In addition to the October 21st Staff Report outlining the proposal for the TWD, a draft Directive to the Board was attached to the Report as Appendix 2, prescribing the relationship of the TWB to the City of Toronto, including policy objectives and reporting requirements as a conditions of its establishment. The Board must act in compliance with the Direction and Council is to approve the TWB Transition Workplan, including the preparation of the TWB Procedural, Financial Control and Purchasing By-laws for presentation to the Board, "the context of the requirements of Provincial Bill 175 (the Sustainable Water and Sewage Systems Act, 2002)".[5]

While the Staff Report contemplates that " The City continues to own the assets, which are held in trust by the board"[6], Provincial Bill 195 (the Safe Drinking Water Act, 2002) anticipates that municipalities may wish to transfer ownership of the local water system to the private sector.[7] While the TBW would continue to be the employer of the water and wastewater workforce, according to the Staff Report, "other administrative practices such as the City's purchasing procedures, may be streamlined to better suit the capital-intensive business needs of water and wastewater services. By delegating operational authority to the TWB, Council will provide the incentive for strong business principles to guide the organization."[8]

The draft Directive to the Board outlines those operational areas where authority will be delegated to the TWB Board, and notes the limitations, if any, on the delegation. Essentially, all operational decisions will be delegated, including the authority of the TWB to enter into contracts and leases for up to twenty years, without Council approval. The TWB will have authority to award contracts under its own Purchasing By-law. Page nine of the Staff Report confirms that the Water and Wastewater Services Division currently purchases all of its support services from other divisions and departments across the City. The new TWB may, however, through its own business-planning exercises,

[4] See Walkerton Inquiry 2 Summary, http://www.cielap.org/walkerton2.pdf, p. 323: " Given that municipal responsibility and accountability flow from municipal ownership, I see no advantage for safety reasons to turning over ownership of municipal water systemsto either the provincial government or to the private sector. Changes in the ownership regime for water systems would raise a number of significant issues in relation to the recommendations in this report. I have premised many recommendations on continued municipal ownership of water systems".
[5] Draft TWB Directive, Appendix 2, supra fn.1
[6] Staff Report, supra fn 1, p7.
[7] Bill 195, section 47.
[8] Staff Report, supra fn,1 p. 7.

determine that some of these services could be improved through the development of its own in-house capacity or "purchased elsewhere".

As to the issue of public control and ownership, the Staff Report assures that "Council is on record as opposing any sale or divestiture of water assets or services. Water assets and services will continue to be owned by the City, operated through a local board of the City". Yet according to the draft By-Law, Appendix 1 of the Staff Report, the TBW would have delegated authority to control and manage " The extraction, treatment, and distribution of Lake Ontario water to provide potable water at the retail level to Toronto customers and at the wholesale level to York Region"[9] and " The entering into contracts with a term of not greater than twenty (20) years".[10]

It should be noted that Council approval is required, however, before the TWB undertakes "The selling, leasing or other disposition of the whole of the water or wastewater services or all or part of the real or personal property related to those services".[11] By setting out how the TWB might sell Toronto water assets, the draft By-law appears to contradict the claim in the Media Backgrounder and Staff Report that all public assets will remain within public control. The creditability of the conclusion that all water services will continue to be provided by the public sector given the authority delegated to the TWB to enter into 20 year contacts to purchase services elsewhere, including for the extraction of water supplies by the private sector from Lake Ontario is in doubt.

As to the time frame, again according to the Staff report, the creation of the TWB, and the appointment of its first board, should take place as soon as possible after Council approval of the report, with an accelerated appointment process to ensure that the board members are selected no later than April 2003. Given the complexity of the service area and the enormity of the issues it faces, it is recommended by Staff that the selected board members undertake a three-month orientation period before the Board's formal establishment in July 2003. This is a very short time period for a thoughtful consideration of the public interests at stake when the private sector obtains acquired rights to invest in water assets and deliver water services.

As to the issue of the threat of possible exposure under international trade agreements, the Staff report recognized fear was expressed that establishing a service board would trigger commitments that Canada has made under two international trade agreements, NAFTA and GATS, thereby limiting the City's ability to retain full public control over its water and wastewater services. Staff research concluded that the implementation of a municipal service board for water and wastewater services does not create a situation that is any more or less vulnerable to the applications of the GATS or NAFTA than maintaining the status quo. The City Solicitor prepared a separate report on this matter, supported by a concurring opinion from an external law firm with extensive experience and expertise in international trade law.

[9] Draft By Law, Appendix 1, section 12(A)(1), supra fn 1.
[10] Draft By-Law, section 12 (A)(14)
[11] Draft By-Law, section 12 (B)(4).

It must be observed that both of these opinions were based upon a governance change where all current water assets and services would continue to be held by and provided with in the public sector, contrary to the description of the project as outlined in the October 21st Staff Report and draft By-Law and Directive, as reviewed above. Moreover, both opinions failed to consider the most relevant Chapter of NAFTA, Chapter 15 on the designation of public monopolies, reviewed below.

As to the issue of public accountability, currently the operations and the process governing the W&WW are required by law to be open and transparent. All meetings, decisions and policies must be open to the public. All information is available to the public through the Municipal Freedom and Information and Privacy Act (MFIPPA). While the Staff Report maintains that the TWB would continue to be covered by the MFIPPA and that meetings would be open to the public, the draft By-Law outlines that "All meetings of the TWB shall be open to the public except where a meeting may be closed to the public by the Municipal Act". [12] This governance option would not appear to meet the same measure of openness and transparency as is currently enjoyed.

As a final matter of background, it should be noted that the draft Directive set out the following objectives and principles for the TWB to observe: The TWB is integral to the health, safety and well being of the residents of the City. The City directs that, in the best interests of TWB and the community of stakeholders whom TWB affects, all members of the Board shall cause TWB to conduct its affairs: with its first consideration, above all others, being the protection of public health and safety through the provision of quality water and wastewater services and in compliance with all applicable laws. Having set out the claims and the facts as known, this case study now turns for a consideration of the apparent trade impacts that should proceed the day after the City Council votes to replace the current Water Department with a third party Toronto Water Board.

2.1 International Trade Implications

Changing the governance structure of the W&WW has tremendous trade implications that could be triggered the day Council makes a decision to establish the Toronto Water Board as a municipal service board under provincial authorizing legislation, the Municipal Act. The May 31st, 2002 Staff Report recalled a Council Motion in October 2001 that called upon the federal government to exclude local governments from the General Agreement on Trade in Services (GATS) because the move to global competition in government procurement of goods and services "may have the effect of limiting the ability of Council to enact the policies and regulations it desires". While the Report indicated the "possibility that any Toronto services or regulations could be challenged under GATS cannot be dismissed with certainty", a review by CAO staff "revealed no indication in the provisions of whether NAFTA or GATS that the structure

[12] Draft By-Law, section 9.

of governance under which the City maintains a service has any bearing on the degree of vulnerability which may be experienced". [13]

As indicated above the City Solicitor as well as an external review (The Tory Opinion) also considered the application of NAFTA and the GATS to the May 31st CAO Staff Report describing the purposed governance structure of the TWB based upon the view that the monopoly services provided by the TWB will continue in the same way as the current Department of Water. For example the City Solicitor maintains that NAFTA Chapter 11 investor – state the establishment of the TWB will not trigger disputes because "The proposal to implement a municipal service board for the delivery of water and wastewater services does not involve contracting with a private sector party".[14] Yet from the review of the October 21st Staff Report, the draft By-law and draft Directive above, the authority of the TWB to enter into 20 year contracts and leases for services "provided elsewhere", that is outside of the City's public sector, is clear. The establishment of a new public monopoly service board that contracts out to the private sector is different from the current City Department of Water directed by the Council.

