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THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND THE PRACTICE OF DOMESTIC ENVIRONMENTAL LAW

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The Relationship between International Law and the Practice of Domestic Environmental Law

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INTRODUCTION

There has always been an interesting interplay between international and domestic law. While one may assume some vague relationship, there are a number of examples in Canada that demonstrate more particularly just how dynamic this relationship can be on a practical level. The purpose of this paper is to provide some examples of the nature and implications of that relationship. More particularly, this paper will address the following themes:

1. International law may at times clearly direct or influence the development and implementation of domestic law and policy. Domestic law may affect the interpretation of international law provisions as legal concepts are transferred from one country to another through international agreements.

2. There is concern that the Canadian federal government may move away from committing to specific international obligations, in part because of the implications for domestic law.

3. It becomes more and more significant to include consideration of international law when considering domestic environmental law issues, both in terms of existing conventions and in terms of proposed or possible future international law documents. Conversely, the implications of domestic law for international law must be considered.

The following examples serve to illustrate these themes.

A. Great Lakes Agreements & Experience - When examining the Great Lakes experience, it becomes apparent that the international law regime governing the Great Lakes has had a discernable impact on the development of domestic law and policy within Canada. Ironically, this same experience has had, or is having, a much broader impact on the development of international environmental law generally.

The Great Lakes Water Quality Agreement

The foundation of the Great Lakes Water Quality Agreement is the Boundary Waters Treaty of 1909, especially Article IV[1] which is probably one of the first expressions of an explicit anti-pollution provisions in treaty law. Despite the existence of this provision, the Great Lakes remained under considerable environmental stress for decades. By 1972, the U.S. and Canadian governments negotiated the Great Lakes Water Quality Agreement which, at that time, was aimed at arresting the problem of eutrophication of the Great Lakes, that is, the premature aging of the aquatic environment. The 1972 agreement limited phosphorous loadings the Great Lakes with quick, positive responses.

As progress was being made on that front, however, scientists were recognizing that the long-term threat to the Great Lakes was the presence of persistent toxic substances. These substances were particularly problematic as they not only have a long residence time in the Great Lakes, but they also accumulate in the fat cells of fish, wildlife and humans.

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1. Article IV provides that "boundary waters shall not be polluted on either side to the injury of health or property on the other".

When the Agreement was renegotiated in 1978, the new, enhanced agreement included a number of important provisions.[2] One of the important provisions in this regard was the inclusion of the Article II policy goal that "persistent toxic substances be virtually eliminated." This virtual elimination goal was supplemented in Annex 12 to the 1978 agreement by stating that when parties are designing regulatory strategies with respect to virtual elimination, such strategies must be undertaken in the "philosophy of zero discharge."[3]

Impact of the Virtual Elimination Goal on Domestic Policy

There is little doubt that the virtual elimination goal of the Great Lakes agreement has directly influenced law and policy in Canada. However, the fact that it has influenced law and policy does not mean that there is a consensus with respect to whether the international commitments have been appropriately interpreted and applied domestically.

One of the clearest influences of the goal is through the Canada-Ontario Agreement (COA). COA is the agreement signed between the federal and Ontario governments and "provides the framework

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2. Another important principle or provision included in the 1978 agreement was the inclusion of the "ecosystem" approach to environmental management. For a more complete history and experience under the Agreements, see: Lee Botts and Paul Muldoon, *The Great Lakes Water Quality Agreement: Its Past Success and Uncertain Future* A project sponsored by the Institute on International Environmental Governance, Dartmouth College, Hanover, New Hampshire, March, 1997.

3.Article II of the Agreement stat that the parties agreed that:

> "...the discharge of any or all persistent toxic substances be virtually eliminated..."(Article II)

and that:

> "the philosophy adopted for control of inputs of persistent toxic substances shall be zero discharge..." (Annex 12, section 2 (a) (ii))

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".[4] Initially, the agreement was responsible establishing the phosphorous reduction targets throughout the Great Lakes area (since the federal government agreed to finance the upgrading or building of waste treatment facilities in order to meet the phosphorous reduction goals). More recent versions of the Agreement highlight specific reduction targets of specific

pollutants as interim steps to the goal of virtual elimination.

