

**Standing Committee on Environment and Sustainable Development**

**Great Lakes Charter Annex**

**October 28, 2004 ~ November 25 2004**

**Hearings . Written Submissions . Final Report**

HOUSE OF COMMONS  
1st Session, 38th Parliament

CHAMBRE DES COMMUNES  
1re Session, 38e législature

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**NOTICE OF MEETING**

**STANDING COMMITTEE ON ENVIRONMENT  
AND SUSTAINABLE DEVELOPMENT**

**Meeting No. 3**  
Thursday, October 28, 2004  
9:00 a.m. to 11:00 a.m.  
Room 269, West Block  
(992-6324)

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**AVIS DE CONVOCATION**

**COMITÉ PERMANENT DE L'ENVIRONNEMENT  
ET DU DÉVELOPPEMENT DURABLE**

**Séance n° 3**  
Le jeudi 28 octobre 2004  
9 h 00 à 11 h 00  
Pièce 269, édifice de l'Ouest  
(992-6324)

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**ORDERS OF THE DAY**

**Great Lakes Charter Annex**

**BRIEFING SESSION**

**WITNESSES**

**To be determined**

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**ORDRE DU JOUR**

**Annexe à la Charte des Grands Lacs**

**SÉANCE D'INFORMATION**

**TÉMOINS**

**À déterminer**

Le greffier du Comité  
Eugene Morawski ((613) 992-5023)  
Clerk of the Committee

2004-10-26 1:22 p.m.

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2004-10-26 13 h 22



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
*L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT*



*An international coalition promoting and  
coordinating basin-wide initiatives to protect and  
restore the Great Lakes and St. Lawrence River*

## **Statement to the Standing Committee on the Environment and Sustainable Development from the Canadian Environmental Law Association and Great Lakes United on the Great Lakes Charter Annex**

### **Summary**

The Canadian Environmental Law Association and Great Lakes United support the efforts of the Provinces and States to entrench long overdue Great Lakes water protection in a legally binding environmental protection framework. However, our support for the two draft Annex agreements released for comment in July 2004 will be contingent on the changes we have requested to these drafts to strengthen them so that they will be more equitable, effective, enduring and fair.

We are grateful for the invitation to appear before you today. We hope to address questions that have been raised about these agreements in your previous committee hearings and outline our belief that a strengthened Annex in combination with measures taken by the Federal Government of Canada will stop leaks, wastage and future diversions from the Great Lakes. Strong federal, provincial, and state action are all essential to full protection of the entire Great Lakes - St. Lawrence River ecosystem. This can be done without causing conflicts with existing agreements, treaties or laws and without encroaching on the sovereignty of any jurisdiction.

### **Background**

The Canadian Environmental Law Association (CELA) is a public interest legal clinic that provides legal advice and representation to the public and has a mandate that extends to environmental law and policy reform. CELA has been involved in Great Lakes water

management and protection for over 30 years. CELA has published popular reports and made many submissions to governments on water protection and sustainability as part of broader law reform campaigns to strengthen Great Lakes and Ontario regulation.

Great Lakes United (GLU), founded in 1982, is an international coalition dedicated to preserving and restoring the Great Lakes-St. Lawrence River ecosystem. Great Lakes United is made up of member organizations representing environmentalists, conservationists, hunters and anglers, labor unions, community groups, and citizens of the United States, Canada, and First Nations and Tribes. The Great Lakes United Sustainable Waters Taskforce has worked with member groups to develop policies and resolutions on local water conflicts and to improve water management regimes in the Great Lakes Basin.

Both organizations were involved in efforts to strengthen the Great Lakes Charter as early as 1984 and have been involved in opposing each of the seven harmful large U.S. withdrawal and diversion proposals originating from the US side of the Great Lakes after the signing of the Charter in 1985. We also actively opposed both significant Ontario withdrawal schemes since the Charter, the GRAND (Great Recycling and Northern Development) Canal proposal and a proposal to divert water from Georgian Bay to York Region. In 1998, CELA and Great Lakes United (GLU) received standing in the Ontario Court of Appeal. The Appeal was to consider the permit given by the Province of Ontario to the Nova Group to export bulk water in ships from the Canadian waters of Lake Superior to the Orient. As the result of negotiations with the Government of Ontario, that permit was withdrawn before it established a dangerous precedent.

In our 1997 publication "*The Fate of the Great Lakes ~ Sustaining or Draining the Sweetwater Sea?*"

(<http://www.glu.org/english/information/publications/fate-report/pdfs/swtfrpt.pdf>) CELA and GLU chronicled the continuing problems with Great Lakes water management after the Great Lakes Charter. Some of the report's findings are, as follows:

- Decisions on water diversion proposals between 1985 and 1997 were purely political and did not protect the environment;

- Although the Provinces received notice of U.S. diversions over 5 million gallons (19 million liters), they did not have a direct role in decision-making on those diversions;
- The report accurately predicted that communities adjacent to, but outside, the boundaries of the Great Lakes Basin would be turning to the Great Lakes for their future water supplies;
- Little was done by the states and provinces after they signed the Great Lakes Charter to reduce water use and wastage within the Great Lakes Basin;
- The Great Lakes States may not have the powers to refuse a request from the thirsty U.S. southwest states; and
- Data gathering in the region on current water use is inconsistent and incompatible and has not led to reliable sound science on the cumulative and individual impacts of the waters already being taken from the Great Lakes.

Our report concluded that it would be unconscionable to continue with the status quo. This is why CELA and GLU have participated for the past three years on an Advisory Committee to the Governors' and Premiers' representatives negotiating the Annex drafts. This is also why we will continue to work to strengthen the two draft Annex 2001 agreements. We agree with the Ontario government that the status quo is no longer an option. Even though Ontario, Quebec and the Canadian Federal government have moved to prevent diversions from Canada, we have to remain involved to ensure that protection is put in place on the U.S. side of the Great Lakes.

*There is great potential to limit that growth since*

### **The Canadian Federal Government and the Annex**



When many of these problems received attention after the Nova Group proposal, CELA and GLU concurred with the legal opinions of the Canadian Government that formed the basis of the Governments three- part strategy.

Central to the Federal government strategy was the conclusion that an outright ban of diversions could result in trade challenges by evoking Chapter XX of the then GATT. Entrenching both federal and provincial protections over their distinct areas of jurisdictional

responsibility would be the wisest and best defence against harmful and opportunistic bids for our waters.

1. The International Joint Commission (IJC) was called upon to conduct a reference on the future challenges for the sustainability of the waters of the Great Lakes. The recommendations of the IJC were welcome ones. They provide a roadmap to protecting the Great Lakes from future uncertainties. Provisions of the Annex are addressing most of the IJC recommendations to the Provinces and States. CELA and GLU maintain that the wheels that the federal government set in motion will become mired and stuck if the two Canadian Provinces and eight U.S. States fail to implement these agreements. Huge areas of the Lakes will remain vulnerable to future diversion proposals.

2. The Government of Canada also passed the *Boundary Waters Treaty Act Amendments* giving the Minister of Foreign Affairs and Trade powers to veto future diversion proposals in **Canadian** Boundary waters. These powers however do **not** cover proposals coming from the U.S. side of the Lakes.

Critics of the Annex have implied that the Agreements may be in conflict with the Boundary Waters Treaty of 1909. It is our belief that the Annex and the Treaty are compatible and that the Annex addresses weaknesses and limitations of the Treaty. The Federal government has jurisdiction over boundary waters, shipping, trade, fisheries and provision of waters to First Nations and to federal facilities. When the Boundary Waters Treaty of 1909 was passed, it included a hierarchy of uses. At that time little was understood about the environment and ecology of the Great Lakes. The Treaty is silent on the environment. The Annex is intended to address the Provincial responsibilities for the day to day allocation of water for drinking water and sewage treatment, agriculture, industrial use, manufacturing including food and beverage production and emergency response like fire fighting. The focus of the Annex on environmental criteria offers us long overdue legally-binding environmental protection tools. The Treaty provisions combined with the Annex protect all of the uses and all of the waters making up the Great Lakes ecosystem.

3. The final piece of the federal government strategy was to seek a Federal- Provincial Accord to prevent bulk water export. Not all provinces were willing to enter into such an accord. However, Ontario and Quebec acted to further protect the Great Lakes. Ontario passed a law that prohibited water transfers out of the major water basins in the Province. New source protection legislation with a watershed management focus is expected in late 2004 or early 2005. It will include strengthened Ontario water permitting regulations. Quebec has prohibited all water transfers out of the Province. Quebec has embarked on a package of ambitious water reforms for new programs, laws and regulations that will also shift focus to watershed management.

These combined actions make it highly unlikely that future Great Lake diversion proposals will originate from the Canadian side of the Lakes. However, it is still likely that a proposal for a large Canadian withdrawal for domestic use could be subject to an Annex review. However, further steps are necessary to increase protections on the U.S. side of the Lakes.

Protecting the ecological integrity of the Great Lakes St. Lawrence River ecosystem requires participation of all ten jurisdictions in future decision-making. Ontario and Quebec need to be at the table for this to happen.

### **U.S. Weaknesses Make the Region Vulnerable**

The current US Water Resources Development Act (WRDA) gives any one Governor the power to veto a diversion proposal. Though some maintain that this is adequate protection, we have learned that most experts have little confidence in WRDA standing up to a legal challenge as it may be contradictory to the commerce clause of the US constitution. This clause makes water an article of commerce and has been evoked by the U.S. federal government to compel states to share water beyond their boundaries. Nor does the WRDA cover all the waters of the Great Lakes Basin because it excludes groundwater, the source of several high profile debates over the siting of water bottling plants in the U.S. Similarly, outright bans of water export in the U.S. would likely also violate the commerce clause. This is why the states have chosen to legally bind themselves

to each other in the Draft Great Lakes Water Resources Compact. It gives them strength in numbers, allows them to jointly administer their obligations to review proposals, collect data and implement conservation provisions. The Compact Agreement makes it less likely that the U.S. Federal Government will interfere with state decisions.

In Canada the Great Lakes are considered a national concern because they provide drinking water to a quarter of our population. In the U.S. the Great Lakes are viewed as a regional concern. The Great Lakes Region recently lost nine seats in Congress due to population shifts to the arid southwest. We should not underestimate the value to the States of the ability to bring international support to their water management efforts in the region through the Great Lakes Sustainable Water Resources Agreement.

Keeping in mind that the status quo is not a favourable option, CELA and GLU support further efforts to strengthen the two Annex agreements, the legally-binding Great Lakes Water Resources Compact (the U.S. Compact) and the non-binding Great Lakes Sustainable Water Resources Agreement (the Regional Agreement). A summary of our main recommendations can be found on pages 7 and 8 of this submission. After years of discussion, we agree that this is the best way to preserve the sovereignty of all jurisdictions while overcoming constitutional barriers to governments binding themselves in laws across borders. We will urge Ontario and Quebec to bind themselves to the Great Lakes Basin Sustainable Water Resources Agreement by incorporating its important provisions into their provincial water protection laws without weakening any of those laws.

The Annex Agreements are not only setting out to prevent harmful withdrawals from the Great Lakes. They are building a system to better understand and improve water management decision-making within the Basin as set out in Chapter 3 of the Great Lakes Basin Sustainable Water Resources Agreement. CELA and GLU support the components of these agreements that require for the first time that each of the ten jurisdictions initially report on all water allocations and management programs in order to establish a baseline. There are also criteria to prohibit harmful intra-basin diversions (from one Great Lake to another). Subsequent annual



reports will be reviewed by all ten jurisdictions making up the Regional Commission for compliance with the agreements' environmental and conservation requirements. This will give Canadians a direct role in monitoring and commenting on any lack of progress in water protection in the U.S.

While Ontario and Quebec have already acted to strengthen their water allocation systems, many of the U.S. States have not acted since the Great Lakes Charter. They will have much more work to do to comply with requirements set out in these agreements. Indeed, Ontario is leading by example because they require that all withdrawals over 50,000 liters (13,800 U.S. gallons) are examined under their permit to take water regulations. The public is given advance notice of these permits on the Environmental Registry and they are able to comment on permit applications.

Many of the U.S. States do not have permitting systems but simply register water allocations. This means they have no way to impose terms and conditions on withdrawals. With the exception of Minnesota, no Great Lake state requires reviews of water withdrawals at the low quantity levels that Ontario does. We see these Agreements as a way to compel the States with weak water management regimes to strengthen their regulations over time and for the Provinces to have a role in seeing that progress is made. However, this does not mean that Ontario will be required to lower their standards.

The Great Lakes Basin Sustainable Water Resources Agreement explicitly states in Chapter 7, Article 701(1).

*"Nothing in this Agreement alters the legislative or other authority of Parliament or of the Provincial legislatures or of the Federal Government of Canada or of the Provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada."*

As well it does not mean that there will be conflicts with the Boundary Water Treaty Act of 1909. Chapter 7, Article 702, states that:

*"Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any person any right claim or remedy under any international Agreement or treaty."*

Article 200 sets out that the Annex standards are to be considered as minimum and that the Parties may implement measures that are more restrictive.

The requirements and standards in the Annex are stringent for applicants and will result in few, if any approvals, ever being granted. The fact that compliance is required with **all** of the Annex environmental standards as well as consensus of all ten jurisdictions will be a major deterrent to an applicant for Great Lakes water. The existence of these two Annex Agreements will let the world know that the Great Lakes are not for sale.