It is submitted that specific NAFTA provisions are likely triggered if Council decides to designate the new TWB. The hope of those who advocate for private sector participation or other partnerships in the provision of essential public services is that cleverly drafted concession contracts with private operators will avoid trade obligations and the Canadian domestic legislation that implements these requirements. Our research indicates that this hope is unsubstantiated. With respect, would it not be more prudent to conduct a trade review of a governance change that honestly contemplates the transfer of both public water assets and services to the private sector first, subject to peer review and public consultations, prior to taking a decision that would be difficult and costly to reverse? Given that international investors could sue for financial compensation under NAFTA's Chapter 11 for failed profit expectations should Council later determine not to proceed with external restructuring or to later increase water-related standards, Council should proceed with extreme caution given the exhaustible nature of this public resource.

2.1.1 Water is an Exhaustible Resource

Despite the purported trade and investment constraints, the International Joint Commission (IJC) recognizes that the waters of the Great Lakes are, for the most part, a non-renewable resource.[15] They are composed of numerous aquifers (groundwater) that have filled with water over the centuries, waters that flow in the tributaries of the Great Lakes, and waters that fill the lakes themselves. Although the total volume in the lakes is vast, the IJC states that on average less than one percent of the waters of the Great Lakes —approximately 613 billion liters per day is reported to be renewed annually by precipitation, surface water runoff, and inflow from groundwater sources.

[13] Staff Report, supra fn. 1, p. 3.
[14] City Solicitor Opinion, October 18, 2002, p 3, supra fn.2.
[15] IJC, Protection of the Waters of the Great Lakes (Final Report), 2000, Section 2, p.6 for reference to Levels Reference Study Board (1993) Levels Reference Study, Great Lakes- St. Lawrence River basin, submitted to IJC, March 31, 1993, see www.ijc.org.

The one percent renewable value is declining. Based on findings from the Canadian Centre for Climate Modeling and Analysis[16], by 2030 the renewable portion will decline to 4/5 percent, and by 2050 it will further decline to 3/4 percent. Thus if water is a renewable resource, it is only to the extent that the base water levels and quality, the natural capital, remain constant in the region.

Current climate change impact assessments, based on equilibrium 2 x CO2 scenarios, suggest that global warming will result in a lowering of water supplies and lake levels and in a reduction of outflows from the Basin. Based on projections using several state-of-the-art models[17], experts from the U.S. National Oceanic and Atmospheric Administration (NOAA) and Environment Canada believe that global warming could result in a lowering of lake level by up to 70 centimeters or 2.2 feet by 2030. This development would cause severe economic, environmental, and social impacts throughout the Great Lakes region. Such impacts include losses in hydroelectricity power generation, reduced shipping, increased dredging, flood damage, infrastructure declines (e.g. docking facilities, shoreline properties) and risks to human health[18]. Existing regulation plans for the Great Lakes are not designed for these climate change scenarios with low net basin supplies and connecting channel flows or within stream flow decreases of up to 50 percent.[19]

The decrease in lake levels will vary with location. By 2030 Lake Ontario levels decline by up to 1.30 meters, causing a dramatic decrease in water availability. By 2030 water levels in the freshwater portion of the St. Lawrence River may decrease by one meter (3.3 feet), representing a 23 percent reduction in mean flow. A decrease in water quality is expected because of the resurfacing and dredging of buried contaminated sediments, with less water available for dilution of toxic substances.

Given the need to adapt to climate change induced low water levels and reduced water quality, would not the public interest be best served if water resources, supplies and services remain clearly within the public sector?

2.1.2 Water and Sustainable Water Management as a Public Trust

Council is advised to proceed with great caution in contemplating any governance changes to the W&WW Department, not only because water is an essential and exhaustible natural resource, but also because water is subject to human rights and a possible public trust. The debate over whether access to safe drinking water is a human

[16] Environment Canada, see Christine Elwell, "NAFTA Effects on Water", prepared for the Commission for Environmental Cooperation, www.sierraclub.ca/nationa, and Toledo Journal of Great Lakes' Law, Science and Policy, Legal Institute of the Great Lakes, Vol 3:151, Spring 2001, p. 161-162.

[17] L. Mortsch 2000, Climate Change Impacts on Hydrology, Water Resource Management and the People of the Great Lakes – St. Lawrence system, Canadian Water Resources Journal, 25 (2)

[18] Environment Canada, Canada Country Study, Climate Change Impacts,Vol V11, p. 4: Extreme hydrological events, such as floods and intense rainfall may cause overflows of storm and sewage sewers leading to the contamination of drinking water (eg crytosporidium). Excessive precipitation creates breeding sites for insects and rodents that carry diseases.

[19] Environment Canada, Canada Country Study, Climate Change Impacts, Vol V11, p. 72 and 76.

right or a "need" subject to market forces of supply and demand flared up at the 2000 Hague Ministerial on Water Security in the 21st Century. A report of the UN Sub-Commission on the Promotion and Protection of Human Rights agreed that access to water is a human right and that an absence or insufficiency of drinking water threatens the maintenance of international peace and security. Many current conflicts are due to the lack of drinking water, and more conflicts could erupt.[20]

In addition to a human rights dialogue, there is also the public trust aspect; an important legal tradition that has aided civil societies for over a thousand years in promoting practical divisions between public and private ownership. From the time of the codification of law in the Roman Empire (Justinian Institutes, Mid-Sixth Century), certain resources have been treated as so important to civic society that the exercise of private property rights cannot be allowed to interfere with public access and use. These resources belong to the public but are held in trust by the sovereign for specific purposes. Over time, it has been learned that there must be very strict limits on the sovereign or these resources might be sold for private gain.[21] Indeed, modern courts have found the public trust doctrine to be pivotal in several water development cases.[22]

2.1.3 The Canadian Constitutional Context

It must be recognized that the environment is not an independent matter of legislation under the Constitution Act, 1867 and that it is a constitutionally abstruse matter that does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.[23] However, Section 92A of the Constitution Act 1982, provides the provinces with exclusive jurisdiction over the development, conservation, and management of non-renewable resources. Four powers set out in section 92 of the 1982 Constitution provide the provinces with broad jurisdiction over drinking water safety: local works and undertakings (s. 92(10)); property and civil rights in the province (s.92 (13)); matters of a local or private nature (s. 92(16)); and municipal institutions in the province (s.92 (8)).

Prior to the 1982 powers in section 92A, however, the earlier 1867 Constitution Act recognized provincial jurisdiction over exhaustible natural resources but subject to certain limitations:

> Section 109: All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or

[20] Financial Times, Friday, August 25, 2000, WTO PROTESTS TO UN OVER 'NIGHTMARE' REPORT The UN Sub-Committee report also described the WTO as a "nightmare" for poor countries as fewer people stood to gain from current trends of globalization.

[21] For further discussion and references see, Elwell, NAFTA Effects on Water, supra, fn. 16, p. 190.

[22] See Water Grag #2 Province of Ontario's plans to Privatize local water systems: A breach of the Public Trust? (forthcoming) CIELAP, 2002.

[23] See R. Foerster, 2002, "Constitutional jurisdiction over the safety of drinking water," Walkerton Inquiry Commissioned Paper 2, pp. 3–14, in Walkerton Inquiry: A Summary and A Response, CIELAP, 2002, www.cielap.org/whatsnew.

> Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. (emphasis added)

Note also that shared jurisdiction in these areas is emphasized by section 36 of the Constitution Act, 1982, which commits both levels of government to provide essential public services of measurable quality to all Canadians

It would be useful to conduct a full constitutional analysis of whether the 1867 Constitution Act recognizes that the provinces hold non-renewable resources, such as water, in trust on behalf of the public and First Nations, and, if so, whether a province has the constitutional authority to transfer water assets and otherwise delegate decision-making and operations to the private sector over public access to and the use of exhaustible water resources. A preliminary analysis will be provided in the second Case Study in this series but focused on current provincial bills 175 and 195.

3.0 Current NAFTA Obligations

While most of the debate in Canada has been over bulk water exports and whether or not water as a good is covered by trade obligations, there is no doubt that water as a service and as an investment is likely caught by current obligations under NAFTA and emerging obligations under the WTO's General Agreement on Trade in Services (GATS). The Tory Opinion suggested that water services per se are not clearly committed today under the GATS for liberalization, but it did conceded that these services are covered under NAFTA[24]. The International Joint Commission also agrees that the investor-state dispute mechanism under NAFTA Chapter 11 applies to water disputes, giving private investors of one NAFTA country the right to commence proceedings against another NAFTA country for injuries to the rights accorded private investors under the agreement.[25] In all other disputes, a government Party to the agreement, often on behalf of their national corporations, may bring claims under the WTO agreements or the NAFTA.

In this Case Study, only certain trade obligations will be highlighted in order to stress that a thorough study of trade implications is required ***before Council makes a decision to restructure the W&WW Department.*** The focus below is on trade obligations concerning public monopolies, free trade in services and investor state disputes. This review does not deal with NAFTA/GATT/GATS technical barriers to trade, subsidies, intellectual property rights or financial services that would otherwise be relevant subjects for a complete trade review and Sustainability Impact Assessment.[26]

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[24] Tory Opinion, supra fn,2, p. 6.
[25] IJC Final Report, supra fn.15, Section 10, see Elwell, NAFTA Effects on Water, supra fn 16, p. 176-180.
[26] See Christine Elwell, Sustainability Impact Assessment of RIO @ 10 years, www.cielap.org/whatsnew, 2002, CIELAP.

An Extent of NAFTA Obligations – Cities are covered

Unless otherwise exempt, most NAFTA and WTO disciplines apply to federal, provincial and local government measures. While challenges or claims can only be made against the federal government, it is obliged under NAFTA Article 105 to "ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments".[27] Express trade obligations are directed at public monopolies.

3.1 Chapter 15: Competition Policy, State Monopolies and Enterprises

Up until now, NAFTA Chapter 15, dealing with competition policy and economic regulation of the marketplace, has remained one of the least developed under the NAFTA regime. When governments engage in anti-competitive practices, it is often to protect the wider public interest through the use of public monopolies to provide public services and subsidies. The basic obligation in Article 1501 is that the Parties will identify anti-competitive business conduct and take appropriate action. The failure to meet this government obligation is not the subject for disputes under this Chapter. Rather, as reviewed below, disputes over the competitive practices of state monopolies are to be conducted by private investors under Chapter 11 as an investor-state dispute.

Chapter 15 sets out disciplines to ensure that any privately owned or government monopoly designated or maintained by the government acts in a manner consistent with NAFTA requirements in the exercise of any regulatory, administrative or other government authority delegated to it. These NAFTA-induced rule changes have increased citizen concerns about the commodification and privatization of water and water services. The NAFTA model of public works, should it persist, is based on state enterprises operating on commercial considerations alone rather than on the basis of sustainable water management with a focus on public health and environmental protection.

3.1.1 Designation of Public Monopolies Trigger NAFTA

Currently under Chapter 15, when a government "designates" a monopoly service - which could include the "redesignation" of that service from a Department W &WW to a municipal service board, commission or corporation - a number of important obligations are triggered. Webster's dictionary defines the word "designates" as: 1. To indicate or specify; point out. 2. To give a name or title to; characterize. 3. To select and set aside for a duty, an office, or a purpose.[28] A Council decision taken on such short notice to

[27] NAFTA, Dec. 1992, 33 ILM 649-680 and see Christine Elwell, "NAFTA Law and Institution: Case Book", Queen's University Faculty of Law, www.queensu.ca/law/texts, 1999, Part B.

[28] The American Heritage® Dictionary of the English Language, Fourth Edition Copyright © 2000 by Houghton Mifflin Company. 1. To mark out and make known; to point out; to name; to indicate; to show; to distinguish by marks or description; to specify; as, to designate the boundaries of a country; to designate the rioters who are to be arrested. 2. To call by a distinctive title; to name. 3. To indicate or set apart for a purpose or duty; -- with to or for; to designate an officer for or to the command of a post or station, Source: Webster's Revised Unabridged Dictionary, © 1996, 1998 MICRA, Inc.

designate a Toronto Water Board to deal with water and wastewater services is likely subject to NAFTA obligations and direct investor disputes, including the regulation by which the new public monopoly would operate.

The most important trade obligations that are triggered when this designation of a state enterprise or public monopoly occurs include: that the entity "act solely in accordance with commercial consideration in the purchase and sale of the monopoly good or service" (Article 1502.3)[29], that it must afford national treatment to and that it must not discriminate against NAFTA service providers (Article 1503.3)[30] and NAFTA investors (Article 1116.1.b). A "State Enterprise" is defined for Canada as a "Crown corporation within the meaning of the Financial Administration Act (Canada), a Crown corporation within the meaning of any comparable provincial law or equivalent entity that is incorporated under other applicable provincial law".[31] Trade expert Barry Appleton agrees that NAFTA Chapter 15 obligations attach to not only federal but also sub-national entities.[32] Given that the TWB, as a new Municipal Service Board, would be an entity established pursuant to the provincial Municipal Act (2001), it follows that it would also likely be caught by NAFTA obligations.

Neither the City Solicitor nor the Tory Opinion identified NAFTA Chapter 15 as relevant for consideration despite earlier submissions by CIELAP regarding its critical application to governance changes to public monopolies. This significant oversight again speaks to the need to reexamine the trade impacts of the TWB proposal before Council takes a decision.

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[29] **NAFTA Chapter 15 - Competition Policy, Monopolies and State Enterprises**
Article 1502: Monopolies and State Enterprises –1. Nothing in this Agreement shall prevent a Party from designating a monopoly. ..3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates: (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement whenever such monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charge (b) ...acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale; (c) provides non-discriminatory treatment to investments of investors, to goods, and to service providers of another Party in its purchase or sale of the monopoly good or service in the relevant market; and (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiary, or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct. 4. Paragraph 3 shall not apply to the procurement by governmental agencies of a good or service for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or provisions of services for commercial sale (emphasis added).

[30] Article 1503: State Enterprises 1. Nothing in this Agreement shall prevent a Party from maintaining or establishing a state enterprise...3. Each Party shall ensure that any state enterprise that it maintains or establishes accords nondiscriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party.

[31] See NAFTA Annex 1505, Definitions of State Enterprises for the purposes of Article 1503(3).

[32] Barry Appleton, Navigating NAFTA, Carswell Publishing, 1994, p. 115.

