LEGAL CHALLENGES TO GREAT LAKES WATERS –
OHIO LAKE ERIE CONFERENCE

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INTRODUCTION

CELA is ...

A few words about the constitutional context in Canada. One of the fundamental paradigms of Canadian constitutional law is that governing authority is divided between federal and provincial levels of government. Aboriginal peoples also have constitutionally protected aboriginal and treaty rights, and it is asserted that this includes governance rights. Most of the time each jealously guards their jurisdiction. However, in environmental matters, there is a recent trend to divest responsibility, both federally and provincially. As well, both levels of government have drastically downsized in Canada over the last five years; provincial governments in the range of 30 to 40% in resource and environmental areas; the federal government in the range of 30%. Primary examples of reduced activities include reduced monitoring, reduced enforcement, and reduced involvement of government bodies in regulation of industries, often turning that responsibility over to industry associations.

At the same time, the Canadian public, nation wide, is highly concerned about water protection. The concerns include water quality, water quantity, diversions and ecosystem protection. A survey of Canadian media in the last year alone would show an incredible amount of coverage of water issues, from domestic ground water extraction to international exports; from water contaminants to lake levels. This extremely high level of public concern together with the recent reduction of capacity and desire to divest themselves of environmental responsibility is creating an interesting dynamic in Canadian provincial and federal politics as politicians attempt to respond to public concern without making increased resource commitments.

I will briefly discuss today the following areas as to Legal Challenges to Great Lakes Waters:

- Pollution
- Riparian Rights & Common Law controls
- Withdrawals, including trade issues
- First Nations Rights

POLLUTION

Great Lakes Agreements & Experience

As you know the Boundary Waters Treaty was entered in 1909, and included Article IV, providing that "boundary waters shall not be polluted on either side to the injury of health or property on the other". However the Treaty does not apply to tributary waters, nor to Lake Michigan other than as to navigation.

Then in 1972, the Great Lakes Water Quality Agreement of 1972, and the additions to that agreement of 1978 (Article II) and 1987 (Annex 12) committed to virtual elimination and zero discharge of toxic substances, and to a phase out of their release. The Great Lakes Water Quality Agreement led to the 1972 Canada - Ontario Agreement and its 1994 amendments (with two other versions in between). The former was responsible for establishment of sewage treatment plants at municipalities throughout the Great Lakes area; the latter for establishment of Remedial Action Plans, of which there were 43 in total and 14 in Ontario. The Canada Ontario Agreement "provides the framework for systematic and strategic coordination of shared federal and provincial responsibilities for environmental management in the Great Lakes basin, and of Canadian efforts to fulfil Canada's obligations under the Great Lakes Water Quality Agreement". The zero discharge goal of the Great Lakes Water Quality Agreement has also led to policy changes and some of the legislation in Canada. In addition to the Canada-Ontario Agreement, it can be traced behind the federal government's Toxic Substances Management Plan of 1995 which is in part resulting in the new CEPA. The new Canadian Environmental Protection Act has passed the House of Commons and is now before Senate but is highly controversial and its fate is uncertain. One of the major sources of controversy is the definition of "virtual

elimination" which was watered down, in our view, in response to an effective industry lobby.

In Ontario the Great Lakes Water Quality Agreement goal of virtual elimination was carried into the Municipal-Industrial Strategy for Abatement and into some phase-out policies for particular substances.

Canada and other nations will be negotiating the international Persistent Organic Pollutants Protocol (POPS) next week in Geneva. Canadian NGO's who were active in negotiating the Great Lakes Binaitonal Toxics Strategy for the Virtual Elimination of Persistent Toxic Substances in the Great Lakes will be involved in Geneva, including Paul Muldoon of CELA, Jack Weinberg of Greenpeace, WWF and others. The debate as to virtual elimination of toxics will continue in the international arena.

RIPARIAN RIGHTS - COMMON LAW PROTECTION

The common law concerning riparian rights is, broadly speaking, applicable on both sides of the Canada - U.S. border and the jurisprudence has many similarities. In Canada, it is a highly under-used tool for environmental protection, however. One of the major reasons in Canada is that litigation is strongly discouraged as an express policy of the courts. They use the mechanism of adverse costs awards aggressively to discourage litigation, and the Court Rules are drafted so as to use costs awards to discourage litigation. As a result, a well-intentioned litigants who tried to use riparian common law rights for environmental protection could be required to pay both her own legal costs and the other side's legal costs, which can run to the tens and hundreds of thousands of dollars. Few private litigants and few public interest litigants can take that risk. Nevertheless, as a legal tool, riparian rights should be used more frequently and it may be that it is public managers of lands and waters who should revisit these legal options.

There are several common law actions that are important in riparian rights matters:

particularly riparian rights, negligence, nuisance, Rylands v. Fletcher actions ("strict liability"), and trespass.