Without these Agreements, Quebec and Ontario will continue to be sidelined in decisions on diversions from the Great Lakes. If we continue to pass up chances to entrench protection and make our own use of the Great Lakes sustainable we can be assured of many more diversion proposals and challenges. It is very likely that our cumulative everyday use of the Great Lakes, rather than a single diversion, will be ultimately where the harm is done to the integrity of the ecosystem and all creatures and enterprises dependent on their waters. We will have failed others in an increasingly water short world if we do not do everything we can to sustain one fifth of the world's fresh water. Others already put us to shame with their conservation and water efficiency practices.

The only other alternative we have now to challenge a U.S. diversion would be to try our luck in the U.S. Courts something that has proven unsuccessful for us. The recent North Dakota decision on Devils Lake has demonstrated this. For years the Canadian Government has written diplomatic notes about the regulation of the Chicago Diversion, the most likely site for future increased diversions out of the Great Lakes. However the current volume of this diversion has been regulated by decree of the U.S. Supreme Court. The Annex Agreements can not change this. It is unlikely Canadians would be given standing in future U.S. Supreme Court matters. It would be preferable to have any increases in the Chicago Diversion subject to the terms of the Annex.

- The measurement of cumulative impacts should be carried out by all jurisdictions at the smallest scale possible;
- Language between the Compact Agreement and the Regional Agreement should be made consistent so that all jurisdictions are committing to the same actions. It is particularly important that the Decision Making Standard and the Decision Making Standard Procedure Manual are included in the Compact Agreement;
- The ten-year implementation timeline is not acceptable. Five years or less is more realistic;
- Conservation goals and targets should be added to both agreements. Programs to achieve them should be referenced in the agreements;
- The 12-mile exemption from review under the Annex should be excluded;
- The jurisdiction of origin for a diversion or large withdrawal proposal **shall** consider the outcome of the Regional review;
- Return flow to the source watershed, as close as possible to the point of withdrawal, should be required;
- First Nations and Tribes must be appropriately consulted and included in the consensus building framework of the two agreements;
- Averaging periods to determine the quantities of all withdrawals should revert to 30 days as set out in the original Great Lakes Charter (from the 120 days proposed in the current drafts); and,
- Proposals for future increases of the Chicago Diversion should be subject to review under these Agreements.

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Submitted November 18, 2004

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OCTOBER 28, 2004

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CANADA

**Standing Committee on Environment and Sustainable Development**

**Comité permanent de l'environnement et du développement durable**

**EVIDENCE NUMBER 03,  
TÉMOIGNAGES DU COMITÉ NUMÉRO 03**

**UNEDITED COPY – COPIE NON ÉDITÉE**

**Thursday October 28, 2004 – Le jeudi 28 octobre 2004**

Ⓢ (0900)

[*English*]

**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):** Good morning everyone. It's a bright, crisp autumn morning in Ottawa and I think it makes everyone feel that they're ready to take on an exhilarating day. We start off with the issue that was of great concern to many of us, which is over the Great Lakes Charter Annex.

We have as witnesses this morning, Jennifer Moore, Director General, water policy and coordinate director. Welcome Jennifer.

Karen Brown, Assistant Deputy Minister, Conservation Service. Welcome. And Bill Crosbie, Director General, North American Bureau from Foreign Affairs and Peter Fawcett. Welcome.

I think that we have a quorum and I also would like to welcome His Excellency, I call him His Excellency but Herb Gray. Thank you very much for being here this morning, Mr. Gray.

I think with that, Karen shall we put it over to you.

**Mrs. Karen Brown (Assistant Deputy Minister, Environmental Conservation Service, Department of the Environment):** Thank you very much. Good morning everyone. Thank you.

We will, if the committee allows, we'll start with a short presentation of the deck that we've provided to the committee. Jennifer Moore will present that deck.

Following that Bill Crosbie will provide a few introductory remarks and then we'll open it up for questions from the committee. Thank you very much.

**The Chair:** Thank you very much.

Miss Moore.

**Jennifer Moore (Director General, Water Policy and Coordination Directorate, Environmental Conservation Service, Department of the Environment):** Thank you very much. The clerk has distributed a deck and what we wanted to do in the next 10 minutes or so is just go through the context around the Great Lakes and give you a federal perspective. Talk a bit to the Great Lakes Charter, its background, some of the considerations that we are working through and also a sense of where we see status and the next step.

Can everybody hear me? Okay.

Reminding ourselves of what is the Great Lakes Basin and in this context it's certainly the Great Lakes Basin within the provinces of Ontario and Quebec and the eight U.S. border states. That means it's Minnesota, Wisconsin, Illinois, Indiana, Michigan, Pennsylvania, Ohio and New York. That's the scope of the Great Lakes Basin.

When we think about the Great Lakes Basin in terms of the range of instruments and instruments that apply to the Basin, on slide four in the deck is a bit of a presentation and an overview that talks to the key instruments. On an international perspective we have the Boundary Waters Treaty which was signed by both countries in 1909. It's a binational treaty binding both Canada and the U.S. and in that sense, it looks at the questions of obstructions and diversions affecting natural level and flow of boundary waters and requiring working approval of the international joint commission. In terms of the umbrella treaty we have the Boundary Waters Treaty of 1909 and that binds both Canada and the United States.

The treaty in Canada and Canadian waters is implemented through the International Boundary Waters Treaty Act. This is our federal enabling legislation that implements the treaty. Within Canada we have used that to prohibit both out of basin transfers from Canadian portion of boundary waters which in this case are principally the Great Lakes and the St. Lawrence. On the U.S. side, there is a Water Resources Development Act. Then at the provincial level, the key instruments within Ontario is the Water Resources Act which prohibits out of basin water transfers. Within Quebec, the Water Resources Preservation Act which prohibits out of province water transfers. On the U.S. side, the eight border states have a wide variety of state regulations that deal with water quantity in one way or another.

Then in terms of what we would look at as sort of subnational instruments, we have the Great Lakes Charter. The Charter itself was agreed to in 1985. There was an annex in 2001 and then in recent months, there have implementing agreements for these

instruments which have been out for consultation. On this chart, you'll see that in terms of the most recent instruments, the ones that affect Canada in terms of being non binding is the Great Lakes Basin Sustainable Water Resources Agreement which is in draft form and has been out for consultation. On the U.S. side, in addition to that particular instrument there's also a compact. I'll come back to the details in a moment.

On slide five, we wanted to give you a bit of a sense of the current protection within Canada in terms of Canada's prohibition on out of basin transfers. As I mentioned, we have the federal legislation and regulations through the International Boundary Waters Treaty Act and regulations which prohibit bulk out of basin transfers from boundary waters. This prohibition refers to the removal of water from boundary waters and taking it outside the water basin where waters are located. There are convictions associated with any infringements to this particular prohibition. We also across the country have worked with provinces who as well have implemented provincial laws, policies, regulations to deal with out of basin transfers as a prohibition of out of basin transfers.

On slide six, a bit of a background for the Great Lakes Charter. It was negotiated by members of the Council of Great Lakes Governors. That's the eight U.S. Great Lakes states, Quebec and Ontario. There's the umbrella charter which was agreed to in 1985. A draft implementing agreement which was agreed to in 2001, a charter annex and then the detailed implementing agreements are now out for consultation.

☎ (0905)

These are the ones that were released in July 2004.

Together, these are a set of interrelated instruments and they move from the 1985 Charter, which is general principles, to increasingly specific measures.

On slide seven, just to go through this in a little bit more detail, the Great Lakes Charter of 1985 is a non-binding instrument and the general principles that are contained in it are things like integrity of the Great Lakes Basin, cooperation among jurisdictions, protection of the water resources in the Great Lakes, notice and consultation, in terms of activities going on, and a series of cooperative programs and practices.

The Charter of 1985 also asks for further details to be worked on by all parties and in 2001 an annex was released. These details are talked a little bit on slide nine. Supplementary to the original 1985 Charter, it reaffirms the commitments of the five principles, which I just went through; it commits governors and premiers to development of a common management regime; it applies to new and increased in-basin withdrawals and out-of-basin diversions proposed for Great Lakes' surface and groundwater; and it also asks that eventual instruments, that would be worked on later on, that they would be binding.

At the time, the Government of Canada expressed concerns to the Great Lakes governors, who were all parties to the original annex, noting that there was concern about the permissiveness of the standard that's within the annex of 2001, potential conflict with the Boundary Waters Treaty, looked at how it might be consistent with the Great Lakes



Water Quality Agreement and also flagged some concerns around the proposed binding nature of the agreements, in terms of the 2001 annex.

Since 2001, the negotiators at the table, which are the eight Great Lake states and the Provinces of Ontario and Quebec, have continued their work and then came out in July of this year with draft-implementing instruments. Those are described briefly on nine and the next couple of slides.

There are two draft documents. One is the Great Lakes Basin's Sustainable Water Resources Agreement, which is non-binding, on the understanding that this would be signed by all 10 parties. So that's the eight Great Lake states and Ontario and Quebec. The other is a Great Lakes Basin Water Resources Compact, which would be binding under U.S. federal law, therefore linked to the Water Resources Development Act, and this would pertain to the eight American Great Lake states.

These collectively set out a decision-making process for new and increased diversions and consumptive uses of Great Lakes water and they also establish threshold triggers based on the proposed quantity of water under consideration.

On slide 10, going through the Great Lakes Basin Sustainable Water Resources Agreement, this is one that is non-binding that all 10 parties would sign. It would establish a review body of Great Lakes governors and premiers, it would be non-binding, according to the text, and would be there to review new and increased consumptive uses above review threshold levels. It applies, as we understand it, to both in-basin and out-of-basin proposals and it also provides that individual provincial/state management and regulation would continue on for activities that are below that threshold level. So the idea is that the water resource management activities below a certain level would be dealt with in terms of provincial/state laws, regulations; above a threshold level would be looked at by the 10-party review body.

The second part of the implementing instruments is the Great Lakes Basin Water Resources Compact. This applies to the U.S. Great Lake states only. It, too, would establish a review council. The same thresholds that apply to the broader 10-party agreement are contained within the U.S. compact and it would be legally binding on American parties. It has some voting rules within the draft text that's been circulated, which talks about the new and increased diversions you would have unanimity--all Great Lake states would have to agree. And in terms of new increased consumptive uses, it would be sets of the Great Lake states.

⌚ (0910)

These are specific parts of the draft agreement that's been out for consultation.

Again, below a certain threshold level, individual state management and regulation regimes would apply to the thresholds.

The draft compact, this agreement that's been out, will have to be approved by state legislatures and the U.S. Congress.

That's an overview of the implementing instruments that have been out for consultation over the last number of months.

On slide 12, a little bit of a sense of the considerations that give you a bit about our federal perspective. The federal government will provide comments to the Council of Great Lakes Governors. Our comments on the draft instruments will be very much informed by the following considerations: consistency with Canada's prohibition on bulk out-of-basin transfers of boundary waters; obligations under the boundary waters treaty, no effect on levels and flows; making sure that it's based on ecosystem perspectives, the importance of protecting ecosystems in communities that depend on a sustainable supply of water in the Great Lakes system; relevance of science-based policy informed by both sound science and reliable data; and a precautionary approach, a prudent action that's very important to face potentially serious risk without having to weigh scientific uncertainty.

These are the considerations the federal government is now looking at and assessing in the context of the comments that we will make to the council.

Finally, in terms of current status and next steps, as we understand it, as I had mentioned, the Government of Canada will provide comments to the governors at some point in November. We also intend to share our comments with Quebec, Ontario, and our U.S. counterparts.

As we also understand, the Great Lakes states and provinces, in other words, the working group of the council, are going to resume negotiations on the draft implementing instruments some time in 2005, and will be looking at these in the context of the public comments that have been received over the consultation period, which has just closed. It started in July and concluded in mid-October. We also understand that there should be revised text for these instruments sometime later in 2005.

Thank you, Mr. Chair.

☎ (0915)

**The Chair:** Thank you, Ms. Moore.

Back to you, Karen.

**Mrs. Karen Brown:** Thank you.

I'll ask Bill Crosbie if he can provide a few opening comments.

**Mr. William Crosbie (Director General, North American Bureau, Department of Foreign Affairs Canada):** Thank you, Karen. Thank you, Mr. Chairman.

We've prepared an information deck on the boundary waters treaty. In the interest of time, we can make it available to members.

I would like to stress to the committee, as Minister Pettigrew had in the House last week, that, first, U.S. and Canadian obligations, under article 3 of the treaty, are unaffected by the proposed Great Lakes Charter Annex implementing agreements. Again, those commitments or obligations already referred to are of no uses or diversions of boundary waters that affect the levels or flows on the other side.

Second, the parties to boundary waters treaty, the two federal governments, must ensure that these agreements between states and provinces can be implemented in accordance with their obligations under the treaty.

Third, as Minister Pettigrew stated to the House last week, we are currently analyzing the proposed agreements for consistency with the boundary waters treaty in consultation with the governments of the United States, Ontario and Quebec.

On the U.S. side, Congress delegated authority to the Great Lakes states to develop new standards for water management under the U.S. Water Resources Development Act. The development of the standards are under the auspices of the Council of Great Lakes Governors, that includes Ontario and Quebec, in recognition of their role in water management in the basin.

As mentioned in the deck, there are two agreements, a non-binding international instrument involving Ontario and Quebec, and a charter which is binding between states and will have to be approved by all Great Lakes states, including implementing legislation, and then by the U.S. Congress. It's a very complex process on the U.S. side.