3.1.2 No Retreat from the Designation

In addition to the investor claims under NAFTA, GATS obligations also arise should a future Council directive reverse a decision to designate a Municipal Service Board, commission or corporation, assuming water services are or become covered by GATS commitments. Under Article VIII of the GATS (Monopolies) it is provided that where monopoly rights are granted regarding the supply of a service covered by specific commitments, a Member shall submit to arbitration any claims for compensation by other WTO members on behalf of their affected service providers. Failure to comply would justify the imposition of retaliatory trade sanctions. Only where "no affected Members had requested arbitration" would Member be free to re-establish a public sector enterprise without the threat of compensation claims.

A number of observations flow from the potential trade impacts of NAFTA Chapter 15. A restructured Toronto W&WW board, commission or corporation would be limited to commercial considerations in the supply of services, while the current, directly accountable to Council Water Department is able to require the best level of service at an affordable price, the best laboratories to detect new pathogens, and the best training for its workers. A redesignation locks in a business-orientated, strictly commercial approach that does not necessarily address wider public interests. A conclusion that a strictly commercial approach to water supply and services is likely inappropriate for such an essential and non-renewable resource is reinforced when one considers that current GATS negotiations would remove a recognized government exemption from trade disciplines, to regulate for the conservation of exhaustible natural resources (see below). Reversing such decisions will be difficult and costly.

In summary, the NAFTA ethic that state enterprises act solely in accordance with commercial considerations, and do not discriminate against NAFTA investors and service providers remains counterintuitive to the environmental ethic of conservation and the human right to clean and affordable water supplies. The effects of these NAFTA imposed rule changes are compounded by efforts at the global level to negotiate the free trade in water services in the GATS at the WTO.

3.1.3 The Hamilton Experience

Once a redesignation of the W&WW Department occurs, any goods or services offered by that entity become immediately available to bids for supply by all possible NAFTA service providers and investors. We review these obligations next, but to illustrate the extent of the public interest impact, one could consider the situation in Hamilton. Since 1994, the City has gone through four different water and sewage operators. While Hamilton's Council gave the operations contract to a local company, Philip Utility Corporation, by 1999 it was sold to the U.S. Azurix Corporation, a subsidiary of Enron Corporation, which was subsequently sold to American Water Works.[33]. Most recently American Water Works was sold to RWE AG of Essen Germany, the third largest Water

[33] "Water Treatment Plant sold to US company", The Hamilton Spectator, August 7, 2001.

company in the world. [34] During these eight years of operations, over $200,000 in fines were imposed for spills under Ontario's Water Resources Act. Moreover, these spills were cleaned up by public tax dollars. Experience shows how distant and unaccountable private sector participation in this essential service can become.

3.2 Chapter 12 NAFTA Trade in Services

The Services provisions of NAFTA apply to all services unless explicitly exempt or subject to a specific reservation. Unlike the GATS, NAFTA provides no general exclusion for services delivered in the exercise of government authority. Chapter 12 imposes discipline with respect to National Treatment[35], Most Favoured Nation Treatment, Transparency and Market Access as well as non-discriminatory measures. These policies and laws treat domestic and foreign-service providers in precisely in the same manner despite the scale effect on exhaustible resources with multiple market participants. Importantly, the application of general exceptions in the 1947 General Agreement on Tariffs and Trade Agreement Articles XX (b) and (g) – necessary to protect human health and conserve natural resources - are not available to defend government measures that may offend NAFTA services rules.[36]

Canada, Mexico and the US all declared reservations for certain social services under NAFTA. Canada has reserved under Article 1201 "the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care".

3.2.1 Designation Threatens Reservations

Canadian Reservations

In a recent paper by Steven Shrybman, "Thirst for Control" he asks: "Do public water services fall within the parameters of this [NAFTA Services] reservation?" He finds that this would appear unlikely, as the reservation placed by governments to avoid NAFTA obligations fails to mention water, sewage, waste and other environmental services, and that the wording of this reservation suggests that it is exhaustive.[37] However, even if inclusion of water supply and services can be implied, contracting with the private sector to provide a "social service" is likely to remove that service from the reservation.[38]

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[34] "American Water Works purchased by German Utilities Company", Stoney Creek News, Sept. 19, 2001.
[35] Article 1202: National Treatment 1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers. 2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by such state or province to service providers of the Party of it forms a part.
[36] NAFTA Chapter 21 – Exceptions, Article 2101.
[37] Steven Shrybman, Thirst for Control, Sack, Goldblatt and Mitchell, January 2002, p72.
[38] Article 1206: Reservations Articles 1202, 1203 and 1205 do not apply to: (a) any existing non-conforming measure that is maintained by: (i) a Party at the federal level, as described in its Schedule to

The Tory Opinion agrees that the narrow Canadian reservations under Chapter 12 are not likely to extend to water and wastewater services because they do not make specific reference to water or sewage services.[39] It adds: "Although the monopoly system for delivering water and wastewater services does not allow private companies to compete, it does not appear to discriminate between or among NAFTA service providers". Again this conclusion is reached based on the mistaken view that the private sector will not participate in the provision of services, which is not the case under the current October 21st proposal nor does it reflect even current practice that already allows some private sector participation.

For yet another opinion, Shrybman quotes the US view stated by the United States Trade Representative: "The reservation in Annex II U-5 [the US equivalent to Canada's] is intended to cover services which are similar to those provided by a government, such as child care or drug treatment programs. If those services are supplied by a private firm, on a profit or not-for-profit basis, Chapter Eleven (Investment) and Chapter Twelve (Services) apply." Indeed the U.S. may hold that the participation of a private partner would negate the "social services" reservation for that service even if the service was provided on a not-for-profit, i.e. non-commercial, basis.

Provincial Non-Conforming Measures

As we have seen, various reservations excuse compliance with certain provisions of Chapter 11 and 12. Pursuant to these provisions, on January 1, 1996 a sweeping reservation was declared for all non-conforming provincial measures that were in place on January 1, 1994. A non-conforming measure is a law, program or practice that would not otherwise be consistent with NAFTA obligations, such as any laws and public institutions in place to perform express social services.

To be sustained, however, non-conforming measures must be maintained or promptly renewed. Moreover, while amendments to non-conforming measures are allowed, these must not decrease the compliance with the measures under NAFTA service (Article 1206) and investment (Article 1108) disciplines. There is no opportunity under NAFTA to have public services re-established once they are abandoned. Any privatization initiatives, such as those contemplated in a restructured W&WW Department, may undo the application of the exemption for the social service of water supply and services, should this specific exemption exist. A restructuring that changes the current Water Department that provides water-related services into a third party board that contracts out those services in whole or in part to the private sector would appear be such so as to remove the reservations to Chapter 12 obligations. With the reservations lost, all NAFTA

Annex I, (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as described by a Party in its Schedule to Annex I, or (iii) a local government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1202, 1203 and 1205.(emphasis added)

[39] Tory Opinion, supra fn. 2, p. 6.

water service providers and investors would likely be entitled to compete, based upon commercial considerations alone.

3.3 NAFTA Investor-State Disputes Become Available

The access to and use of water is critical to many investments. NAFTA's Chapter 11 ("Investment, Services and Related Matters") specifically links obligations under Chapter 15 (Public Monopolies) and Chapter 12 (Services) with a powerful investor-led dispute settlement mechanism.[40] It must be stressed that these rights and claims are only available to foreign-service providers and investors, and not domestic corporations.

