

**Subject: Information on NAFTA and PPP- SOME SLIDES - and Info on our famous Metal Clad case**

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Attached as PowerPoint are a few of my slides from a recent presentation I made on PPP at a Vancouver Conference.

Included is some general info on NAFTA; the source is mainly a Toronto law firm. The conclusions fit my own understanding from legal work for Westcoast Energy's \$1.2 billion US project in Mexico on which I worked in Mexico for a year. It receives NAFTA protection as do most Canadian investments in the US or Mexico.

The "GVRD Oxymoron" referred to on the one slide is that (many claim) the GVRD is unelected, unaccountable, undemocratic, unresponsive, inflexible, and arrogant (and some even claim stupid!). . . .

BUT they are the only people we can possibly trust with our drinking water! Go figure!

C. Harris at a DNV recent council meeting again referred to the famous Metal Clad case which activists claim is an example of the horrible things NAFTA does. It is worth reading the decision, rather than talking about it based on something some special interest group claims (including, quite possibly, me!). As is typical, the facts are much less spectacular than the rhetoric.

The Metal Clad case.

From CUPE's "legal opinion": "Ignoring the evidence of Mexico's constitutional law experts, including the ex-chief justice of the Supreme Court . . . , the tribunal ruled . . . ." Reality check please. Would "Disagreeing with the evidence of the hired legal guns who gave the opinion they were hired by the defendant to give" not be an equally fair characterization?

Why does the CUPE opinion fail to mention that the then current Secretary of the Mexican federal body responsible for environment testified that the

locals had no jurisdiction to shut down construction? CUPE also fail to mention that this was not a new facility, but an existing Mexican one that Metal Clad bought to upgrade, that it was constructed with the full knowledge of federal, state, and local officials, and that the locals did not act against Metal Clad until construction was "virtually complete". The state later decided to declare the whole area to be an ecological preserve, permanently putting Metal Clad out of business, despite the state knowing about the deal. The Mexican feds did not act to correct the actions of the state or the locals.

The federal government had given all required approvals, and told Metal Clad that was all it needed, and had approved the project due in part to the positive environmental impacts.

It was quite simply the expropriation of a business without compensation. IF the various governments wanted to change their minds and not do the project, even though it was already built, they could have expropriated Metal Clad legally and with compensation. NAFTA specifically allows that. Instead, they did a de facto expropriation without compensation.


Hence Metal Clad won their case. As they should have. Would you as a Canadian dare invest anywhere without similar protection?

Not nearly as interesting a story as some would have you believe.

I think the decision is on the web.

John Hunter

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 <a href="#">April 2002NAFTA Slides.ppt</a>	<b>Name:</b> April 2002NAFTA Slides.ppt <b>Type:</b> Microsoft PowerPoint Show (application/vnd.ms-powerpoint) <b>Encoding:</b> base64 <b>Download Status:</b> Not downloaded with message
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## *THE BC “LOGIC DISEASE”*

- WATER OR HEALTH CARE PPP TABOO
- WALKERTON, N. BATTLEFORD: PUBLIC
- THE GVRD OXYMORON
- PRIVATE SECTOR OK IN FOOD, BOTTLED WATER, AIR TRAFFIC CONTROL, PRIVATE WATER SYSTEMS, OIL, GAS, POWER
- *WHAT’S WRONG WITH THIS PICTURE?*
- *WHAT ARE THE IMPLICATIONS?*

## *PPP THE MYTHS 1*

- **PPP IS THE SAME AS PRIVATIZATION**
- **JOB LOSS (MAY BE ATTRITION OR GAIN)**
- **ONLY TO AVOID DEBT**
- **POORER QUALITY SERVICE**
- **LOSS OF CONTROL BY GOVERNMENT**

## *LOSS OF CONTROL WITH PPP*

- **“IT CAN BE ARGUED THAT LOCAL GOVERNMENT HAS MORE CONTROL, IN THAT IT HAS WELL-DEFINED CONTRACTUAL REMEDIES IN A PPP THAT IT MAY NOT HAVE WITH ITS OWN MANAGEMENT AND STAFF.”**
- **Source: May 1999 BC Government PPP Handbook**
- **PPP BRINGS CARROT AND BIG STICK**

## *PPP THE MYTHS 2*

- **INCREASED COST OF SERVICE**
- **PRIVATE SECTOR CAN GOUGE ON PRICE**
- **LOSS OF OWNERSHIP**
- **“NO PUBLIC ACCESS TO INFORMATION. PRIVATE CORP. EXEMPT FROM FOI”**

## **CONTROL AND INFORMATION**

- **AS MUCH AS YOU WANT OF BOTH!!**
- **SIMPLE MATTER OF CONTRACT**
- **3 COSTS IF EXCESS: -FLEXIBILITY**
  - NO BIDS**
  - PRICE/COST**

## **NAFTA IN CONTEXT**

- **Trade laws are designed to prevent extreme abuses rarely seen in Canada.**
- **Municipalities do not need to nor should they want to break trade laws to do business – “the Shrybman myth”.**



# *WHAT NAFTA DOES*

- **AIMED AT ABUSIVE ACTION BY GOVERNMENTS**
- **NAFTA provides some protection for investors from abusive actions of a host country (including Canadians in USA, Mexico)**
- **Allows government expropriation for a public purpose, on a non-discriminatory basis, with due legal process, and with compensation. Would we want it otherwise????**
- **Addresses expropriation, direct or indirect, that disobeys the above rules.**
- ***Specifically* allows host government to set and change environmental, health, and similar standards (PPP contract addresses “who pays”).**
- **Attempts to prevent sweetheart dealing (“you can only buy local cement and my brother is the only cement dealer in town”)**
- **Specifically discourages host countries from relaxing health, safety, or environmental standards to attract investment.**

# **NAFTA DOES NOT**

- **PROTECT A BUSINESS FROM NORMAL BUSINESS RISK SUCH AS LOSS OF PROFITS DUE TO CHANGE IN LAW, TAXES, OR ENVIRONMENTAL STANDARDS, AND ANY OTHER NORMAL BUSINESS RISK.**
- **PREVENT TERMINATION OF A CONTRACT AT THE END OF ITS TERM, OR FOR BREACH/NON-PERFORMANCE, UNDER THE TERMS OF THE CONTRACT.**
- **REPLACE HOST COUNTRY COURTS IN CONTRACT DISPUTES SUCH AS ADDRESSING BREACH OF CONTRACT BY EITHER PARTY.**
- **PREVENT IMPOSITION OF PERFORMANCE REQUIREMENTS AND PRODUCT QUALITY STANDARDS ON THE PPP, NOR PREVENT CHANGES IN THEM OR PENALTIES FOR BREACH OF THEM.**
- **ALLOW LAWSUITS AGAINST MUNICIPAL GOVERNMENTS.**
- **BIND MUNICIPAL GOVERNMENTS (BUT THEY SHOULD RESPECT IT – WHY WOULD THE WANT TO BREAK IT?)**