In Ontario, the Great Lakes Water Quality Agreement goal of virtual elimination was carried into the Municipal-Industrial Strategy for Abatement (MISA) (a program to reduce water discharges in the province) and into the development of candidate lists of substances for phase-out of particular substances.[5] Environment Canada recently made a submission to Ontario's Waste Management Branch on this issue, which in itself is unusual. In response to a proposal to change waste management regulation in the province of Ontario, Environment Canada cited its obligations under the Canada-Ontario Agreement and the Great Lakes Binational Toxics Strategy for the Virtual Elimination of Persistent Toxic Substances in the Great Lakes. Their comment focussed on their commitments in respect of dioxins and furans in particular, and recommended an addition to the provincial regulation that would expressly state that compliance with that regulation "does not

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4. *First Progress Report Under the 1994 Canada-Ontario Agreement respecting the Great Lakes Basin Ecosystem*, p. 1

5.Marcia Valiante, Paul Muldoon and Lee Botts, "Ecosytem Governance: Lessons from the Great Lakes" in *Global Governance - Drawing Insights from the Environmental Experience* (Mass.: MIT, 1998), pp 214-215.

absolve the suppliers or applicators from responsibility for compliance with the requirements of other provincial or federal legislation."[6] This is an example of international commitments directly influencing domestic law - in this case, provincial regulation.

The federal government's Toxic Substances Management Plan of 1995 also commits to the goal of virtual elimination. Similarly, a new bill designed to revamp the Canadian Environmental Protection Act (CEPA, or Bill C-32), also commits the government to the goal of virtual elimination. The difference in this context, however, is while the Toxic Substances Management Policy and Bill C-32 adopts in principle the goal of virtual elimination, these initiatives do not adopt the definition of the term that has emerged over a decade of discussion within the Great Lakes regime.

In summary form, CEPA proposes a definition of virtual elimination that connotes for certain designated substances, cannot be released in detectable amounts. In other words, substances (and presumably the most dangerous ones) could be used or generated by a facility so long as they were not released in amounts so defined as detectable. Furthermore, the proposed section 64 provides for implementation of "virtual elimination" goals based on any factor or information that in the opinion of the Ministers, is relevant. This includes, but limited to, environmental or health risks and any other relevant social, economic or technical matters.

While ostensibly this approach may be reasonable, it is completely inconsistent with the evolution

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6. Environment Canada, Letter from Ron Shimizu, Regional Director, Environmental Protection Branch, Ontario Region, to Bob Breeze, Director Waste Reduction Branch, Ontario Ministry of the Environment, dated September 15, 1998, re: EBR Registry #RA8E0023.

of the term as understood under Great Lakes Water Quality Agreement by such agencies such as the International Joint Commission.

In the International Joint Commission's (IJC) Eighth Biennial report, the IJC stated that

> "Virtual elimination...will not be reached until all releases of persistent toxic chemicals due to human activity are stopped. Zero discharge does not mean simply less than detectable...does not mean the use of controls based on best available technology or best management practices that continue to allow some release of persistent toxic substances...Zero discharge means no discharge...It is a reasonable and achievable expectation for a virtual elimination strategy..."[7]

Hence, while the Great Lakes regime has in part shaped domestic policy, there remains considerable controversy as to how that concept is applied and implemented domestically.

Impact of the Virtual Elimination Goal on International Law

The concern, however, is not only how the term is applied and interpreted domestically, but what will be the impact of Canada's interpretation of the term in other international fora. For example, what will Canada's position be with respect to the definition of "virtual elimination" in the negotiation of the *Protocol on Persistent Organic Pollutants* now under development through the United Nations Environment Program? How will Canada's domestic position on this topic influence the *Great Lakes Binational Toxics Strategy for the Virtual Elimination of Persistent Toxic Substances in the Great Lakes* an agreement being implemented between Canada and the U.S.

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7. International Joint Commission, (Ottawa-Washington, 1996) *Eighth Biennial Report on Great Lakes Water Quality*, pp. 8-10. For a critique of the definition in Bill C-32, see: Canadian Environmental Law Association and the Canadian Instiute for Environmental Law and Polcy, Submission on Bill C-32, the Canadian Environmental Protection Act (October, 1998, pp. 92-96.