Indeed the City Solicitor concedes that if the TWB were to enter into a contract with a private sector party, that party would be an investor and would thus be able to challenge a government "measure" that infringes its rights under that Chapter.[41] Given that the TBW would have the power to enter into 20 year contracts from outside the City public service for services related to water and wastewater services, then according to this opinion NAFTA Chapter 11 dispute settlement mechanisms would indeed be available about government measures that reduced profit expectations. For example, under NAFTA Chapter 11 foreign investors could sue City Council if a later environmental regulation or By-law on say, higher water quality standards, reduced the profit the investor anticipated.[42] An illustrative parallel case is the current Methanex dispute in which a Canadian corporation is challenging the State of California for announcing a ban of a gas additive (MTBE) because it contaminates surface and groundwater supplies.[43] The amount of the expropriation claim is in the billions of dollars.

These disputes, however, do not take place in open courts, but behind closed doors and away from public and media oversight. If the intent of W&WW restructuring is to save taxpayer dollars, it is incumbent upon the CAO Staff to conduct a cost benefit analysis of potential savings compared to the costs of likely investor disputes in the future should the Council wish to improve standards or reverse a decision on W&WW Department governance changes.

Indeed, it was the threat that NAFTA could limit the region's ability to set water standards that caused the Greater Vancouver District Water Board to reject a plan in June

[40] Article 1116: Claim by an Investor of a Party on Behalf of Itself 1. An investor of a Party may submit to arbitration under this Subchapter a claim that another Party has breached: (a) a provision of Subchapter A; or (b) Article 1502(3)(a) (Monopolies and State Enterprises) or Article 1503(2) (State Enterprises) here the alleged breach pertains to the obligations of Subchapter A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

[41] City Solicitor Opinion, supra fn 2 , p. 3.

[42] Article 1110: Expropriation and Compensation 1. No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and the general principles of treatment provided in Article 1105; and (d) upon payment of compensation (emphasis added).

[43] See details of case at www.naftalaw.com, and by Christine Elwell "NAFTA Effects on Water", www.sierraclub.ca/national, supra fn, 16 p. 188.

2001 that would have allowed a public-private partnership to design, build and operate a $117 million filtration plant. A senior engineering report summarized the situation this way: "No perspective gains in efficiency would be worth any perspective risk of losing control of the water system to multinational corporations using trade treaties for their own private goals".[44] While elected officials are directly accountable to the public, it is unlikely that global corporations will be similarly focused to take into account local water conservation objectives or other public interests such as the human right to clean and affordable water supplies.

3.3.1 No Contracting Out of NAFTA

Some may argue that it is possible with clever contract wording to oust the application of NAFTA Chapter 11 in a partnership agreement or joint venture between a transnational water corporation and a local government. In such a model, the corporation contracts to design, build and operate water plants and delivery systems, usually for several decades, while the government retains public ownership. But by virtue of NAFTA Article 1122 all NAFTA Parties agreed to submit investor claims to international arbitration.[45] Also, through Article 1105, disputes are conducted in accordance with international standards of investment treatment, and not the domestic law of contract or based on domestic competition policy.[46] There is no need for an investor to pursue domestic remedies in domestic courts; indeed the investor must waive their rights to make a claim in a domestic court before it may seek international arbitration.[47]

The implication of this arrangement is that partnership or concession agreements are governed not only by the rules of domestic contract law, but by international investment and services treaties, and in a conflict, the latter prevails. Again according to Steven Shrybman, "This means that when a government enters into a typical P3 contract, it will also be entering into a foreign-investment relationship, whether it appreciates that fact or not."[48] It does not seem likely that a municipality and a private service operator or investor may contract out of NAFTA, nor the domestic legislation that implements it.[49]

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[44] "Trade Pact Deters Privatization Plan", Vancouver Sun, June 21, 2001

[45] Article 1122: Consent to Arbitration 1. Each Party consents to the submission of a claim to arbitration in accordance with the provisions of this Subchapter. 2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration in accordance with the provisions of this Subchapter shall satisfy the requirement of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Center) and the Additional Facility Rules for written consent of the parties; (b) Article II of the New York Convention for an agreement in writing; and (c) Article I of the Inter-American Convention.

[46] Article 1105: Minimum Standard of Treatment1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security...(emphasis added)

[47] NAFTA Article 1121 Conditions Precedent to Submission of a Claim to Arbitration. and more generally see C. Chinking, Third Parties in International Law, (Oxford: Clarendon Press, 1993) M. Sornarajah, The Settlement of Foreign Investment Disputes, Kluwer International Law, 2000

[48] Shrybman, supra fn 37, p.75.

[49] See Elwell, supra fn 27, NAFTA Law and Institutions, Part 1, for the Canadian legislation that implements NAFTA.

3.3.2 A Sampling of Water-related Investment Disputes

Governments need to regulate water because it is an essential and exhaustible natural resource. As owners of water resources, governments are crucial to equitable resource allocation, and have a public service mandate to ensure conservation measures and safe and universal access to potable water. Currently, governments moderate economic growth and profit, and therefore its measures to conserve and maintain safe water are targets of investor and foreign service providers disputes.

When they do arise they are decided not by national courts or judges, but by private tribunals operating under international law and in accordance with procedures established for resolving private commercial claims and not disputes over questions of public policy and law. Furthermore, the tribunals deliberate in camera without the media present.

In addition to the Methanex case referred to above, there have been a number of water-related investor disputes. The U.S.-based Sun Belt Water Inc. filed suit against Canada for US$10 billion because British Columbia interfered with its plans to export Canadian water to California. Even though Sun Belt had never actually exported water, it claims that the water export ban expropriated its future profits. [50] Another relevant example involves the U.S. Metalclad Corporation. Metalclad successfully claimed against Mexico, for more than US$15 million, because an impoverished rural municipality refused to grant it a building permit for a 650,000-ton/annum hazardous waste facility on land already so contaminated by toxic wastes that local groundwater was compromised.

In summary, it is important to remember that once the NAFTA public service reservation has been removed in the area of water services and related investment, for example by the designation of a new public monopoly such as the Toronto Water Board with the capacity to recommend to Council the selling of water assets and to directly contract out those services, there is little room for retreat. In addition to losing the reservation, new regulations affecting competition could lead to compensation claims by unhappy investors and service providers. Even non-discriminatory environmental health standards could become the focus of private and effective arbitration. That is disputes are likely even if the law applied equally to Canadian, US and Mexican corporations if profit expectations were disrupted. The likely trade and investment consequences that are triggered by a hasty and ill-considered governance change to the City's Water Department are contrary to the environmental protection and public interest mandates of governments and a likely affront to a public trust in exhaustible natural resources.

In conclusion, it would appear that the both the City Solicitor and external reveiwer failed to appreciate the plain words of the NAFTA text on the scope and extent of the current obligations triggered by the designation of new public monopolies, as well as the nature of free trade in services and in investor-state disputes. The flaw in both opinions rests

[50] See www.naftalaw.com for the cases and see Howard Mann, Private Rights, Public Problems: A Guide to NAFTA's Chapter on Investor Rights, the International Institute for Sustainable Development, http://www.iisd.org/trade/private_rights.htm for a critical review of many of the leading cases that pose trade and environment issues.

upon an inaccurate description of the purposed facts. The October 21 st Staff report and supporting documents make clear the intent is to contract out services, including over the extraction of water supplies, and even contemplates the selling of water assets, if approved by Council. Given that contracting out of NAFTA through clever wording in partnership agreements is unlikely to be effective, and that investor disputes, and that claims become available the day Council decides to designate a Toronto Water Board or otherwise significantly restructure the current W&WW Department, extreme caution is urgently recommended. A full trade analysis, subject to peer review and public consultations, are required ***before Council makes any decision*** related to the W&WW Department.