The U.S. government has recently submitted comments to clarify, but nothing in the compact, once approved by Congress, conflicts with U.S. federal and international law or its obligations under the boundary waters treaty. Some of the provisions will enter into force when signed by all states, but the standards will not apply until the full approval process is completed, which is expected to take up to 10 years.

All that to say that the federal government is very much seized at the matter and looking very carefully at developing comments, and looks forward to hearing comments from the committee.

I should say for myself that I've just started this job a few weeks ago, so I'll be relying on my colleague Peter Fawcett, who has himself been involved in many of the consultations with the provinces, along with colleagues in Environment Canada quite heavily.

Thank you.

**The Chair:** Thank you Mr. Crosbie.

Mr. Fawcett, do you wish to add anything?

**Mr. Peter Fawcett (Deputy Director, U.S. Relations Division, Department of Foreign Affairs Canada):** Not at this time, Mr. Chairman.

**The Chair:** Good. Well if there isn't any further comment from your side, perhaps we'll go to the committee now. Members of the committee will adhere to our agreed upon order. We have the Conservatives who will ask questions and we'll go to the Bloc, then over to the Liberals and then over to the NDP and then I'll take questioners in the order that they occur.

From the official opposition.

**Mr. Jeff Watson (Essex, CPC):** Thank you. Can you clarify how many questions I can ask here, right off the bat?

**The Chair:** We have up to 10 minutes.

**Mr. Jeff Watson:** We have up to 10 minutes, okay.

First of all I want to thank all the witnesses for appearing before the committee. I certainly appreciate that. I know this has come up very quickly and you've done your work to your best to give us a presentation here.

I have a couple of concerns, I want to probe a couple of areas here. The first concern I have is about whether water is going to become a commodity. I'd like to probe an area here. The Council of Great Lakes Governors had a legal opinion on whether or not in-Basin and out-of-Basin withdrawals could be distinguished. In other words, their opinion was, that if you treat water like a commodity inside the Basin, then federal and international law would require you to treat it like a commodity outside the Basin.

The International Joint Commission though believes that... has a contrary opinion on this matter. I guess the question I have here, when we have conflicting legal opinions, if the Governors accept that water is being treated as a commodity in the agreements, does this not mean that water will be treated as a commodity under NAFTA?

I'm not sure who will answer that one. Somebody can take a stab at that.

⓪ (0920)

**Mrs. Karen Brown:** I'll start. I think we want to make it clear that we're not lawyers, any of us, so we're not professing a legal opinion.

What has always been clear, I think, to certainly the Government of Canada in terms of its views in this regard is that, water in its natural state is certainly not considered a commodity and water maintained in its natural state therefore is protected, if you like, under the NAFTA rules.

That's why the Government of Canada's policies with respect to bulk water removal focused very much on ecosystem health and its withdrawal of policy is focused very much on the Basin itself.

I can't comment on outside opinions or legal opinions in that regard but clearly this is a matter of some concern to all levels of government to ensure that we are consistent in terms of how we approach this, that we maintain the ecological integrity of the Great

Lakes and its Basin. I'm assuming that the Council of Great Lakes Governors is very ceased of this matter in addition to both Canada and the U.S.

**Mr. Jeff Watson:** So that's the federal governments perspective. I'm going to probe the U.S. side for a second here. I'm going to put this in a political context because I'm a politician of course but, the current proposed...let me just step back for a second here.

The Great Lakes Basin Water Resources Compact, as I'm reading here, this is the one you say requires unanimity among U.S. states and then would also have to be approved by congress. I'm going to put a political context around this if you will for a second here, supposing that this formula goes forward.

You know currently we have a different political climate in the United States, we have hog counter bills, we have counter bills against softwood lumber, borders closed because of BSE, the security climate where Canada is not necessarily perceived as being on-board with the United States. The political climate over there raises concerns for me that it's actually quite easy to achieve some amount of unanimity on diverting resources like water or commodities water, if you will, without regard for what it really means to the Canadian side.

I'm going to ask a question here, you know, requires unanimity on the U.S. side, what recourse does Canada have if we disagree... say they approve a water diversion or a massive diversion outside of the Great Lakes Basic, what recourse does Canada have if we disagree with that? I mean if this is really going to... for example, I'll make it a little more specific. If Chicago for example, I shouldn't say Chicago is inside the Basin but if there was a larger community outside of the Great Lakes Basin that was diverting water for its use and then say putting it into the Mississippi River Basic, which is an entirely different Basin, and that was approved with unanimity on the U.S. side, what recourse do we have to say no to that?

**Mrs. Karen Brown:**

First, I think it's worth repeating that the U.S. State Department has provided comments to the Great Lakes Governors with respect to these agreements and has clearly indicated they wish to see a clause inserted into the compact to state very clearly that the Boundary Waters Treaty--which is the Canada-U.S. treaty--will prevail, notwithstanding all other matters that are under consideration.

In that regard I won't go further because I don't know any further with respect to what the U.S. views are but we do know with some certainty that the U.S. State Department has made this request very officially to the Great Lakes Governors and clearly have signalled a very strong commitment to the Boundary Waters Treaty which is in fact the treaty that governs all of the Great Lakes.

The stop-gap, if you like, is the Boundary Waters Treaty itself which both levels of government have made a commitment to and the State Department has clearly indicated to the governors that they must live within that treaty.

**Mr. William Crosbie:** I'd just add that we can provide the committee with a copy of the comments from the U.S. State Department which, as Karen has already said, clearly states their commitment to the Boundary Waters Treaty and--

**Mr. Jeff Watson:** When were those comments made, if you don't mind me asking, as far as the State Department's direction?

**Mrs. Karen Brown:** Very recently. Last week?

**Mr. Jeff Watson:** Perhaps I'm naturally a little bit cynical. I'm still not satisfied that because they say that today, that that's how they feel about it, that somehow that won't change. My great fear is that somehow we're going to be left with an agreement that gives us no recourse. I don't know if we necessarily need a veto per se, but if we don't like a diversion that's approved on their side of the border, what recourse are we left with on our side of the border?

We also thought softwood lumber and a number of the other political problems would have been cured a long time ago.

If I can probe my concern for a minute, going back to the commodification of water, here we go again. The federal government says it's not a commodity. If the U.S. disagrees and they're of the opinion that it is a commodity, I keep wondering what our recourse is, as a federal government here if the U.S. simply disagrees or if we have a real disagreement. What's built into this agreement that gives us some sort of veto or some sort of recourse if we have a difference of opinion with the United States is I guess what I'm trying to probe here.

**Mrs. Karen Brown:** First, we're not party to the agreements that are being discussed here. I think we've made that very clear. The federal government is not party. The provinces and territories, Ontario and Quebec, obviously as well as the U.S. states are.

But just to come back to that--and Peter can add more--the Boundary Waters Treaty is, in fact, how we would manage that and we would fall back on the Boundary Waters Treaty. Canada and the U.S. have had excellent cooperation since the inception of the treaty, working very closely through the IJC and its relevant bodies and agencies.

Perhaps Peter can add additional comments.

**Mr. Peter Fawcett:** Thanks very much.

Maybe I can just go back to the first question you asked about the differing opinions that the Council of Great Lakes Governors received and that of the IJC.

The opinion that the Council of Great Lakes Governors received was related to U.S. law and the opinion--and one we share, frankly--that the IJC has put forward represents international law. To go to the specifics of the question of in-basis versus out-of-basin, clearly the international law experts agree, as we've done in our own implementing legislation under the International Boundary Waters Treaty Act, you can discriminate between in-basin and out-of-basin use.

It's because of the existence of the Boundary Waters Treaty there is an international regime that covers the Great Lakes and therefore you can take that. I think the proof of the pudding, if you will, is our own law that in fact provides the highest level of discrimination, an absolute prohibition, on bulk water removals on our side.

So the opinion that the Council of Great Lakes Governors have received is related to U.S. law. I'm not a constitutional lawyer or an expert in that area but clearly what the Council is trying to do is to try and rationalize, if you will, these two competing opinions.

As I say, we certainly share the view that's expressed by the IJC that because of the international regime in the Great Lakes, that international law would prevail. Also, I think the statement by the U.S. Government would indicate a similar view.

**Mr. Jeff Watson:** I have two very brief questions, just to wrap up. One minute?

First, I'm looking at a quote of the Council of Great Lakes Governors in the overview of the charter annex which says,

If you treat water like a commodity inside the basin, federal and international law would require you to treat it like a commodity outside the basin.

Now you're saying the IJC's is about international law. In their opinion, they think international law will draw a distinction, so there's a disagreement there.

I want to move on to another question here and I'll get to this one right now. Does the American proposal, as it is written, constitute a violation of the Boundary Waters Treaty?

**Mrs. Karen Brown:**

That's part of what we're reviewing at the moment. We're still awaiting the legal opinion. We're reviewing very carefully the agreements, as Minister Pettigrew has indicated in the House.

Clearly our biggest concern is to ensure that these agreements are in fact consistent with the Boundary Waters Treaty and in fact if there is a way to implement them consistent with that treaty. So that review is underway.

**Mr. Jeff Watson:** Okay, thank you very much.

**The Chair:** Thank you.

Mr. Bigras.

☎ (0930)

[*Français*]

**M. Bernard Bigras (Rosemont—La Petite-Patrie, BQ):** Merci beaucoup, monsieur le président.

Mon collègue a assez bien présenté la chose, il y a quelques minutes. Ce qu'il a dit représente plusieurs inquiétudes de la part de nombreux environnementalistes. La crainte de certains c'est que cette entente devienne la fin d'un quasi moratoire. Cela pourrait avoir pour conséquence une certaine dérivation de plusieurs milliards de litres d'eau à la hauteur de Chicago vers le Mississippi. Je pense que vous devez être sensible à cela. Certains estiment même, je pense au Conseil des Canadiens et au Professeur Scheinler qui ont un avis juridique, qu'il y a un risque de perte pour la souveraineté canadienne et le risque d'une dérivation importante des eaux.

Ma question est la suivante. Est-ce que vous avez un avis juridique? Est-ce que vos ministères se sont assuré d'avoir une certaine garantie que cette souveraineté ne sera pas perdue? Qu'est-ce que vous avez fait? Avez-vous demandé des avis au ministère de la Justice? Quelle disposition avez-vous prise pour éviter de perdre, jusque dans une certaine mesure, une souveraineté canadienne?

[*English*]

**Mrs. Karen Brown:** Thank you.

Yes, we are consulting with the Department of Justice. We have asked for a legal opinion with respect to how these implementing agreements will fit, if you like, with the Boundary Waters Treaty, with the International Boundary Waters Treaty Act, which is the Canadian law and they are reviewing that as we speak. We're working with the Department of Justice and JOL within foreign affairs and those are the very questions that they are seized of.

[*Français*]

**M. Bernard Bigras:** Serait-il possible, monsieur le président, lorsque la sous-ministre obtiendra cet avis juridique, qu'elle le dépose au comité? Premièrement, ce serait souhaitable pour les membres du comité. Deuxièmement, avez-vous évalué l'impact que pourrait représenter la baisse du niveau des bassins des Grands Lacs suite à une certaine dérivation sur le Saint-Laurent? Avez-vous évalué un moment donné l'impact que pourrait avoir selon vous sur le Saint-Laurent, dans la mesure où certains environnementalistes craignent par cette dérivation une baisse du niveau du bassin des Grands Lacs, ? Dans la mesure où cette situation se réalise, une baisse de trois mètres par exemple, d'après ce qu'on dit dans certaines hypothèses de travail?

[*English*]

**Mrs. Karen Brown:** On the first question, I think we will certainly be happy to provide the draft comments when we have them. Obviously we are very much working with justice and with all the program staff. We want to consult with Ontario and Quebec as well as our U.S. counterparts in providing comments to the Great Lakes governors and look forward to receiving the report of the committee as well so that we can make sure that's taken account of as we go forward.

On the second question, the International Joint Commission actually has a study in that regard and I'll ask Jennifer to give a little bit more of that detail.



**Jennifer Moore:** The International Joint Commission does have a levels and flow study underway looking at the St. Lawrence system. This is one that is being conducted, I believe, in conjunction with our U.S. counterparts and our very best experts are certainly engaged in this study. It's underway. I cannot tell you exactly when it will be completed, but I can certainly get back with that information to the committee.

**The Chair:** Mr. Simard.

[Français]

**M. Christian Simard (Beauport—Limoilou, BQ):**

Il y a quelques années j'ai participé à un *public advisory committee*, un comité conseil de la Commission-mixte internationale. À ce moment-là c'était une demande à la Commission-mixte pour le contrôle des inondations ou des niveaux très élevés dans les Grands Lacs qui avaient été connus à la fin des années 1980. Ils avaient donc une nécessité de mieux gérer l'eau des bassins. Il y avait des projets avec L'Army Corps of Engineers. Je me souviens que, dans le cadre de ces études, ne serait-ce qu'au chapitre des changements climatiques il y avait des scénarios qui prévoyaient une baisse jusqu'à 30 p. 100 de l'eau qui se jetterait dans le Saint-Laurent en fin de bassin, et des scénarios catastrophes qui allaient jusqu'à 50 p. 100 en 2025.

Les questions que je me pose c'est: premièrement, a-t-on un bilan des échanges actuels d'eau? Il s'en fait quand même. Ce n'est pas nécessairement une dérivation de bassin. Il se puise actuellement de l'eau dans les Grands Lacs. À quel niveau cela se puise-t-il? J'aimerais donc savoir d'où on part. Deuxièmement, de voir s'il existe des scénarios d'effets cumulés entre les prélèvements possible massifs dans les Grands Lacs combinés aux changements climatiques.