(serves to implement the Great Lakes agreement both in Canada and the U.S.). How did it influence amendments to the Economic Commission for Europe's *Convention on Long Range Transport of Air Pollution*?[8] One could argue that the conservative approach taken with respect to the concept in Bill C-32 could have a negative influence on the interpretation of the term in existing agreements such as the Canada-Ontario Agreement and the Great Lakes Water Quality Agreement[9] which preceded it. Those agreements did not include a definition of the term virtual elimination and it is feared that the definition in domestic law will be imported by reference into the international agreement. Therefore, the domestic law as ultimately passed assumes even greater importance because of the international law implications. If, for example, the proposed CEPA definition influences the interpretation of the Great Lakes Water Quality Agreement, it may result in an interpretation contrary to that originally intended in the Agreement.

The Great Lakes Water Quality Agreement's goal of "virtual elimination" was itself originally derived from U.S. domestic law,[10] thus again illustrating the theme of international law acting as a conduit for legal principles from one state to another - in this case from U.S. domestic law to the GLWQA to the Canada-Ontario Agreement to CEPA. Now the process may reverse itself if the proposed Canadian domestic definition is adopted.

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8. The *Strategy* is developed through the Commission on Environmental Cooperation, which was created by a side agreement to NAFTA.

9. *Great Lakes Water Quality Agreement Between Canada and the United States,* (1978), Article II and Annex 12

10. Valiante et al p. 212

B. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposals - Canada, along with over one hundred other countries signed the first phase of this Convention, controlling export of hazardous wastes in 1989. The Basel Convention was in force as of May, 1992 and by 1997 was ratified by 114 countries.[11] Regulations promulgated under the Canadian Environmental Protection Act include specific provisions with regard to the export of hazardous waste, consistent with that first phase of Basel, in 1992 (the *Export and Import of Hazardous Waste Regulations*).

Amendments suggested by Canada in 1991 were adopted by the OECD in 1992, providing for a three-tiered control system ("green", "amber" and "red" lists) for hazardous recyclables "destined for operations which are environmentally sound." Canada's 1991 proposal directly resulted from its domestic work on the Export and Import of Hazardous Waste Regulations through a task force co-chaired by Environment Canada and the Mining Association of Canada. The green, amber and red lists were recently incorporated into Basel as Annexes VIII and IX.[12]

However, Canada, and Australia are resisting ratification of the amendments to Basel in 1994 with respect to a ban on export of hazardous waste to non-OECD countries as recyclables. As noted, Canada has been under pressure from the Canadian Association of Recycling Industries and other industry associations to treat export of hazardous wastes destined for recycling differently than other

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11. Bombier, Nina, "The Basel Convention's Complete Ban on Hazardous Waste Exports: Negotiating the Compatibility of Trade and the Environment", 7 J.E.L.P. 325 at 326.

12. Environment Canada backgrounder, supra, p. 14.

hazardous wastes.[13] In this case, domestic law has an impact on the international position. A recent backgrounder from Environment Canada noted the distinction between the use of the term "hazardous waste" internationally as including both wastes and recyclables, compared with the domestic use of the term which sometimes excludes recyclables from the term.

The Canadian position in the international negotiations is strongly influenced by the domestic distinction despite criticisms here about basing rules on whether material is destined for recycling or not. An illustration of this concern arose with respect to a major plastics fire at the site of the Plastimet facility in Hamilton, Ontario in 1997. Ironically, Environment Canada's September 1998 backgrounder on its international position on this issue cited Plastimet as an example of the need for control of hazardous wastes destined for recycling; perhaps not appreciating the extent to which the very definition of recyclables as "not wastes" and the difference in the regulatory regime led to the problem there. In any event, the Basel Convention and the separate Canada-U.S. Agreement on Transboundary Movement of Hazardous Waste give rise to federal concerns as to how hazardous waste is dealt with provincially. This is a very timely issue in Ontario as the regulatory system governing wastes is undergoing a major overhaul. The theme of domestic law influencing international law and vice versa are well illustrated by the Basel and binational processes regarding cross boundary transport of hazardous wastes.