4.0 Emerging GATS Obligations

The General Agreement on Trade in Services (GATS) and the current GATS negotiations at the WTO require special attention from an environmental policy perspective. The GATS is both a trade and investment agreement with far reaching implications, potentially affecting local, national and global policy options for social and ecological regulation. In this Case Study only a brief review is provided, but it will be sufficient to indicate that a thorough analysis is required despite the May 31st CAO Staff Report and subsequent legal opinion assurances that the proposed TWA as a new Municipal Service Board is not vulnerable to trade obligations.

As the legal opinions and CAO Staff GATS report indicates[51], the purpose of the GATS agreement is to liberate the global trade in services. This includes the removal and elimination of barriers to trade in water and wastewater services. As in NAFTA, the principles of national treatment, non-discrimination and transparency will apply for the benefit of foreign services providers and investors from over 144 countries. The objective of the GATS is to produce rules that limit governments from both providing and regulating services. The Canadian government has placed environmental services, and many related water and sewage services such as the testing and reporting of water quality on the negotiating table.

With respect to government regulation of services, the agreement seeks to impose a "necessity test" so that regulation is "not more burdensome than necessary to ensure the quality of the services". Tellingly, the word "quality" is defined in terms of reliability and efficiency, and not in terms of environmental or public health quality standards.

It should also be noted that a general exception to trade disciplines for government measures related to the conservation of exhaustible natural resources that is found in the 1947 GATT has been removed from the current GATS agreement. Therefore government

[51] CAO Staff Report September 6, 2001 to the Policy Finance Committee on the implications of GATS for Toronto and other Canadian municipalities, resulting in a Council Motion in October, 2001 to, inter alia, exclude local governments from GATS measures. One of the chief concerns identified in the report was the move to open up to global competition government procurement of goods and services "which may have the effect of limiting the ability of Council to enact the policies and regulations it desires".

regulation to conserve water supplies is no longer protected and could be subject to state-to-state disputes.

Fundamentally, it will be unelected trade panels that decide if the government regulation is GATS-compliant and not local officials who are accountable to the public. That trade agreements purport to replace the decision-making authority and capacity of government is remarkable. Also significant, is the fact that Council would proceed with a vote to replace the Department of W&WW with an entity that could trigger these and other trade obligations for generations to come without a detailed analysis.

4.1 Current Scope of Commitments

GATS Article I provides: "This Agreement applies to measures by Members affecting trade in services". "Members" refers to the 144 nation signatories to GATS WTO Agreements, and "Measure" is defined by Article XXVIII as: any action by a Member, "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".[52] A "Measure" means virtually any government action that directly or indirectly affects the provision of services by the private sector.

GATS Article I.3 stipulates that it applies to all levels government, including local municipalities, and even to: "non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities." Article I: 2, defines "trade in services" to mean the supply of a service:

a) from the territory of one Member into the territory of any other Member [cross – border supply];

b) in the territory of one Member to the service consumer of any other Member [to consumers abroad];

c) by a service supplier of one Member, through commercial presence in the territory of any other Member [commercial presence]; and

d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member [presence of natural persons].

Importantly, Subsection (c) entitles foreign-service suppliers to establish a "commercial presence" in local service businesses and investments.

4.2 GATS is an Investment Agreement

GATS is not just a traditional trade agreement, but also a multilateral investment agreement, as the commercial presence (foreign direct investment) of service companies is considered a mode of trade in services in the GATS context. However, given its central principles (Most-Favoured Nation and National Treatment), from an environmental

[52] See www.wto/GATS.org

policy point of view the GATS is not likely an appropriate framework for an international investment regime.[53] GATS does not fulfill the requirements of an environment- and development- oriented investment regime and therefore is likely not an appropriate framework for future investment disciplines. Rather than WTO management, the international ngo Centre for International Environmental Law, for example, recommends a binding "Sustainable International Investment regime" in the UN context.

4.3 The Classification of Services

The extent to which liberalization commitments and government measures may be subject to GATS constraints depends on which services have been listed to that country's Schedule of Specific Commitments. The listing process allows a country to specify which GATS disciplines it is willing to embrace for a particular sector. Commitments can be of three types: Market Access, National Treatment and Additional Commitments.[54]

Discussions concerning the classification of services are considered critical and detailed sectorial impact assessment must be undertaken prior to further negotiations. Special attention should be given to environmentally sensitive sectors such as tourism, transport, energy and environmental services in water, energy and hazardous waste.

At the new round of trade negotiations launched in Doha in November 2001, however, Members agreed to initiate negotiations immediately on the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services. The EU has proposed to reclassify water supply as an environmental service.

The Centre for International Environmental Law recommends environmental services should only be liberalized in light of the results from detailed impact assessments. Questionable services, such as waste incineration, should be excluded from further liberalization, and "end-of-the-pipe" services should not gain market advantages over integrated environmental services.[55]

4.3.1 Status of Water Services under GATS

While the WTO as well as both legal opinions on the trade aspects of the TWB correctly states that no country has so-far committed to liberate water-supply services per se, dozens of Members have made commitments about other water-related services, including: environmental services, pollution control, waste-water and sewage treatment; general construction work for civil engineering, including construction for waterways, harbours, dams and other water works, for long distance and local pipelines; engineering and project management services for water supply and sanitation works; and technical

[53] See IISD, supra fn. 50.
[54] Canada's commitments are listed in Schedules to the GATS (GATS/SC/16; 15 April 1994) and can be found at the following Web site: http://strategis.ic.gc.ca/SSG/sk00079e.html.
[55] Assessment of Trade in Services in the Context of the Current GATS Negotiations in the WTO (November, 2001) (Tuerk & Krajewski) http://www.ciel.org/Publications/pubtae.html [TE01-8]

testing and analysis services (e.g., water quality) including quality control and inspection (e.g., water and waste-water works). According to Michelle Swenarchuk of the Canadian Environmental Law Association, the Canadian government made clear commitments for wastewater and sewer services.[56]

In other words, while the supply of drinking water is not yet a committed service, virtually every aspect of designing, building and operating a water supply infrastructure is the subject of service commitments made by many WTO member countries. A search of the Central Products Classifications Code (CPC Code) kept by the United Nations Statistics Division using "water" reveals hundreds of sub- classifications that relate to water, ranging from bottled water to dam construction.[57] In terms of water supply, the most important product categories are ores and minerals, electricity, gas and water – (which is further defined to include water and natural water).[58] While this Code is specific to products and not services, it has been adopted as a way to describe the sectors for which commitments are being made. Finally, Canada, among others, has listed a number of general limitations in its Schedule of Commitments, including three that specifically identify public sector service delivery of such services as welfare, health care and education. Unfortunately, water and wastewater services are not specified.

From an environmental and public interest perspective, it is especially important to recognize that access to clean and affordable water is a human right in the context of current GATS negotiations and that the water sector should not be liberalized according to the interests of multinational companies.

As the legal opinions made clear whether water services will be considered environmental services and if not, for how long will these services remain sheltered from market access and national treatment obligations as the negotiations proceed, are open questions.

4.4 Limited Exceptions – The Exercise of Government Authority

In addition to careful listing, Members can attempt to avoid GATS obligations by invoking a limited exemption where a service is supplied in the exercise of government authority. This is defined by Article I.3(c) as "any service, which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". The GATS provides no definition of the terms "commercial basis" and "in competition with one or more service provider", creating great uncertainty. The decisions of WTO dispute bodies with the full reach of GATS disciplines will eventually cause the intentions to become clear though. Both legal opinions relied upon this exception to say that GTAS obligations would not apply.