☎ (0935)

[English]

**Mrs. Karen Brown:** We probably don't have all the information that you're seeking today but we can certainly provide it. In addition I think the International Joint Commission, when it appears and I think it's appearing before the committee, can provide much of that information. The IJC is charged with those studies and as well is, as Jennifer just indicated, working on the flows issues and it is current records that they have.

Unless Peter has anything to add, we certainly would be able to provide additional information that we don't have that information at our fingertips at the moment.

**The Chair:** The IJC is scheduled for next Tuesday. They will be coming in.

Sorry. Mr. Fawcett.

**Mr. Peter Fawcett:** Thank you, Mr. Chairman. That's exactly what I was going to say. That's one of the issues they are going to testify.

Much of this information, in fact, has been generated by the IJC in its reports including your question about the current level of diversions out of the Great Lakes. The study that was mentioned previously, studying the levels and flows of Lake Ontario and the St. Lawrence system, we hope that will be finished within the next year will provide additional information.

I think your question also goes to another important matter and that is the need for greater water management in the Great Lakes Basin. Absolutely there is very much a need for better information about current uses, about what the cumulative impacts will be. We need the information and scientific research to make those determinations and a better management regime in the overall basin as called for by a number of international organizations such as the IJC and the Great Lakes Commission.

[*Français*]

**M. Christian Simard:** Dans une éventuelle entente entre les huit États, l'Ontario et le Québec, même s'il y a un engagement dans ces ententes de respecter, au bout du compte, les traités et les lois, est-ce que ce ne serait pas un peu comme le cheval de Troie, c'est-à-dire une première étape pour faire pression pour les États américains pour faire changer la loi fédérale américaine.

Est-ce qu'on pourrait, nous, que ce soit l'Ontario, le Québec ou au niveau fédéral, avoir un angle d'attaque contre cette éventuelle chose étant donné qu'il pourrait y avoir un engagement de respecter le traité. Cependant, si après, le pacte fait changer la loi fédérale et que ce soit un peu le premier étape. Il y a une pression énorme. On sait qu'il y a plus de 40 millions de personnes--ce sont des vieux chiffres--autour des Grands Lacs et du bassin des Grands Lacs et 4 à 5 millions le long du Saint-Laurent, qui est un peu le tuyau d'échappement, ce qui n'est pas gentil au niveau environnemental. Au Québec, on subit l'ensemble des décisions prises par un bassin qui fait une pression énorme, sans compter le mid-west américain.

Est-ce qu'il nous sera possible d'avoir une prise de ce côté-ci, que ce soit pour le Québec, à la deuxième étape, de faire changer la loi américaine avec une pression populaire extrêmement lourde?

[*English*]

**Mrs. Karen Brown:** The issues that you are identifying in fact are the ones that the Council of the GreatLakes Governors. There is no doubt that the numbers of people that live in the Great Lakes Basin is very large and the numbers of people that rely very much on that ecosystem is in fact growing, in particular communities that are outside of what we would traditionally call the basin and there is quite a bit of demand in that regard.

The short answer to the question is that notwithstanding these agreements, first of all, the agreement that's referred to, that the province of Ontario and Quebec are party to, are in fact non binding first of all. Secondly, notwithstanding that the International Boundary Waters Treaty Act, the Canadian implementing legislation, would still prevail which in fact prohibits the outer basin transfer. That's the dilemma that we're faced with, how we actually work with the Council of the GreatLakes Governors to ensure that whatever they

are proposing is in fact consistent with that treaty. I think Minister Dionne in response to a question has yesterday indicated very clearly we have no intention of changing that legislation nor the regime that we have in place. That is our very strong and firm commitment in that regard.

Ⓢ (0940)

**The Chair:** Thank you.

I'll go to the other side. Mr. Wilfert then Mr. Scarpaleggia, ten minutes.

**Hon. Bryon Wilfert (Richmond Hill, Lib.):** Thank you, Mr. Chairman.

First of all, there have been some that have said that Canada has played a very passive role in all of these discussions and in fact we've really been detached. Could you comment on that?

**Mrs. Karen Brown:** The Government of Canada is not a member of the Council of Great Lakes Governors, as probably members well know, and therefore not at the negotiating table, nor a party of the working groups. Until the agreements were actually released for public comment in July, we actually had not seen them.

We are now engaged in a process with our colleagues federally, but also with Ontario and Quebec. It is our hope that we will be able to provide comments to the council in late November of this year.

**Hon. Bryon Wilfert:** I assume, Mr. Chairman, that one of the major principles must be that we do not want any bypassing of the Boundaries Water Treaty. Period, end of discussion.

Now there are concerns that have been raised that the compact could in fact affect the powers of the treaty, and in fact maybe even the powers of the IJC. Are you able to comment on that?

**Mr. William Crosbie:** I guess I'd refer to the comment submitted by the U.S. State Department.

In particular, what they have asked is that the compact have the language as follows:

Nothing in this compact is intended to be inconsistent with other federal or international law. In particular, nothing in this compact is intended to be inconsistent with the 1909 treaty relating to boundary waters and questions arising along the boundary between Canada and the United States. To the extent that any provisions herein are found to be inconsistent with that treaty or other federal international law, the treaty or law shall supercede the affected provision. In addition, the requirements herein relating to new and increased diversions, withdrawals and consumptive uses shall be in addition to those requirements found in the treaty.

**Hon. Bryon Wilfert:** Mr. Chairman, given that these comments were made, you said, last week?

**The Chair:** Yes.

**Hon. Bryon Wilfert:** I presume we haven't heard any reaction yet from the States.

**Mrs. Karen Brown:** Not to my knowledge. No.

**Hon. Bryon Wilfert:** The U.S. State Department has made very clear their position. You indicated that once the process is finished, we will make ours known very clearly.

I think one of the things that we want to know is that there is no...the line in the sand is going to be very clear as to where we stand, both to the Governments of Ontario and Quebec, and obviously to the governors.

I think the fear is that if in fact changes were made that would require, or would force to any degree the Governments of Ontario and Quebec to enact legislation, which in fact would change the standards, then we might see some form of withdrawals of water, which in fact is not in the national interests of this country. Obviously, I can't make it any clearer that the national interests of Canada must prevail, regardless of what others may be engaged in.

I would trust that we, in our consultations and in our discussions with the other parties, don't want to go down the road too far here without making that known, because as you have indicated, these discussions continue into next year, and presumably some enactment by the end of next year.

I just want to again emphasize, Mr. Chairman, as the minister indicated yesterday, our position on bulk water is very clear, period: We do not want to see any changes, which could in any way be interpreted...we don't want any legal loopholes. American law is very complicated. I understand the implications, but I want to make it clear that this government has to be very, very strong on that, and certainly with our provincial counterparts.

**The Chair:** Thank you.

Mr. Fawcett, I think the committee would also like the reference that you cited just a few minutes, if you could make copies of that available to committee.

Mr. Scarpaleggia.

**Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.):** Thank you, Mr. Chair.

I think the Canadian public is frustrated about this issue. It's very complex, no doubt, and every time we think we have a grasp on it, and excuse the analogy, it's like the water is running through our fingers in a way, because we finished telling Canadians about a year ago that we have the International Boundary Waters Treaty Act and that's it. That's the line in the sand. Then they wake up a little while later and we're talking about a complex agreement among the states and the provinces and the federal government is overlooking it, but it's not really involved. So I think the concerns are justified on a certain level. But my question and comments focus on measurement and enforcement.

There's this myth that science is objective and science reaches the truth and all good scientists will come to an agreement on what is true and factual, but it's my understanding

that when we talk about Great Lakes water levels, they're affected by natural factors. I've been told, and I don't know if this is correct, that the current low level of the ecosystem is probably caused by natural factors.

My understanding is that under the Annex Agreement, and if I understand you correctly, it says that water taken out must be put back in by the States. What if there's disagreement on whether this is being done. American scientists, Canadian scientists, provincial scientists and federal scientists all start arguing and let's say it becomes a messy problem and there's fear on the federal government side that this agreement is not being lived up to and that there's a need to act? Take me through the process, step by step. How would the federal government go about enforcing its view of the International Boundary Waters Treaty Act in such a confusing situation? What are the steps? What would the federal government do if it said "Okay, Ontario and Quebec, I don't think you're living up to the spirit. We're not happy with this. We disagree with your scientists, the American scientists". What happens?

☎ (0945)

**Mr. Peter Fawcett:** If I can start with an informal comment related to your first. We too are somewhat frustrated by this current proposal because of its lack of precision and its lack of basis on sound sciences as you mentioned. Absolutely, that's one of our fundamental principles that we will provide in our comments back to the council, that there has to be a science-based decision making here.

If I might, one of the reasons why I'm told by Ontario and Quebec that the language is such as it is there was a need to go public with what the state of the negotiations were at that time. They had a mandate to negotiate this agreement within three years. They were beyond that and clearly the public wanted to know what was being considered. So we have kind of a proposal that's really not finished. There's language there that needs to be tightened up. There's a lot of misunderstanding and misinterpretation in terms of what we see before us. So I certainly share your concern about the lack of precision.

Now to go to the specifics of your question, if we are not satisfied with what is going on in this process and assuming that Quebec and Ontario are similarly frustrated, that it's leading to an unacceptable result, and influencing or affecting the U.S. obligations under the treaty, then we would seek consultations with the U.S. government, and if that does not result in an acceptable outcome, then we would likely refer the issue to the International Joint Commission and seek independent advice that would be based on science.

So I think that's what we would look to. The IJC would then come back to us with this independent advice and then we would try to resolve the matter that way.

I can't really comment on the process within the ambit of this agreement because, as was mentioned earlier, this is an agreement between the states and the provinces.

**Mr. Francis Scarpaleggia:** This is, as a follow-up, a sincere request for information.

What if the IJC is split and what if the Province of Quebec and the Province of Ontario disagree with the federal government on this?

You said in your comments, assuming we have concerns and the provinces have similar concerns. What if they don't have similar concerns, and what if the IJC is split? What happens next? What's the next step? How is the issue resolved? What are the mechanics of resolving this issue? As I said, it's a sincere quest for information.

Ⓟ (0950)

**Mr. Peter Fawcett:** I should underline, the federal government is the party to the Boundary Waters Treaty, so we are sort of, at the end of the day, ultimately responsible. But we have had very close cooperation and dialogue with Ontario and Quebec throughout the development of this process and we would hope that dialogue, that close cooperation with the provinces, would continue.

**The Chair:** Mr. Scarpaleggia, I'm going to have to interrupt now. We will go to Mr. Comartin.

I just would remind you that Mr. Gray and we will have the IJC and we can explore that line of questioning further with him.

Mr. Comartin.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Thank you, Mr. Chair.

Let me just make a statement to start off. And that is that, in spite of what we went through in the last Parliament around the act to strengthen any possibility of diversions or bulk export, the reality is that the minister does have the discretion to license under that act. So we don't have an absolute prohibition.

I appreciate Mr. Wilfert's comments, though, about the position the government appears to be taking, that that discretion will not be exercised, and I want to pursue his line of questioning.

I'm not sure, Mr. Fawcett or Mr. Crosbie, who I should be asking this of the two of you, but when did it become known that the Great Lake governors were considering building the second agreement in the form of the compact? When did that become known to the federal government, on this side or the U.S. side? Just this July? Or was it earlier?

**Mr. Peter Fawcett:** Let me see if I can address your two questions because it's one--

**Mr. Joe Comartin:** The first one wasn't a question, Mr. Fawcett. It was a statement. I don't need a response to that. I just need a response to the second one: when did we become aware about that?

**Mr. Peter Fawcett:** Yes. When Congress delegated authority under WRDA, the Water Resources Development Act, to the Great Lake states, it was intended at that time that the eight Great Lake states would come back to Congress with a proposal in the form of a compact. That is how. As I understand it, under U.S. law, the states make a binding

arrangement. It is then referred back to Congress. So I think when it was delegated to the Great Lake states in, I believe, 1999 or 2000, it was clear at that point that a compact was intended, that would then come back to Congress for approval.

**Mr. Joe Comartin:** Was it understood at that time that the council would be set up, the Council of State Governors would be set up to make decisions on the issue of diversions? Or did that only become apparent more recently?

**Mr. Peter Fawcett:** I'm not sure I have a good answer to that question. It was delegated to the Council of Great Lakes Governors, which includes Ontario and Quebec, to develop a water management regime, is what the charge from Congress was. So I guess you can interpret from that that there was going to be some decisions about water management made within the auspices of that group.

**Mr. Joe Comartin:** But it could have also been that the decision-making body or the recommending body would have been the International Joint Commission because that was already established and already mandated to take on that responsibility. It didn't have to be a state governors body.

**Mr. Peter Fawcett:** Well, I think the compact would have to be among the eight Great Lake states. But maybe I can answer it in another way.

There is a need, as I said earlier, for water management in the Great Lakes Basin. Water management is conducted by the states and by the provinces. They're the ones that issue permits and collect data and are hands-on. We're not involved in water management. That's a resource management issue and in the hands of provinces and states.

Now, there is, I should say, quite a variety of measures put in place on the U.S. side to conduct this water management. The idea was that there would be common standards, rather than this hodge-podge of different measures in different states so that we could have comparable data, we would have a better assessment of what is, in fact, going on in the basins. So that was the intent, I think, of the charge to develop these standards for water management.