One text[1] states that the word "riparian" is derived from the Latin word for "bank" and defines riparian water as "the water that flows in a defined channel having a source, bed and banks". This usually means water in lakes, ponds, rivers, streams, and creeks. It is a centuries old common law principle that an owner of riparian lands has a right because of that ownership, "to the flow of water through or by his land in its natural state".

Among some of the interesting court holdings in Canada are that

- Municipalities can be liable for damages caused by municipal works like stormwater or drainage channels or where their works cause "extra" flooding.
- Where an injunction to prevent a nuisance is sought, the economic effect on the defendant of the injunction may be held by the Courts not to be relevant.
- Public authorities should keep in mind that they are not immune to common law actions just because they are constructing works that are for the benefit of the community; nor because they have a mandate to construct such works.
- A conservation authority may be found negligent in breaching its statutory duty of care where it issues a permit without enquiring into whether the approval works would have adverse affects in terms of flood control, pollution or conservation.
- A City or other body may be liable negligence when it knows of the direct and specific consequences that its system would have on another riparian owner when planning and constructing its system.

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[1]Faita, M., Kohn, H., Kligman, R., Swaigen, J., Environmental Harm: Civil Actions and Compensation, Butterworths, 1996, p. 121

- One riparian owner should not be put in the position of having its rights sacrificed for the benefit of other upstream interests.

Of course the common law principles may be put into abeyance if a statute is enacted that changes the applicability of the common law. A prime example in Ontario in the 1950's was legislation that made it impossible to sue municipalities for nuisance where they discharged sewer works into riparian channels.

WITHDRAWALS

Both in-basin and out of basin withdrawals have become hotly debated in Canada in terms of public policy over the past year.

The Ontario Minister of the Environment granted a water taking permit to the Nova Group in early 1998 and precipitated a very concerned response by the Ontario public. CELA played a major role in bringing the unresolved issues around surface water taking permits to public and governmental attention in the Nova case. Interestingly, a strong concern was voiced by the Great Lakes governors when the permit came to their attention in May of 1998. The U.S. Great Lakes governors actually sought status to participate in the Ontario Appeal Board hearings about this permit that commenced in October 1998, and were given party status. Since then, the Nova Group withdrew its application on condition that if the Ontario government decides to issue such permits in the future, it will be first in line.

Once the Nova application surfaced, the inadequacies of the present international agreements became evident and the U.S. and Canadian governments made a joint reference to the International Joint Commission in February of 1999. The reference asked the Commissioners to examine existing and potential consumptive use of waters, existing and potential diversions of water, in and out of the basins, and including exports, the cumulative effects of diversions and

removals, and the current laws and policies that may affect the sustainability of the water resources in boundary and transboundary basins. An Interim Report was released two weeks ago, titled "Protection of the Waters of the Great Lakes." You can find it on the IJC web site.

The 1985 Great Lakes Charter among Great Lakes states and Ontario and Quebec, although non-binding provides that:

> "The signatory States and Provinces agree that new or increased diversions and consumptive uses of Great Lakes basin water resources are of serious concern. In recognition of their shared responsibility to conserve and protect the water resources of the Great Lakes Basin for the use, benefit, and enjoyment of all their citizens, the States and Provinces agree to seek (where necessary) and to implement legislation establishing programs to manage and regulate the diversion and consumptive use of Basin water resources. It is the intent of the signatory States and Provinces that diversions of Basin Water resources will not be allowed if individually or cumulatively they would have any significant adverse impacts on lake levels, in-basin uses, and the Great Lakes Ecosystem. (Principle III)
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> "It is the intent of the signatory States and Provinces that no Great Lakes State or Province will approve or permit any major new or increased diversion or consumptive use of the water resources of the Great Lakes Basin without notifying and consulting with and seeking the consent and concurrence of all affected Great Lakes States and Provinces. (Principle IV)" [2]
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> In Canada, in-basin resource use is primarily provincial jurisdiction as a matter of

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** cite to the Great Lakes Charter

Canadian constitutional law. This includes provincial control by the provinces over the beds of the Great Lakes within Canada and tributary waters. Federal Canadian government authority includes environmental regulation over waters, navigation and shipping, including dams and flood control systems, and sea coast and inland fisheries, which may include water quality regulation or regulation of uses that could impact on fish or fish habitat.

However, as to control of exports of water from the Great Lakes, regardless of the federal - provincial division of powers issues in Canada, there are major trade agreement concerns. GATT Article XI prohibits countries from restricting imports or exports of any good through "quotas, licences or other measures."

There is an environmental exception in GATT, Article XX, which in part allows the parties to enact measures "necessary to protect human, animal or plant life or health" or measures to conserve "exhaustible natural resources".

However, the second case requires those measures to be "effective in conjunction with restrictions on domestic production or consumption".