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[56] Michelle Swenarchuk, From Global to Local: GATS Impacts on Canadian Municipalities, 2002, Canadian Centre for Policy Alternative and the Canadian Environmental Law Association, see www.cela.ca., Annex A Canadian Sector-Specific Commitments, p. 33.

[57] Shrybman, supra fn 37, p. 37.

[58] Category 1 also references another UN statistical code – ISIC Rev.3 that includes a classification for the "Collection, purification and distribution of water."

Again according to Michelle Swenarchuk, this "government authority" exception would not include public-sector services such as water or sewage services if they were offered commercially or in competition with the private sector. She observes that today public services are often a mix of monopolized and competitive services, and they may be delivered in partnership with for-profit companies, or offered on a cost recovery basis. It would therefore be difficult to identify a public service clearly exempt according to this definition.[59]

4.4.1 No Conservation Laws Need Apply

Before highlighting some of the most important GATS obligations, it is important to note that GATS contains a general exception clause in Art. XIV which is similar to Article XX of GATT, 1947.[60] However the GATS exception is much narrower with respect to the environment, since GATS has no provision similar to Art. XX (g) of GATT allowing for measures "relating to the conservation of exhaustible natural resources". Only Art. XIV (b) GATS allows WTO members to use measures (e.g. standards) otherwise inconsistent with GATS obligations, if they are "necessary to protect human, animal or plant life or health" There are no plans in the current GATS negotiations in the Council on Trade in Services to expand the scope and specify natural resource conservation or environmental protection. Furthermore, the "necessity tests" under the WTO regime have proven to be environmentally ineffective.[61]

While the GATT Art. XX (g) has yet to be successfully invoked, the WTO has been willing to at least accord it theoretical support. However, no government can use conservation to justify interfering with the rights of foreign services providers. According to Steven Shrybman, "The implications of this omission for measures to limit demands on water resources is obvious".

In summary, with the ambiguity around whether water services are included within the scope of agreed GATS commitments to liberate environmental services, with the limited scope for services provided under "government authority" and without the benefit of a "conservation of exhaustible natural resources" exception, a host of government measures- including robust drinking water quality testing, stream habitat protection and water export controls - have just as likely as not have no safeguard whatsoever and would

[59] Swenarchuk, supra fn. 56, p 32.

[60] Under the General Agreement on Tariffs and Trade (GATT), governments may use certain listed exceptions to justify departing from its broad constraints. These are set out in Article XX. Two of these exceptions, which are particularly important for environmental, public health and conservation purposes, concern measures that violate the GATT but: [are] necessary to protect human, animal or plant life or health, [GATT Article XX (b)] or; [relate] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption [GATT Article XX (g)]

[61] See Towards Coherent Environmental and Economic Governance: Legal and Practical Approaches to MEA-WTO Linkages (CIEL/EIIEEP, November, 2001) (Stilwell &Tarasofsky), http://www.ciel.org/Publications/pubtae.html and Elwell, NAFTA Law and Institutions, supra fn 27. Also see WTO *Shrimp Turtle* case, see www.wto.org

in any event, be open to disputes at a trade forum. This trade-related impact no doubt creates a "chilling effect" on the actions of elected officials to put in place higher environmental protections who would otherwise be responsive to the public interest.

4.5 Basic Obligations

It must be observed that the GATS is a very complex agreement and that it contains some rules that apply to all service sectors of all WTO Members. These include Transparency and the Most Favoured Nation rule (treating all member countries the same).[62] GATS also contain other rules that apply specifically to services specified by countries in its Lists of Schedules, including National Treatment and Market Access.

With respect to **Market Access**, GATS contains a list of quantitative and other restrictions that might be viewed as prohibited trade barriers. Article XVI (Market Access) prohibits six different categories of non-discriminatory regulatory controls. These include limitations on the number of service suppliers or service operations; the total value of service transactions; the types of legal entity or joint ventures through which a service supplier may supply a service and as well limits aggregate foreign investment.

Such measures can be important environmental policy tools for the protection of vulnerable regions and exhaustible resources, and can control access to them by local communities. For example, as the Basel Convention on Hazardous Waste recognizes, it makes very good environmental sense to require that domestically generated hazardous waste be treated domestically rather than exported abroad. But a domestic law such as this might not survive under the Market Access provisions of GATS.

Indeed, some speculate that the Market Access provisions could constrain non-discriminatory measures to limit water-resource demands by the industry since the GATS does not have an exception for government regulation related to conservation. [63]

GATS also contain the principle of **National Treatment**. Article XVII (National Treatment) states that governments must provide foreign-service providers with the same most favourable treatment accorded to domestic providers. Notably, this provision makes no distinction between public non-profit service delivery and private for-profit suppliers. Therefore it has been argued that the obligation to provide foreign investors with most favoured National Treatment is essentially a right to establish businesses and operate them on the most favourable terms allowed for any domestic enterprise, including those in the public sector. [64]

While this equality principle is a key element of the multilateral trading system it contains a number of problems from an environmental perspective. For example, the distinction between "like" and "not-like" services and service suppliers remains unclear

[62] Consider how current service obligations for NAFTA Parties extend the scope of GATS obligations.
[63] Shrybman, supra fn 37, p 44.
[64] Swenarchuk, supra, fn 56, p. 4-5.

with regard to the different environmental implications of services (e.g. the difference between environmentally sound and unsound energy or hazardous waste services).

Clear exceptions from National Treatment and the **Most Favoured Nation** rules must be possible for environmental reasons, and not only for specific sectors but also more generally under the Market Access and National Treatment commitments. For example, the Most Favoured Nation principle (Art. II GATS) must not put limitations on the implementation of Multilateral Environmental Agreements (such as the flexible mechanisms of the Kyoto-Protocol). It should be possible to treat the energy-intensive goods and services of a WTO member differently depending upon whether it has implemented the Kyoto Protocol to the Climate Change Convention and has thus internalized the environmental costs of production into its processes.

GATS lay down some rules concerning **Domestic Regulation** in Article VI. This area is one of the most sensitive subjects in current GATS negotiations. It applies to all measures of general application affecting trade in services whether these are discriminatory against foreign-service providers or not. The proposed "necessity test" purports to only permit laws that are "no more burdensome on trade than necessary" to ensure the quality of the service. The word quality will not likely mean up or downstream protection of environmental quality but rather will probably focus on narrow considerations of reliability, accuracy and consumer safety.

The safeguard of local, regional, national and international environmental policy regulation possibilities must be ensured in the context of the negotiations about "domestic regulation". There is no need to strengthen GATS provisions concerning "domestic regulation" from an environmental perspective; rather these disciplines already threaten to restrict regulatory options for environmental policy.

In summary, in effect the **necessity test** will second-guess whether a law or regulation passed by any level of government is necessary at all. Absent provision otherwise, the necessity for the government measure, the adequacy of whatever due notice and process was afforded and the rationale for deviations from lower international standards or for determinations of non-equivalency will all become disputable. Even non-discriminatory domestic regulations could be subject to dispute and prohibited unless they are no more "burdensome than necessary". If this proposal is accepted, it is likely that environmental regulations will be at risk in WTO dispute settlement proceedings because of the trade restrictive effects of domestic regulations.