☺ (0955)

**Mr. Joe Comartin:** The difficulty I'm having with this and I've had since I first, sometime in August, saw the agreements, and I'm maybe just wearing too much of a lawyer's hat here, but from the time I saw that, I said there's an inevitable conflict coming here--it seemed to me so obvious--between this council and the IJC, especially when you get into the details and how permissive the standards are under the compact and the agreement. I didn't see anybody, and again, maybe you just have to have a legal background, but anybody with a legal background who wouldn't see that this is an inevitable conflict coming.

The IJC has its standards, which clearly are stronger. They're basically in a moratorium position in terms of any diversions at all until we get better scientific bases. The reality is there's all sorts of provisions in here where the council doesn't even look at diversion.

There's a great deal of water that can be taken out of the basin that doesn't require any, especially when you get into the consumptive-use side. So I just don't understand how we got to this stage.

I have to say to you, I asked this question of the MNR people when they were in Windsor, and I didn't get any kind of a satisfactory answer. Somebody had to see this coming.

**Mr. William Crosbie:** The question of consistency is something that both federal governments are charged with ensuring. I think the comments submitted by the U.S. State Department are intended to clarify the supremacy of the Ground Waters Treaty obligations.

**Mr. Joe Comartin:** Mr. Crosbie, it doesn't answer it. If they go with that statement and continue on, how does that resolve the issue between the conflict we're inevitably going to have between the IJC and the council?

**Mr. William Crosbie:** I wouldn't venture to say there is an eventual conflict. One of the intentions of our comments is to help the parties to find a way to ensure that all of them can function with their appropriate roles and responsibilities. As Peter already said, the states and provinces do have a responsibility for water management and they're attempting through these agreements to find ways to better manage their own responsibilities in a coordinated fashion. We, as a federal government, working with the U.S. federal government, want to ensure that this level of cooperation is consistent with our international obligations.

**Mr. Joe Comartin:** Mr. Crosbie, I'd agree with you if we were only talking about water that is staying within the basin, but as soon as you empower that council to make decisions about diverting water outside the basin, and I don't see them backing off on that, then you're moving inevitably to a conflict with the IJC.

Let me just be very clear, I have no problem, I agree, the states and the provinces badly need to do more management. I know, I've lived with the polluted water all the time, so I'm quite conscious of the need for them to do that. That's not my problem. My problem is the diversion outside the basin and why they're allowed to have any authority in that. I do not understand.

**Mr. Peter Fawcett:** Maybe just one comment on the last element there. Not only are the obligations under the Boundary Waters Treaty unaffected by the proposed implementing agreements, U.S. obligations and our obligations under the Great Lakes Water Quality Agreement remain as well.

**The Chair:** Mr. Comartin, one minute.

**Mr. Joe Comartin:** (Inaud.) Thank you, Mr. Chair.

**The Chair:** Thank you.

I'll now go to the committee and perhaps we can go back to this side and Mr. Carrie.



**Mr. Colin Carrie (Oshawa, CPC):** First of all, I'd like to say that I'm very pleased that you're here. I like the way the questioning is going. My biggest concern is I find myself agreeing with the NDP and the Bloc and I'm wondering if, Mr. Chairman, you put something in this water?

**Some hon. members:** Oh, oh.

**Mr. Colin Carrie:** Coming from a constituency that's on the Great Lakes, Oshawa, I see that everything in our community--our social, economic, and recreational lives--has to do with the water. I see water as bringing life. As a younger person I thought we had an endless supply of it.

I see now with our challenges with population growth that we see our water tables down. I think, as politicians, it's going to be something we need to address over the next 20 or 30 years to manage better. If we don't, if we take a history lesson ... I believe you may have heard of the Aral Sea in Russia where there was a huge diversion of water, and within 20 or 30 years they took a vibrant area that sustained thousands of people and turned it into almost a barren desert. This, I see, is one of the biggest issues we're going to be facing as politicians. I think we need to start balancing things and looking at this over the next few years.

My question for you is really, why are we doing this now? It's a difficult question. It seems we had an agreement we were pretty happy with. Who are we getting the pressure from to change this, to open this up a little bit? Is it governments--federal, provincial? Are we finding pressure from corporations for utilization of the water? Why are we opening this up now?

⌚ (1000)

**Mrs. Karen Brown:** I think this stems from, in the first instance, the fact that the U.S. Congress did delegate to the U.S. states the responsibility to actually try to figure out the management regime under the Water Resources Development Act. As, I think, Peter and others have indicated earlier, there is a great need for them to harmonize standards and try to come to some agreement where they share, obviously, quite a bit of water. So you're talking about a fairly recent development.

I can't answer and I don't think anybody can answer why the U.S. Congress decided to take the route that they did with the way they structured their legislation and the request that they've made to their states. I think the positive development perhaps in that regard was the decision on the part of Ontario and Quebec to join that dialogue, because they very much wanted to be assured there was a standard that developed that they could in fact live with; and I think their objective, I think, clearly stated, has been to make sure that standard is at the highest level with regard to their interests along the Great Lakes and St. Lawrence River.

So in that regard I think it's impossible for us to answer why the U.S. has taken the route it has, but clearly we are engaged collectively with the provinces to make sure we are consistent and that we maintain the highest standards with respect to those Great Lakes.

**Mr. Colin Carrie:** All right.

My next question, again, a kind of a history lesson, living on the Great Lakes I know that Lake Huron has dropped significantly over the last 20 years and I was wondering, are we looking at why this has occurred? What happened and what effect has it had so far?

**Mrs. Karen Brown:** Again, that's part of the study that's going on right now on the way of levels and flows in the Great Lakes that IJC is undertaking and very much a lot of work going on in trying to determine the balance and the flows within the Great Lakes. So it is under study at the moment.

**Mr. Colin Carrie:** Do we know which ones are dropping? Are all of them dropping? Are some of them actually raising or....

**Mrs. Karen Brown:** I don't know that amount of detail, but I think the IJC, again, could answer that question next week.

**Mr. Colin Carrie:** All right.

Are we working with different agencies to start aggressively working on conservation throughout this whole process?

**Mrs. Karen Brown:** Yes, we are.

We work very closely through the Canadian Council of Ministers of the Environment and we are now working on some very broad programs to deal with the whole conservation issue. Likewise, within the Great Lakes, we have had for a number of years the Great Lakes action plan and the equivalent in the St. Lawrence, le plan du Saint-Laurent, to deal with joint issues of responsibility on dealing with both water quality and quantity issues, but also dealing with issues around conservation.

**Mr. Colin Carrie:** All right.

What about things in regard to like, damming? Are we working with agencies as far as like hydro electric, new projects, things along those lines, with industry?

**Mrs. Karen Brown:** Yes, to the extent there are any new proposals being put on the table the federal government would work very with the proponents and with others to do an environmental assessment if there was federal responsibility that was involved in the project.

**The Chair:** Mr. McGuinty and then Mr. Simard.

**Mr. David McGuinty (Ottawa South, Lib.):** Thank you, Mr. Chairman.

Thank you for appearing this morning. I guess I wanted to begin by sharing some comfort in hearing the extent to which you are collectively seized with this issue and some of the comments made by my colleague, Mr. Wilfert.

I want to look at this as a lawyer and I've read both agreements twice now and I'm just trying to put a couple of questions to you which hopefully you can put to others who are

reviewing perhaps at Justice how some of these agreements hit me in the first and second reading. First of all, both the compact and the agreement acknowledge in their preambular sections that nothing in either of these agreements would supercede or run counter to the Boundary Waters Treaty of 1909 and effectively I think they go as far as saying in the agreement pretty well every other international treaty that's relevant in its play here. That is a preambular statement and I don't know if it means that this compact and agreement is bound. It leaves me to ask the question which I'd like to see addressed if you're having a legal opinion done. Is this compact in the agreement effectively trying to contract out of treaty provisions of the Boundary Waters Treaty of 1909 for example? So that's a question I had to put to you.

The second thing that struck me was under the compact, article 10's additional provisions that speak about cumulative impacts. I don't know how far advanced the science of cumulative impacts is in particularly large fresh water bodies. It's certainly not very far advanced when we look at terrestrial cumulative impacts. The science is not well defined in my experience. I certainly would like to ask a question or have a question answered. What does this proport to mean? They've defined it in very broad and loose terms. It's not an easy area for sure but I would like some better indication of what this means and that they're going to be doing a periodic assessment of cumulative impacts, of withdrawals, diversions and consumptive uses every five years. Or each time the basin water losses reach 50 million gallons per day and so on and so forth, article 10 in the compact.

I guess the other thing that struck me was chapter seven in the agreement, the final provisions, article 7.01, 7.02, 7.03 for example. There's a very clear reaffirmation of constitutional powers and responsibilities of both the Federal Government of Canada and the United States. So again I'm trying to jive some of the comments put forward by colleagues saying we have legal opinions saying that this is effectively a loss of sovereignty. I can't see it. I've tried looking for it and looking for it desperately.

I guess the last question I want to put to you is how does this or does it at all jive with the province of Ontario's new approach to water pricing. The province of Ontario is looking now for example at abstraction and licensing costs when it comes to bottled water for example and bringing in new measures which I think is going to show the province of Ontario quite quickly that it does not have the hydrogeology it probably needs to make some hard choices and decisions. Those are some of my questions for you.

⌚ (1005)

**Mrs. Karen Brown:** Thank you. We'll pass on those questions to both the Department of Justice and perhaps with respect to the cumulative effects let me just say that we certainly agree that any attempts to try and improve information in the science base with respect to cumulative effects would be something that we would be supportive of. That is a very challenging area particularly when you're dealing with both water quality and quantity issues. Great Lakes Basin under stress from invasive alien species amongst a whole host of different toxic chemicals. So there's a very important piece of work that we would certainly want to encourage to continue and work collaboratively on both sides of the border. We'll pass these questions on.

**The Chair:** Okay.

Monsieur Simard.

[*Français*]

**M. Christian Simard:** C'est une question qui est très complexe. J'ai l'impression, et je me demande si mon impression est juste, que tout tourne autour des normes qui sont dans l'entente et sur l'unanimité ou non dans le conseil des gouverneurs. Je vois des interprétations qui disent qu'il y a un avis du conseil général, du gouverneur des Grands Lacs, un avis juridique qui dit qu'il est impossible de distinguer entre les transferts à l'intérieur du bassin des transferts à l'extérieur du bassin, parce que l'eau est commercialisée. Donc, c'est une façon de détourner le préambule ou l'aspect de dire que cela doit respecter tous les traités.

Donc, cette porte, cette fuite possible avec des normes et cette impossibilité de distinguer intérieur et extérieur du bassin à partir du moment où l'eau des Grands Lacs est mise dans une bouteille, on ne peut pas savoir où elle va, où elle est commercialisée, d'une façon ou d'une autre. Est-ce qu'il serait possible, même advenant une opposition forte de l'Ontario et du Québec aux dispositions, que la seule entente normale entre les huit États américains autour des Grands Lacs suffise à appliquer unilatéralement ces normes floues et, en fait, ce détournement ou déviation qui ne porte pas son nom, mais cette réelle déviation des eaux des Grands Lacs, qui pourrait se faire un peu à la cachette? C'est ma question.

⌚ (1010)

[*English*]

**Mrs. Karen Brown:** I think this is a confusing matter and not all that clear. As we stated earlier one of the reasons for the early release of these agreements is that it is very complex and it is very important to have public input and get some views with respect to the standards. As we work through this we need to see how it all inter-relates and that's part of the challenge both for the Council of Great Lakes Governors, and also for Canada and the U.S.

It's fair to say that both the provinces of Québec and Ontario have also clearly indicated their strong position against the prohibition on out of basin transfers. I think we're all on the same page in that regard. The challenge, as I indicated earlier, is to work within this agreement at this stage to make sure that the standards are of the highest consistency and the highest level that meet Canadian's needs as well as the U.S. needs and then through this process a consultation, public input, and comments further, to try and bring some consistency through that piece.

It's very difficult to answer hypothetical questions because these are very draft. We expect them to change, frankly, on the basis of very expensive consultation and they will be reviewing public comment through the November-December time period. We're fully expecting these agreements to look quite different once they're published again.

**The Chair:** Members of the committee I'm taking the speakers now as you catch my eye, so there is no particular order.

Mr. Comartin and then Mr. Watson.

**Mr. Joe Comartin:** Mr. Crosbie or Mr. Fawcett, I'm not sure which, I understand the Attorney General of Michigan has filed a letter—and I haven't seen it—opposing the versions, and I don't know in how much detail. I wonder if you can tell us in your context on the U.S. side, are there other states that are signalling in some fashion discomfort with the agreements at either the group editorial level or some other level?

**Mr. Peter Fawcett:** As you know we have five consulates in the Great Lakes region. The consulates are reporting on the public consultations that the United States have undertaken and also the Council of the Great Lakes Governors.

You're absolutely right, the Attorney General of Michigan has made a very strong statement opposing diversions. Michigan is very much opposed to diversions because the entire state is within the Great Lakes Basin. We know their position, but we've not seen much in the way of reaction from states other than Michigan. I guess they are finishing their consultation process and as I understand it, as the Council of Great Lakes Governors resume their meeting in mid-November, they will report on the consultations that they've had, and the public input. We may see there is an advisory committee that will also hear the results of those consultations so perhaps at that time we may see further reaction from the U.S. side.