The environmental exception is qualified as between Canada and the U.S. so that even where it applies, it may not reduce the proportion of national production of the good to which the other country has had access over the prior 3 years, must not include higher prices for exports than charged domestically and must not disrupt normal channels of supply of the good.

Even to apply the environmental exception in order to enact environmental protection measures, Canada and the U.S. would have to justify the measures with strong scientific evidence as to the environmental impacts that are being prevented. Plus the measures must be *primarily aimed* at conservation (and not for example, considered by a trade panel to be a protectionist

measure in disguise).

Next, Canada and the U.S. must be able to show that application of the measure is non-discriminatory, that is that it is not applied in a manner that causes arbitrary or unjustifiable discrimination between countries.

One problem is that the challenges so far to environmental protection measures have found the environmental measures to be incompatible with the trade agreements. The trade agreements then require that the incompatible measures be rescinded by the country that enacted them. Examples included challenges to the US Marine Mammals Act, regarding killing dolphins while catching tuna; and the US Clean Air Act regarding gasoline standards applied to foreign producers.

However, any approach to control of diversions, inter/intra basin transfers and other controls of water removal from the Great Lakes Basin would have to meet the requirements of GATT and the exceptions.

The best approach would see a common standard across all Great Lakes; even better would be national standards by both countries, accompanied by domestic conservation measures. There must be no discrimination among countries or provinces or states or their nationals and the approach must be based on conservation and sustainable use, with strong scientific evidence that measures are necessary to protect human, animal, plant life & health & to conserve the natural resource. It may also be necessary to have data so as to be able to tell what the proportionality requirements entail.

NAFTA -

Another twist as to what can be done to control diversions from the Great Lakes Basin is because of NAFTA. NAFTA incorporated articles XI and XX of GATT. The parties (Canada,

U.S. and Mexico) also adopted an Official Statement in 1993 declaring that NAFTA "creates no rights to the natural water resources of any Party to the Agreement" while in their natural state until and unless the water has entered commerce by becoming a traded good or product and further that nothing in NAFTA will oblige any NAFTA Party to either exploit its water for commercial use or to begin exporting water in any form.

Nafta investment chapter

However, a concern is raised by the NAFTA investment chapter, Chapter XI. Investors may sue states for compensation for "expropriation or measures tantamount to expropriation of an investment" even if the measures are for a public purpose and even if the measures are non-discriminatory. The investor-state suits are conducted in a private arbitration process without public scrutiny. The protection of Article XX of GATT, the environmental exception, does not protect measures against the NAFTA investment chapter. None of the cases so far filed have yet gone to a panel. However, there have been settlements and this provision provides major concern as was demonstrated in the recent instance of the Canadian government settling a case as to MMT controls.

FIRST NATIONS RIGHTS

350,000 descendants of first nations live in 110 nations in the Great Lakes Basin; 60% of them along shorelines. Aboriginal peoples' rights and claims are made in both domestic and international fora, and the law surrounding the basis for those claims is still developing, both under Canadian domestic and international decisions.

Canadian constitutional law provides that Canada and the provinces owe fiduciary obligations to First Nations peoples[3], in part because the Crown has benefitted from massive land

surrenders during treaty processes. Aboriginal peoples in Canada also have constitutional protection for their existing aboriginal and Treaty rights since the 1982 Constitutional amendments. This requires that the Canadian and provincial governments consider the impact of any international agreement on those First Nations' rights before making an international commitments. Similarly when enacting domestic legislation to implement international obligations, the Canadian government is constrained by the requirement to act consistently with those rights. Many, including myself, argue that aboriginal peoples in Canada have governance rights to accompany the effective exercise of their aboriginal and treaty rights. Furthermore, even where "infringement" is allowed by our Supreme Court, it must be justified and one of the mandatory requirements is meaningful consultation with the aboriginal peoples affected. Many now argue that aboriginal peoples in Canada are the third level of government, with exclusive authority within their spheres of jurisdiction. Accordingly, negotiations among the U.S., Canada, states and provinces should include the first nations living in the basin in order to avoid future international or domestic constitutional challenges to any decisions made if aboriginal peoples' interests are not reflected.

CONCLUSION

Legal issues affecting Great Lakes Waters protection have attracted an unprecedented level of public and political attention in Canada. The legal challenges are daunting and the political and public debates as to the way forward must be conducted in a well-informed and open forum. With bona fide environmental protection as the paramount consideration, and with full appreciation for the respective jurisdictional interests of all of the governments in the basin, national, provincial, state and aboriginal, it should be possible to provide good legal solutions. In Canada, the Canadian public will not countenance governments who fail to act and aboriginal

peoples cannot be expected to sit by while their interests are affected without their involvement. At the same time, possible trade challenges by third party countries or by private corporations can be expected and this places even greater importance on good faith and good science as the Great Lakes players negotiate solutions.