Moreover, by requiring that regulations be no more burdensome than necessary, the GATS allows the judgment of international trade adjudicators to overturn that of accountable elected representatives. This is clearly contrary to the public interest and the conservation ethic.[65]

[65] The Centre for International Environmental Law (CIEL) considers that: Because of environmental and democracy implications no new domestic regulation disciplines should be introduced; The "necessity test" proposal should be rejected; If a new agreement concerning services and domestic regulation cannot be avoided, environmental protection and human rights must be recognized as legitimate policy objectives

4.6 Public Monopolies

As in the case of NAFTA Chapter 15, the GATS purports to regulate public monopolies. Article VIII (Monopolies and Exclusive Service Suppliers) requires that publicly owned or controlled monopolies, such as municipal water utilities and others licensed to provide exclusive services, comply with the constraints imposed by the GATS. This provision imposes many of the same constraints on public sector service providers as NAFTA and thus limits the options of government. Public-sector service providers cannot "abuse [their] monopoly position to act... in a manner inconsistent with [their] commitments."

Subsection 4 of this Article effectively requires that private-sector service providers be compensated when public monopolies are "granted" and allowed to perform the services they provided or expected to provide. Thus compensation is payable when a government wishes to return a service to the public sector. Recall that under the NAFTA investor-state dispute procedure, a NAFTA investor could sue for lost profit expectations.

4.7 Government Procurement

The last area in which we recommend further examination before Council proceeds with a decision about the TWB regards disciplines on government procurement. Currently the GATS does not apply to procurement by government of services "purchased for governmental purposes and not with a view to commercial resale" (Article XIII). However, the scope of this exception is unknown. So many government services are provided for some kind of fee (e.g. water rates, day care), that the exception may in fact be meaningless. Many governments also use procurement as a policy tool (e.g. fair wages requirements or green power procurement) to kick-start an industry.

Indeed the government procurement of services has potentially important environmental functions. This concerns the environmental quality of services provided as well as the production processes and the suppliers of these services. Future GATS negotiations and negotiations in the context of the plurilateral Agreement on Government Procurement to restrict government procurement will have serious environmental implications such as restrictions on the government purchasing of green power to deal with climate change and local smog.

There is no need for stronger measures concerning government procurement in the GATS context from an environmental perspective. A fair Sustainability Impact Assessment would likely show the need to preserve the largest possible room for government

unconstrained by GATS disciplines; Any new rules on domestic regulation should only apply to specific sectors and should not contain general disciplines applicable to all sectors

For further clarity, and in order to guarantee sufficient autonomy to regulate these services, CIEL recommends that "public services" should be excluded from the GATS in general. Since the exclusion concerning "services supplied in the exercise of governmental authority" (Art. I: 3 GATS) depends too much on a non-commercial and non-competitive supply of these services, the clause should be redrafted to recognize and approve the current mix of delivery of government services

procurement aimed at environmental goals.[66] Negotiations on market access in government procurement of services should likely be rejected.

5.0 Conclusion

Given the tragedy in Walkerton, the Hamilton experience and the fact that NAFTA and at least 144 foreign service providers and investors could compete for Toronto W&WW service operations at the lowest possible level of environmental and public health protection, it is incumbent upon City Staff and Council to undertake a thorough analysis of the trade and investment implications of restructuring Toronto's water service system, ***before Council makes a decision to restructure.***

Both legal opinions that discount public concerns around the trade and investment impacts related to the designation of the TWB are based upon an a prior description of the TWB proposal and with respect, are in need of review given current plans for the TWB. The proposed Board would have delegated authority to contract out to the private sector for up to 20 years about as so far unspecified amount of water and wastewater related services that are currently provided in house or as otherwise agreed upon as part of the 1996 provincial non-conforming measures to NAFTA service and investment obligations, that must be maintained in order to be effective. This reservation is likely lost and NAFTA Chapter 15 obligations - on the need for new public monopolies to act on commercial considerations alone and permit the participation of all NAFTA service provider and investors to bid for contracts and opt for dispute settlement about unwanted environmental standards - are likely triggered the day the TWB is established. Going back to a true public sector water system will be difficult and costly.

Given the significant public interests and trusts at stake about the most essential non renewable resource - water, Council would be advise to delay any restructuring recommendations until these fundamental questions about public accountability and trade consequences both under NAFTA and the GATS are examined, and subject to peer review and public consultations. Indeed, the International Joint Commission recognizes that the waters of the Great Lakes are, for the most part, a non-renewable resource. Water is also the subject of human rights as well as a possible public trust since the 1867 Constitution Act recognizes that the provinces hold non-renewable resources subject to any Trusts. This puts into doubt the constitutional authority of a province or local government to transfer ownership of local water works and systems as is contemplated in Bills 195 and 175 as well as to delegate core decision-making and operations to the private sector, including the direct extraction of water supplies.

Our international trade concerns are as follows: NAFTA obligations are just as likely as not to be triggered as soon as a government "designates" a new public monopoly service. This includes the "redesignation" of a service from a Department W &WW to a municipal service board, such as the proposed Toronto Water Board. NAFTA's Chapter 11 ("Investment, Services and Related Matters") specifically links obligations under

[66] See Elwell, Sustainability Impact Assessment, supra fn. 26.

Chapter 15 ("Public Monopolies") and Chapter 12 ("Services") with a powerfully effective investor led dispute settlement mechanism. NAFTA obligations would allow direct foreign investor disputes over how the new public monopoly would operate, as well as about what level of environmental and public health standards are acceptable and if compensation is payable.

Investors can sue governments behind closed doors, if a later environmental regulation, for example, on water quality standards set by a later City Council reduces the expected profit the investor anticipated. The current Methanex dispute by a Canadian corporation against the State of California because of an anticipated ban the gas additive MTBE is a directly analogous case in point. The amount of this expropriation claim is in the billions of dollars. It was the threat that NAFTA could limit the region's ability to set water standards that caused Greater Vancouver District Water Board to reject a plan in June 2001 to allow a public-private partnership to operate a $117 million filtration plant.

Current federal and provincial reservations from NAFTA imposed free trade in service and investment obligations, if even found to include public sector water services, would be lost for those services once supplied in whole or in part by a private firm even if provided on a not-for-profit, i.e., non-commercial, basis.

It is unlikely that government and corporate partnership or concession agreements can contract out of either NAFTA or the domestic legislation that implement trade obligations. These contracts are governed not only by the rules of domestic contract law but also by international investment and services treaties.

The general exception to trade disciplines found in the goods agreement, the 1947 GATT, for government measures related to the conservation of exhaustible natural resources has been removed from both the NAFTA services and investment obligations as well as from the GATS agreement. Therefore, government regulation of services to conserve water supplies would not likely be protected under NAFTA or the GATS.

The limited scope for exceptions under the GATS services provided under "government authority" and without the benefit of a "conservation of exhaustible natural resources" exception, suggests that a host of government measures, including robust drinking water quality testing, stream habitat protection and water export controls, would have no safeguard whatsoever from trade and investment disputes at a trade forum. This creates a "chilling effect" on the response of elected officials to concerns about the public interest and environmental protection. Absent provision otherwise, the necessity for the government measure, the adequacy of afforded due notice and process and the rationale for deviations from lower international standards or for determinations of non-equivalency all become disputable. Even non-discriminatory domestic regulations could be subject to dispute unless they are no more "burdensome than necessary".

In short, as responsibility moves from a directly elected governance system such as the current Department of Water to a third party water utility board, as contemplated with the Toronto Water Board, without provisions made otherwise, the opportunity to ensure the

capacity of governments to respond to the public interest, to ensure timely public access to information and public accountability diminishes accordingly. Given the nature of the resource at stake, it would be contrary to the public interest to diminish rather than to enhance public accountability in any governance change about water resources, supplies and services.

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