**Mr. Joe Comartin:** Do you have a copy of the letter from the Attorney General?

**Mr. Peter Fawcett:** I believe we do, yes.

**Mr. Joe Comartin:** Could you provide a copy to the committee, please?

**Mr. Peter Fawcett:** I'd be happy to do that.

**Mr. Joe Comartin:** I think this is for both of you. Both ministers have indicated there is a willingness on the part of the governors in the provinces to not hold the federal government to the October 18 deadline. Do we have something solid on that? It sounds like you're not going to get a response to them at least until late November. Are they going to wait for that? Do we have a confirmation on that?

⌚ (1015)

**Mr. Peter Fawcett:** We've indicated to the Council of Great Lakes Governors in Chicago that we are waiting input on the Canadian side and that we intend to submit comments. They have reacted, as they have on a number of occasions. They will take our input. They look forward to it.

I should say also for the members of the committee that I've made a presentation, in fact twice, to the committee about our implementing legislation, the amendments that we made to the International Boundary Waters Treaty Act, so they're very much aware of what the federal government is doing and are anticipating a response from us.

**Mr. Joe Comartin:** Is there any indication they're going to extend the consultation period for anybody else, such as the environmentalists?

**Mr. Peter Fawcett:** Not to my knowledge.

**Mr. Joe Comartin:** Thank you.

Mr. Watson.

**Mr. Jeff Watson:** Thank you.

I want to pick up on a couple other lines of questioning here from a couple of my distinguished colleagues on the panel who really started on the right track.

The fallback position always comes back to the International Boundary Waters Treaty Act, which, of course, by Article 3 puts the IJC as the ultimate arbiter. I want to probe the role of the IJC a little bit for your guys, or your understanding of the role of the IJC. Because of Article 3, I guess the question would become will the IJC be involved in approving water diversions under the Annex 2001 implementation agreements.

**Mr. Peter Fawcett:** If I might, the IJC is charged with approving any project that affects levels of flows. I guess the short answer to your question is if a project affects levels and flows then it requires the approval of the IJC.

I would also say the IJC has provided to us some comprehensive advice in its 2000 report called *Protection of the Waters of the Great Lakes* and its subsequent three year review in August 2004. In particular, it is important to recognize that recommendation number one on this very matter that says the federal governments, the Great Lake States, Ontario and Quebec should not permit any proposal for the removal of water from the basin unless the proponent can demonstrate that it would not endanger the integrity of the Great Lakes Basin. From that recommendation you will see that there is a very strict review and approval process within the IJC, based on that recommendation.

**Mr. Jeff Watson:** Picking up on Mr. Comartin's question about the Michigan government being against new large scale diversions, in terms of the understanding of the compact, does that mean no new large scale water diversions would happen, if this compact were approved, I should say because it's not approved yet. Were that in place that would effectively mean no new large scale water diversions. Is that correct?

**Mr. Peter Fawcett:** As we indicated earlier, the compact, on the U.S. side, requires all of the eight Great Lakes states to approve it, including implementing legislation and then approval by the U.S. Congress. That will take considerable time, so the answer to your question is as it applies to these implementing agreements, it would require approval of all of the states.

**Mr. Jeff Watson:** Are Great Lakes water levels dropping right now, to the best of your knowledge?

**Mr. Peter Fawcett:** As I indicated earlier, the IJC would be the best to try to address that question, and, to go back to your colleague's earlier question about Georgian Bay in

particular, we are very concerned about dropping levels in Georgian Bay. The IJC give that considerable review, certainly, to try to determine what the causes are. The entire system of lakes and they are interrelated and it's very complicated. There are natural variabilities in the levels over time. Then there's the impact of climate change, which the experts tell us will have an impact on levels. That's something we're very concerned about.

**The Chair:** Mr. Simard and Mr. Carrie.

🕒 (1020)

[*Français*]

**M. Christian Simard:** Oui. Je vois, dans les *briefing notes*, dans le résumé de la bibliothèque, la position de Great Lakes United. Je ne sais pas si, de la façon dont c'est écrit, c'est une position d'une certaine partie de Great Lakes United. Great Lakes United est une organisation parapluie qui regroupe énormément d'ONG autour des Grands Lacs, mais j'aimerais avoir une précision.

S'agit-il de la position du grand groupe ou d'une partie de Great Lakes United, qui semble dire qu'un accord imparfait vaut mieux que la situation anarchique actuelle?

J'aimerais avoir vos commentaires sur cet aspect, parce qu'il demeure que si un groupe aussi important d'ONG appuie le principe de l'accord, même s'il fait la promotion d'une augmentation des normes, cela n'ira pas nécessairement dans le sens des intérêts du Québec et de l'Ontario et de la préservation des eaux des Grands Lacs.

[*English*]

**Mr. Peter Fawcett:** If I might just try a brief response to your question.

Great Lakes United is in fact a binational grouping of NGOs on both sides. They have been a member of the Advisory Committee and have been following this process very closely.

I think we all share that view, as I said earlier, this is an imperfect proposal, we're not satisfied with the language, we're not satisfied with a number of elements, in terms of what is being proposed and hence the need I think for the Canadian government to submit its views to the council.

**The Chair:** Mr. Carrie.

**Mr. Colin Carrie:** I'm aware there are real legitimate concerns about any diversion but there's also, I guess what I say is more like a fear, a paranoia, we don't want to over exaggerate anything. But to get back to my colleagues question about diversion projects, are you aware of any proposed or planned diversion projects that certain American states may be thinking about right now?

**Mr. Peter Fawcett:** I'm sorry, not really, I can't answer your question. Maybe in a more general sense if it's helpful, unlike Canada the United States has quite a history of

water diversions and there are certainly proposals and projects under consideration at any point in time. We're not aware of any that are specifically being considered that would impact on levels and flows in the Great Lakes but again, I think this maybe goes to the earlier point about the need for better information, the need for better coordination between the States and Ontario and Quebec and greater transparency in all of this so that proposals do come out and are on the table and are reviewed.

**Mr. Colin Carrie:** I guess I'm more concerned about different, perhaps, agendas that are out there. One that I did hear about a few years ago was diverting Superior down the Mississippi. I don't know how serious it was but I would see that a huge concern for Canadians. And just the way the agreement, you stated, that the Great Lake States, they need approval but what if there's something coming up like that and Canada says no?

I'm wondering are we going to be in a position just to say no?

**Mr. Peter Fawcett:** If I might, maybe just to give you a very specific example, when NOVA Corporation, in 1998 was given approval for a permit to remove water out of Lake Superior, by Ontario unfortunately, this was... forgive the term, a watershed issue, and really I think brought the attention of Canadians and Americans to the need for greater protection in the waters of the Great Lakes. So Ontario amended its legislation, we amended our legislation to prohibit bulk water removals. We have a very comprehensive regime in Canada against prohibition.

If I might, just one small point on this because it's not clear from reading the agreements, article 200 of the agreement says individual members can take more restrictive measures. So Ontario and Quebec are permitted under the agreement to maintain their prohibition on removals and that's very important. They stated publicly that they intend to maintain that prohibition as we have in Canada.

But to get back to NOVA, that was what the reaction in Canada was. In the United States the loudest and the longest screams of protest were from the eight Great Lake states. Eight Great Lake states in a larger context have the same interest as Ontario, Quebec and Canada do to maintain the integrity of the Great Lakes. That was also the reason why the U.S. Congress delegated authority under worded to those Great Lake states because they realized, you know, those who managed the water in the Basin are critical to maintaining its integrity and the level of protection that we all want.

⌚ (1025)

**Mr. Colin Carrie:** I think that's really important to note. I think we're all in agreement as this process goes through that it's important that we maintain that ability to say no. This is something that is the lifeblood of our whole country. Thank you very much.

**The Chair:** Mr. Cullen and then Mr. Watson.

**Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP):** in my colleague's question here.



Two questions. What I've been hearing from the province, particularly Ontario, is that the federal government's involvement in the discussions has been too distanced, more in the observer status sort of way. From your perceptions, particularly in foreign affairs, do you feel like we've been involved enough integrally in the process in these decisions that are coming forward?

While I hear the prohibition that you're talking about, essentially it sounds like a veto power that the provinces have if the Great Lakes are to propose mass exports. I want to understand that clearly. Is there something very explicit in the agreement saying for whatever reason all the states start to line up because clearly the pressures on water are going to increase over the coming decades. I'm not necessarily worried about September as I am 15 to 25 years from now as the States dry out further and further. I would hate to foresee some eventuality where the States, for whatever reason, do line up and start to feel like exports make sense for whatever reasons they have. I want to have complete assurance the veto power stays.

I come from British Columbia and we had an experience where an American firm tried to export bulk water and was prohibited by the province then sued successfully, I believe under NAFTA, and I could stand corrected on that. I wonder what your opinions might be on an eventual process like that where some company comes forward with some measure of state or congressional approval and Ontario or Quebec deny that application and then we're under litigation.

**Mr. William Crosbie:** Of course the question of denial comes under the Boundary Waters Treaty. The Boundary Waters Treaty applies to any change in flow or level of water, it has to be approved by the IJC. Any of these agreements cannot alter that obligation. It's not up to the provinces to determine that, it's under the Boundary Waters Treaty itself with the IJC.

Peter, did you want to comment on some of the other issues you raised?

**Mr. Peter Fawcett:** Very briefly. We have been working and consulting with Ontario and Quebec in the development of this. Before you arrived I believe I mentioned that we did presentations on the federal legislation and the council is very interested in how we chose to implement our obligations under the Boundary Waters Treaty which is the amendments to the Boundary Waters Treaty Act and we have taken the most restrictive measure by putting an absolute prohibition in place.

In addition, and this is not something that is focused on very much in the legislation, we also have a licensing regime for in-basin use. The minister of foreign affairs licences projects within the basin if they affect levels and flows. We have a very tight control, I would say, in both the prohibition and the licensing for in-basin use in Canada. I think we consulted with Ontario during the development of those. That legislation, our regulations are very similar to Ontario's and certainly we want to maintain that same high level of control.

I do want to just briefly touch upon the Sunbelt case that I think you're referring to in British Columbia. There was a filing under NAFTA chapter 11, that case in four years now has not gone anywhere, it is dormant as far as I understand.

**Mr. Nathan Cullen:** Thank you.

**The Chair:** Mr. Watson and then Mr. Jean.

**Mr. Jeff Watson:** Mr. Fawcett, your comments actually raise another question in my mind here. I'm going back to previous comments. You talked about the strong legislation we have in place, that individual parties and I'm presuming that's Ontario and Quebec, can maintain their bulk water bans. The discrepancy or at least an apparent discrepancy arises here and you can clarify whether there actually is one. The provinces are required to make legislative and regulatory changes or other changes in order to give force to this agreement. This agreement also provides for out-of-basin transfers. Can you really maintain a bulk water ban and yet have to give force to this agreement that allows for those types of transfers? Perhaps you can tell me whether there is a discrepancy there, what types of changes and if there is no discrepancy that has to be made in order to give that agreement force.

⌚ (1030)

**Mr. Peter Fawcett:** We're certainly looking at this carefully. As I mentioned earlier in my remarks, article 200 allows both Ontario and Quebec to maintain the prohibitions that they have in place right now. They have stated publicly that those would remain.

**Mr. Jeff Watson:** We're going to be looking very carefully to ensure there is no discrepancy.

**The Chair:** You can think about that.

**Mr. Jeff Watson:** Let me just think about something here for a second.

**Mr. Brian Jean (Fort McMurray—Athabasca, CPC):** My question really deals with the long term aspects of water, generally, in Canada and our relationship with our southern neighbour. Under NAFTA I understand water currently is not considered a commodity and my question really relates to the future of our relationship and the necessity of Midwestern states to have more water because of drought, etc.

Are there long term threats relating to NAFTA and the current description of water? I understand it's not a commodity or it is not going to be traded as a commodity, but it is indeed traded now through bottled water, etc. Is there some sort of long term threat relating to general water in Canada and not just to the Great Lakes itself?

**Mr. Peter Fawcett:** If I can try, it's hard to answer questions that relate to long term impacts, but let me try a couple of things.

First, there is quite a bit of controversy surrounding this so-called commodification of water, but I think, certainly, the best legal opinions that we have were incorporated in our amendments to the International Boundary Waters Treaty Act to treat water as a resource.

As long as you manage water as a resource, it's not a commodity. Once you go down the road of bottling it or something like that, then it is a commodity and is subject to our international trade obligations. I think we have taken the right approach to manage water in its basin, manage it as a resource.

There have been a number of projects and we're always concerned when these come about to look at long range diversion of water. If water does become short in supply, those ideas will probably come back. But I look at the recent decisions on a number of projects. It's very expensive to move water long distances. A cubic metre of water weighs a metric tonne, so you either need a very large infrastructure project or have a very cheap source of transportation to be able to move that volume of water. But, who knows, the economics may change and certainly we need to be ever vigilant that we protect and conserve our water resources.

**Mr. William Crosbie:** But let me clarify, we do not see NAFTA as posing any threat to our ability to regulate Canadian water and water in its natural state and bulk water. We do not see it as in any way imposing some obligation on Canada now or down the road that would cause a conflict between our appropriate use and regulation of water resources.

**Mr. Brian Jean:** Thank you.

**The Chair:** Thank you, Mr. Jean.

Ms. Ratansi.