C. Nova Group water taking permit - The granting of a water taking permit to the Nova Group

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13. *The Transboundary Movement of Hazardous Wastes and Hazardous Recyclables: A Background Paper on the Evolution of Canada's Obligations*, Environment Canada, The Transboundary Movement Division, Revised September, 1998, p. 5

by the Ontario Minister of the Environment in early 1998 precipitated a very concerned response by the Great Lakes governors when it came to their attention in May of 1998. This past summer, the Ontario Ministry of Environment granted the Nova Group a permit to take water from Lake Superior by tanker for export to Asia. After a hue and cry, including by the Great Lakes states, the Ministry decided to revoke the water taking permit. That decision to revoke the permit was appealed by the Nova Group to the Ontario Environmental Appeal Board, a provincial tribunal empowered to hear appeals of decisions under the Ontario Water Resources Act. U.S. states were willing to participate in the Ontario Appeal Board hearings about this permit that commenced in October 1998 and in fact were given party status. In late 1998, the Nova Group withdrew the appeal.

Nevertheless, the appeal raised a number of important issues and concerns.[14] For example, the granting of the permit has implications for the North American Agreement on Free Trade (NAFTA). Did the granting of the permit mean that this is one step forward in treating surface water as an export commodity? It also raised the issue concerning the applicability of the Great Lakes Charter, a document agreed to by the eight Great Lakes states and the province of Ontario. The Great Lakes Charter 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

14. For a general discussion on this topic, see: Claire Farid, John Jackson and Karen Clark, *The Fate of the Great Lakes Sustaining or Draining Sweetwater Seas?* Great Lakes United and the Canadian Environmental Law Association, 1997.

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)

"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)" [15]

This is a striking example of the impact of international law on domestic legal processes and it will be of interest to observe how international law is used in that process, whether as evidence, legal argument or both.

D. Nuclear Law - Canada's *Nuclear Liability Act* with a 75 million dollar absolute total cap on claims from a nuclear accident and complete exemption from liability for suppliers to nuclear plants was originally patterned on international, British and other states' nuclear liability laws and

15. Great Lakes Charter, reprinted in Great Lakes Governors Task Force, *Final Report and Recommendations: Great Lakes Governors Task Force on Water Diversion and Great Lakes Institutions* (January 1985), appendix III, p. 40.

conventions. The early industry players took the position that as they had such protection in other countries they would not participate in the Canadian industry without similar protection. Having achieved that protection in Canada in the 1960's and 1970's, there is today tremendous resistance to altering the Act. The Canadian *Nuclear Liability Act* has failed to keep pace with changes in the liability regime for the nuclear industry in the other industrialized countries who use nuclear power. For example, in Germany and in Switzerland now, victims have unlimited legal rights to claim compensation; while the United States nuclear insurance pool has been increased from its original 560 million dollars in 1957 to 9.8 billion dollars today. However, as Canada enters into agreements with other countries to sell CANDU nuclear reactors, it strongly suggests to those countries that they enact a version of the *Nuclear Liability Act* with its very low limit, its cap on liability and its absolute exemption for suppliers. The themes of international law affecting domestic law and as a conduit from state to state are again illustrated with this example.

E. First Nations' Rights, Claims and Legal Systems -

An emerging trend is consideration of First Nations' rights and claims and their implications for both domestic and international law. Those 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 domestic and international decisions.

Canadian domestic law to the effect that Canada owes fiduciary obligations to First Nations peoples, together with the constitutional status of their existing aboriginal and Treaty rights as of 1982 requires that the Canadian government 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. A thorough examination of these issues is beyond the scope of this paper, but no consideration of the themes mentioned here should be without the proviso that First Nations rights must be incorporated.

CONCLUSIONS

From the perspective of the Canadian Environmental Law Association, these are important themes. They affect our work in law reform, in public legal education, in community organizing and in particular cases like the Nova case, the Plastimet appeal, the *Nuclear Liability Act* challenge, and in our work directly with Canadian legislation and international agreements.

We are concerned that Canada's continued movement to the "3D's" ("downloading, downsizing and deregulation") is occurring in a manner that will affect its international capacity and reputation, both under existing agreements and in negotiating new commitments.

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