**Ms. Yasmin Ratansi (Don Valley East, Lib.):** Thank you for being here.

I know with the discussions that have been going around, my head is spinning and of course once we saw the movie *H<sup>2</sup>O*, it's spinning even more. I guess it raises concerns and certain fears about whether this is reality. Water is such an important commodity and we've had it for so long.

The complex issues around this agreement, is there a perception that the compact is bypassing the boundaries water treaty? If so, what is the recourse that we have? Where is the teeth in the agreement that will keep the feet of all the parties to the agreement to the fire? How will we enforce it? Maybe you can't answer it, maybe justice needs to be involved, maybe the IJC, but just give me some brief analysis and then we can ask the IJC if that needs to be done.

⌚ (1035)

**Mr. William Crosbie:** Well, earlier on, we addressed this question and pointed out that the U.S. government has submitted comments and changes that they would like to see that would specify in the compact agreement that it does not infringe upon or in any way go against the provisions in the boundary waters treaty.

Now the Government of Canada is preparing its comments and clearly, one of our objectives is ensure that any of these agreements do not in any way appear to infringe upon the boundary waters treaty and the obligations that both governments have.

**Ms. Yasmin Ratansi:** So I guess we need to wait and see those responses?

**Mr. William Crosbie:** We have asked for legal opinions. The Department of Justice and Foreign Affairs lawyers are assisting in preparing those legal opinions.

**Ms. Yasmin Ratansi:** I guess it's a question of trust and how do we trust the enforcement within that agreement.

**Mrs. Karen Brown:** I think it's important to not that the compact is a draft that's out for public consultation. The Great Lakes governors are receiving lots of comments, as you can appreciate, in addition to those that have been directed to them by the U.S. State Department.

We are fully expecting that there will be amendments and changes to these agreements, so we're all in a state where we're not quite sure what the revised versions will look like, how they would accommodate the issues, clearly, they must accommodate the U.S. State Department, how they will deal with some of the other challenges that they've heard. We're certainly not going to comment on the U.S. compact, but we certainly will comment on the Water Resources Agreement.

**The Chair:** Thank you.

Mr. Simard, Mr. Watson and Mr. McGuinty.

[*Français*]

**M. Christian Simard:** À mon avis, il ne faut pas prendre cela d'un point de vue juridique. Je comprends qu'il y a une demande d'eau extrême des Grands Lacs vers l'extérieur du bassin des Grands Lacs. Cette demande est tellement forte qu'elle va trouver une solution et il sera très difficile de poursuivre par le biais juridique. Il sera extrêmement difficile de savoir faire appliquer les normes, comment faire un suivi dans une multitude d'entreprises privées. Il y a une expression, en français, qui dit: « Le diable se cache dans les détails ». Dans ce cas-là, il y aura, dans les faits, s'il y a normes, détournement qu'il sera à peu près impossible à prouver au niveau de violation d'accord étant donné qu'il sera impossible de faire la traçabilité de l'eau sortant des Grands Lacs, pour savoir où elle se retrouve exactement. C'est un peu le problème de traçabilité qu'on voit dans d'autres domaines. On n'a absolument pas une gestion intégrée ou une compréhension intégrée de cela.

À la limite, je me demandais, tout à l'heure, si le statu quo ne serait pas meilleur qu'un accord comme celui-là, qui va nécessairement conduire à des déviations et des diversions qui peuvent être majeures de l'eau des Grands Lacs, sans qu'on puisse même le prouver ou s'en rendre compte, sauf lorsqu'il sera trop tard.

[*English*]

**The Chair:** Thank you, Mr. Simard.

Mr. Watson, and then Mr. McGuinty.

**Mr. Jeff Watson:** Thank you.

It's clear, at least it seems to me by testimony today, that the federal government has some concerns about the agreement, as it's written. My question, first of all, is: as written, will these agreements diminish the power at all of the Boundary Waters Treaty to protect the Great Lakes?

**Mrs. Karen Brown:** That's under review. Clearly, as Minister Pettigrew and, I think, Mr. Dion has stated quite publicly, it is our intention to ensure that we provide comments to ensure consistency with those. It's clear that we are very much in defence, as is the U.S. government, of the Boundary Waters Treaty and our obligations therein, and, as well, the International Boundary Waters Treaty Act.

**Mr. Jeff Watson:** Okay. My last question to you here, then. What options are available to the federal government, as far as seeking changes? I guess I'm looking for what the course of action is from here on out. Not what changes you're looking for, but what is the federal government going to do to seek changes? What mechanisms are available to them in order to obtain these changes?

**Mrs. Karen Brown:** Well, we'll certainly be submitting our comments to the Great Lakes governors. We will work very closely with the Provinces of Quebec and Ontario and with the U.S. government. That's the next step, once we have a draft comment that we are comfortable with and that we have fully integrated the Justice opinions.

⌚ (1040)

**The Chair:** Mr. Fawcett.

**Mr. Peter Fawcett:** Mr. Chairman, if I can just add to that, in February 2001, the federal government submitted comprehensive comments on a very permissive proposal that was proposed at that time. In fact, they were talking about 5 million gallons a day as a threshold to review diversions out of the basin. I'm pleased to say that after the comments were received in a number of other states, not just Michigan but a number of other states, New York, in particular, was very concerned about the level of diversions, the annex that came out of that process, I think, outlined some principles that really put this more in the context of what we wanted to achieve.

So I think the council is looking forward to the comments from the Government of Canada and then will reflect upon all of the input they've received through this process.

**The Chair:**

Thank you.

Mr. McGuinty.

**Mr. David McGuinty:** Thank you, Mr. Chairman.

Can I pick up on a couple of comments that were more generalized about water, and to maybe take advantage of your presence this morning? I haven't seen any recent numbers. If you have any insight on this, I would be particularly pleased to hear it. My understanding is about 84% to 88% of all freshwater used in the United States and Canada is for irrigation purposes. I don't know if that trend is increasing or decreasing as irrigation becomes more technologically advanced, as we find new, for example, underground, more sophisticated ways of irrigating large, massive crops. This is particularly in the American mid-west.

I don't know if the trend of the American northeast emptying, and building more and more cities in the desert in the southwest is continuing, or whether that's in fact going to create more pressure for freshwater demands in many of those areas. I hear that often, but I've never seen any evidence to suggest it or trends suggesting that's where we're going.

Also, some time ago, considering I think water is probably going to be a global problem. Probably in most developing countries, it's the global problem today as opposed to, for example, climate change, in the minds of many people living in developing countries and cities.

Have you heard any more about the movement toward small, stationary, nuclear desalination plants? In terms of the economics, because I think, Ms. Brown, you mentioned something about the economics of water changing or not changing in terms of the cost, or maybe it was Mr. Crosbie. I know the French nuclear industry has been examining desalination market opportunities going forward, something that might be very difficult to resist going forward, as we do water shortages in some of the driest places on the planet.

Can you comment, generally?

**Jennifer Moore:** We're certainly not technical experts. You raised the point about the global challenges. There's no question. There's a major global challenge. There are millennium development goals, trying to sort of improve access, both in the drinking water and sanitation side, lots of discussion about how you make that happen.

I would say that beyond desalinization, there are all sorts of technologies. They're starting to change, to shift from systems to household levels. There's a fair bit of work going on in those areas. So I think that technology in a number of areas is going to be fairly important to try to address the demand side and the conservation of water.

If you want more details, we can certainly get back to you, but I'd say generally, there's a lot of work going on out there.

On the question about trends, certainly we monitor that. There's agriculture, there are municipal uses. Canadians, and residentially, all of us are the second highest per capita users of water of any country in the world, and that's to the United States. I think that's something which really reminds us on the demand, management and the conservation side that again, there's a lot of work that we can do.

We're looking at a number of strategies around that, working with the Canadian Council and Ministries of Environment. There's starting to be some work on conservation. That's something we will continue to focus on more.

**The Chair:** Thank you.

Mr. Wilfert. Oh, sorry. Mr. McGuinty, sorry.

**Mr. David McGuinty:** Mr. Chairman, some indication from the witnesses this morning with respect to where we are nationally in terms of our hydrogeology knowledge. How much do we know? How much funding is being made available on a year-in and year-out basis for us to actually know where we are from a hydro-geological perspective? The flows, how much water do we have? How much science is being invested here? Resourcing for this kind of analysis and knowledge so we are in a better position to know what the state of the art of the water question is in Canada.

Ⓜ (1045)

**Mrs. Karen Brown:** We'd certainly be happy to provide that in more detail. In general terms, when you're talking about the hydrogeological state, you talk about everything from precipitation, snow packs, snow melt, the hydrogeologic cycle in that broad sense as well as groundwater and the like.

It's a fairly complex system, as you can appreciate. It involves everybody from meteorologists, to hydrogeologists to groundwater specialists. It varies in terms of the level of detail that we have around the country. We have a pretty good handle on the Rocky Mountain areas and flows into the prairies. There have been quite a lot of studies done there as well as some of the impact further north.

We have instituted, our colleagues in the Geological Survey have instituted a very systematic study to start to take a look at the groundwater reservoirs, which are clearly...the oil and gas reservoirs in this country are better understand than the groundwater reservoirs, as you all know. We are starting to do that quite systematically and trying to invest as best we can in trying to get a handle on that, working very closely with provincial colleagues as well as other experts, and scientists and universities.

So it's not perfect, by any means, but we can certainly provide more detail.

**The Chair:** I think we have come to the end of the questioning. If I may make some observations...Sorry, Mr. Wilfert, you were the last one, then I'll be the last one. I'll have the final comment.

Mr. Wilfert.

**Hon. Bryon Wilfert:** I appreciate the generosity of the chair.

One is a mechanics question. We have Justice, Environment and Foreign Affairs. I know how things work around here and I would like to make clear that in terms of the coordinated approach, who is the lead department?

**Mrs. Karen Brown:** I think it's fair to say the lead department is Foreign Affairs with respect to the Boundary Waters Treaty Act obligations. We are obviously very much the scientific expertise and work very closely with them. Mr. Pettigrew is in fact the lead minister.

**Hon. Bryon Wilfert:** I noticed sometimes in Question Period these discussions as to whether Foreign Affairs will take the question or whether we will take the question in Environment. I really want to make sure that all three are working seamlessly together.

When you indicated that your comments would be made to the Council of Great Lakes Governors we have a date to wrap-up on this committee no later than November 26th. Will those comments be made available to this committee before November 26th?

**Mrs. Karen Brown:** We can certainly consult with ministers and suggest that. Likewise we would assume that ministers would be very interested in hearing the views of committee before finalizing comments. We should try and coordinate our reviews.

**Hon. Bryon Wilfert:** I think, Mr. Chairman, it would be helpful to know what the comments are going to be that are submitted. If we are, in fact, going to make any recommendations it would be better not to do it within a vacuum. If that message could be delivered it would be helpful.

I'm obviously concerned with how this issue is dealt with today. It will have significant implications for tomorrow and down the road. Whether it's the Great Lakes, or whether it's issues in western Canada dealing with Montana and Alberta, St. Mary's, North Dakota and Manitoba. Of course, we have to get outside of the American election. A lot of posturing has gone on. I certainly think it's critical that we need to be very clear.

This is going to be the oil of the 21st century and we're not as rich in it as some might think. The other bogey man often out there is NAFTA. I keep hearing, this is under NAFTA. Well I want to make absolutely clear that one day I don't want to see us suddenly up against a situation where Article 11 is brought out and suddenly it's, oh no, we didn't mean that. We distinguish between bulk water exports and then bottled water issues. I get a little concerned and a little nervous, Mr. Chairman. I hope at another time we are going to do this. My major concern right now is that we have a clear understanding of the comments that are going to be made and what they are, and that officials be made available in case we need to extract more information from the comments that are presented.

Thank you.

④ (1050)

**The Chair:** I'm sure that will be taken under consideration.

Mr. Bigras.

[*Français*]



**M. Bernard Bigras:** Merci, monsieur le président. Au mois de février 2001, devant le conseil des gouverneurs des Grands Lacs, le gouvernement canadien a émis des réserves, entre autres concernant les normes qui étaient établies dans cet accord-là, indiquant que cette norme pourrait permettre des prélèvements d'eau, entre autres dans les bassins des Grands Lacs ou dans d'autres régions. Je voudrais savoir, monsieur Fawcett, si, depuis le 8 février 2001, vous avez eu des discussions avec vos homologues provinciaux, entre autres du Québec et de l'Ontario, qui vous permettent de remettre en considération ces inquiétudes? Est-ce que vous avez eu des relations avec les fonctionnaires du gouvernement du Québec, de un? Est-ce que les discussions que vous avez eues dans les derniers mois, dans les dernières années, vous ont rassuré, par rapport aux inquiétudes que vous aviez le 8 février 2001, devant le Conseil des gouverneurs?

[*English*]

**Mr. Peter Fawcett:** Thank you very much for the question.

Yes, we have been in consultation with Quebec officials and officials from the Government of Ontario, who sit on this water working group under the Council of Great Lakes Governors.

As I said earlier, the proposal that was before the council in 2000, and our comments in February 2001, were a very permissive proposal: 5 million gallons a day for diversions. Certainly we were very concerned that this would lead to long-range diversions out of the basin that would not be brought back in.

I think perhaps the best answer to preventing any diversions a long way out of the basin, if you will, is to have an agreement that brings those parties who manage water in the basin together, so that they have a common standard to review proposals, so that they have better information on which to make those determinations, better science on which that data emerges. Closer cooperation, I think, will be part of the solution to management within the basin. As we've said a number of times, we have the backstop of the Boundary Waters Treaty that would prevent any project from going forward if it affected the levels and flows on the other side. Those obligations under the treaty remain.

I would say as a final point, I think as this goes forward--there was a comment earlier about enforcement--enforcement is absolutely essential to this, because you have such a long period of approvals from the various States, and legislation, and so many different starting places. Some States don't have any permitting requirements currently. Others have very good information and very good data, similar to our own. There is a real need to coordinate the implementation of this, and I think an ongoing need for our coordination with our colleagues in Ontario and Quebec.

[*Français*]

**M. Bernard Bigras:** Dans vos discussions avec les provinces, entre autres avec le Québec, est-ce que vous avez senti qu'il y avait une certaine forme de délinquance de la part de ces derniers? Est-ce que vous le sentez? Est-ce que les relations avec les provinces vont bien? Est-ce que vous sentez que l'esprit est respecté? Est-ce que la collaboration est bonne? Est-ce que vous avez des discussions? Parce que vous ne m'avez

pas dit si vous aviez eu des discussions avec le Québec. Deuxièmement, quel est l'état de vos discussions?

[English]

**Mr. Peter Fawcett:** We've recently met with both Ontario and Quebec, in September. We had a very good discussion, I think, of the proposal. Up until that time, we talked about the concept, talked about what was being considered, but only when the proposal came out on July 19 did we have some specifics that we could then sit down and discuss.

Certainly our partner in this, Environment Canada, had some very good questions for our colleagues about what are the implications of this. They are the parties to this proposal. They've been involved in many of the discussions, and they've had many detailed discussions within the Council of the Great Lakes Governors. It's a very technical matter. There's certainly room for improvement. I think both Ontario and Quebec agree that there is a need for further precision as we go forward with this.

⌚ (1055)

**The Chair:**

Thank you.

Members, the next committee is coming in. If I could just now conclude and thank our witnesses.

I would just like to indicate that when we were looking through our sort of bible of jurisdiction and whatnot, Environment Canada comes directly under the purview of this committee. When you look in the delineation of responsibilities, the two that pop out are "to conserve and protect Canada's water resources" and "to enforce the rules of the Canada-U.S. International Joint Commission". Those are the mandates under that part of our proceedings, if you will.

I think Mr. Herb Gray has been here today. He will be in next day. We'll continue this line of questioning.

I'd like to thank the witnesses and I'd like to also welcome Mr. Charles Caccia. Charles was the committee chair for 11 years, a former Minister of the Environment who will continue to be here. Charles, I think you can take some comfort that the baton has been passed on and you see by the line of questioning from the members of this committee that the environment will continue to be in good hands through the deliberations and the competencies of the members of this committee. We appreciate you being here today.

Thank you, and thank you to the witnesses.

Members of the committee, before we adjourn, I'd just like to bring you up to date on a few things. First, the steering committee did meet. We are going to recommend to you--but there will be an additional report--that we use the framework of Kyoto to cross-cut into some of the issues that have been raised by the Commissioner of the Environment

and some of the concerns raised in our other meeting, in particular around the issues of finance. Tim is working on putting a sort of agenda together for your consideration.

The second thing is, we have two bills--Parks and Birds--and these two bills will be coming before the committee probably next week, Mr. Wilfert, and we are hoping the minister can, in fact, address both those in order that the committee could condense its deliberations. Mr. Wilfert, if you could just follow up on that with the minister.

Finally, in terms of witnesses before the committee pursuant to the issue at hand, it would be my suggestion that we have another couple of days. The chair has received suggestions for witnesses from some of the members, and you have received from Tim a sort of background, overview of some of those witnesses, or you will be receiving them. You haven't had those out yet?

**Mr. Tim Williams (Committee Researcher):** Those were just for you.

**The Chair:** Oh, I see. Well, I think they could be distributed, absolutely. They should be shared with the rest of the committee.

My suggestion would be to please submit any further witnesses and then the steering committee will look at the issues that have been raised and attempt to come back with a recommendation next Tuesday of the witnesses we think should be scheduled. Mr. Bigras, we'll attempt to have that next Tuesday before our regular meeting.

**Hon. Bryon Wilfert:** Mr. Chairman, on the bills, yes. I think that will be fine.

On the list of witnesses, I have provided, in English and French, suggested witnesses and hopefully it will be of interest of the committee.

**The Chair:** Thank you.

Meeting is adjourned.

NOVEMBER 2, 2004

EVIDENCE

RIGHT HONOURABLE HERRB GRAY  
CHAIR, CANADIAN SECTION  
INTERNATIONAL JOINT COMMISSION



CANADA

**Standing Committee on Environment and Sustainable Development**

**Comité permanent de l'environnement et du développement durable**

**EVIDENCE NUMBER 04,  
TÉMOIGNAGES DU COMITÉ NUMÉRO 04**

**UNEDITED COPY – COPIE NON ÉDITÉE**

**Tuesday November 2<sup>nd</sup> 2004 – Le mardi 2 novembre 2004**

Ⓜ (0910)

[*English*]

**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):**

Good morning members of the committee and to our witnesses and ladies and gentlemen.

I think we're ready to begin.

We would like to welcome the Hon. Herb Gray and his colleagues to the meeting this morning. The honourable Herb Gray, and in every particular way that title has been well earned and it is very much in character.

As you know, Mr. Gray, we have been looking at the implications with respect to Annex 2001. We have been attempting to gain some insight in terms of the principles it's based on and the committee would be very pleased to hear the response through the viewpoint of the International Joint Commission and our Canadian representatives.

We welcome you to provide us with that.

**Right Hon. Herb Gray (Chairman, Canadian Section, International Joint Commission):** I am pleased to be here to speak to you about the views of the International Joint Commission regarding the draft proposal to implement Annex 2001 of

the Great Lakes Charter. However, I can do so only to the extent the commission has reached a decision on such views.

I was in the audience last Thursday. I heard most of what was said. I couldn't stay to the end of the meeting and therefore I do not intend to repeat all the information that was presented to you by officials from the Department of Foreign Affairs and Environment Canada.

As you know, in 1909, the boundary waters treaty was entered into between Canada and the United States to establish a permanent means of preventing and resolving disputes over water where it formed their common boundary. The boundary waters treaty set out agreed principles for managing U.S.-Canada transboundary waters and established the International Joint Commission to carry out a number of functions described in the treaty to deal with them.

It's important to note that the commission is composed of six commissioners--three Canadians appointed by the federal cabinet acting as governor in council, and three appointed by the President of the United States and confirmed by the U.S. Senate.

Commissioners, once appointed, are not however representatives of their respective countries and all commissioners must sign a solemn declaration to faithfully and impartially perform the tasks set out for them in the treaty.

The commission may take decisions by majority vote but in practise it makes decisions by reaching a consensus on them and not by voting. The commission, in 93 years, divided on national lines only twice and so the commissioners work to reach a consensus for a decision on a matter referred to it, then set it out in a document which they all sign.

I appear here at the committee pursuant to your request as Canadian chair of the IJC and therefore I can speak about the matter before you only to the extent that commissioners as a whole have reached a consensus decision about it. My remarks will be based on the reports the commission has issued in recent years about protecting the waters of the Great Lakes.

First there was our 2000 report which was updated by our 2004 report, a review of the recommendations in the earlier one. The commission as such has not as yet reached a view on the proposals to implement Annex 2001 other than what we said in our August, 2004 report which updated and reaffirmed the recommendations in the report we issued in the year 2000.

The commission has two principal functions under the boundary waters treaty. One is to carry out studies and make reports at the formal request of the Canadian and American federal governments. These formal requests are called "references". These reports are made to the two governments and are also issued to the public.

The second function is to issue orders in response to applications submitted to the commission through the federal government of the country where the project will take place. If the IJC issues an order approving the application, it usually does so with

conditions and if so, it supervises the implementation of the resulting order and conditions through a binational control board.

Although the treaty allows either government to give the commission a reference, references have always been given by both governments. This means both governments have an equal obligation to respond to the resulting report and its recommendations and to consider acting on them.

The boundary waters treaty expressly states in Article IX that in the case of references made under it, the commission's report shall not be considered a formal decision about the questions and either the facts or the law regarding the matter referred. In other words, they aren't binding arbitral awards. The commission's reports in these cases are matters of fact-finding, scientific information and recommendations.

We know that the waters of the Great Lakes are essential for the health and well-being of the Great Lakes ecosystem and for the nearly 40 million people on both sides of the border who rely on the lakes for drinking water, for food, for work and for recreation.

The Canadian and U.S. governments have committed themselves in the Great Lakes Water Quality Agreement to restore and maintain the integrity of this unique, vital and--which the commission found, and I'll talk about this in a minute--virtually non-renewable resource.

Also, the governments of the Great Lakes states and of Ontario and Quebec have made commitments in the Great Lakes Charter and in Annex 2001 along similar lines.

In its 2000 report the commission concluded that the Great Lakes do not offer a vast reservoir for an increasingly thirsty world. The report noted that although the Great Lakes contain only about 20% of the fresh water on the earth's surface, only 1% of this water is renewed each year from snowmelt and rain.

The commission concluded that the removal of water from the basin reduced the resilience of the system and its capacity to cope with unpredictable stresses such as those created by climate change.

Therefore the commission recommended that governments take a number of specific measures to ensure that removals of water from the basin will not endanger the integrity of the Great Lakes Basin Ecosystem and that in basin consumptive usage should be dealt with separately and differently. I will discuss these measures in a minute or two.

Now the commission was asked by the two federal governments to review their recommendations in May in its 2000 report in the light of developments that have taken place since that report was issued. We did so in the report issued this year August 30th. While there are not at present any active proposals for diversions outside the Great Lakes Basin except to communities on the outside edge of the basin, this situation could change. Moreover the increasing demands for water to supply the needs of these near basin communities and potential future demands for diversions to other parts of the continent, I submit make it urgent for the two federal governments to carry out the package of recommendations in the commission's 2000 report and for the Great Lakes states and

provinces to implement their annex 2001 in a manner that conforms with those recommendations and which I will proceed to describe shortly.

Specifically the commission recommends in its August 2004 report that the outcome of the annex 2001 process should include a standard and management regime consistent with the recommendations in its 2000 report. Until the process of developing proposals to implement annex 2001 is complete, it's not possible to say whether and to what extent the published draft proposals to implement the annex and measures taken under it will give effect to and be consistent with recommendations in the commission's 2000 report.

The 2000 report specifically recommended about removals for the basin, and I quote:

Without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that the removal would not endanger the integrity of the Ecosystem of the Great Lakes Basin and that (a) there are no practical alternative for obtaining the water; (b) full consideration has been given to the potential human cumulative impacts of the proposed removal, taking into account the possibility of similar proposals in the foreseeable future; and (c) effective conservation practices will be implemented in the place to which the water would be sent; and (d) sound planning practices would be applied with respect to the proposed removal; and (e) there's no net loss to the area from which the water was taken, and in any event, there's no greater than a 5% loss, the average loss of all consumptive abuses within the Great Lakes Basin, and the water is returned in the condition by using the best available technology protects the quality of and prevents the introduction of alien invasive species into the waters of the Great Lakes.

In its 2004 update, the commission observed with reference to the recommendation in the 2000 report about removals that no proposals to divert water out of the Great Lakes Basin have been approved since our 2000 report. The report went on to say in December of 2002 the Canadian government proclaimed and enforced Bill C-6 which amended the Canadian International Boundary Waters Treaty Act and it approved new related international boundary waters regulations. These two documents among other things prohibit new removals from the Canadian boundary waters of the Great Lakes St. Lawrence Basin by means of diversion and also prohibit removals by any other means of amounts over 50,000 litres per day. You might observe the regulatory impact statement says that's equal to approximately one tanker and trailer load of water. There are limited exceptions the report says for manufactured products that contain water including water and other beverages in bottles or packages; waters used in the conveyance including a vessel, aircraft or crane as ballast; for the operation of the conveyance or for people, animals or goods on or in the conveyance; or for water used in a non-commercial project on a short term basis for fire fighting or humanitarian purposes.

☎ (0915)

This prohibition against all the basin removals applies only to those Canadian waters that are boundary waters as that term is defined in the Boundary Waters Treaty.

As we know, in 1999 Ontario enacted a water taking and transfer regulation which generally prohibits transfers out of Ontario's part of the Great Lakes and St. Lawrence basin and since 1999 Quebec has also generally prohibited transferring water outside of Quebec that has been taken in Quebec. In recommendation 1 on approvals ends with the



words: "Nothing in this recommendation alters rights or obligations under the Boundary Waters Treaty".

In our 2000 report there is recommendation two, major, new or increase consumptive uses. It reads as follows: "To avoid endangering the integrity of the ecosystem of the Great Lakes Basin and without prejudice to the authority of the two federal governments, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for major, new or increased consumptive use of water from the Great Lakes Basin to proceed unless full consideration has been given to the potential cumulative impacts of the proposed new or increased major consumptive use taking into account the possibility of similar proposals in the foreseeable future and (b) effective conservation and practices will be implemented in the requesting area and see some planning practices will be applied with respect to the proposed consumptive use."

Implementing this recommendation the report says: "States and provinces shall ensure that the quality of all water return meets the objectives of the Great Lakes Water Quality Agreement". This section also ends with words similar to the recommendation on removals and nothing in these recommendations alter rights or obligations under the treaty.

Finally, the commission said in its 2000 report about both consumptive uses and removals: "Any transboundary disagreements concerning the above that the effective governments are not able to resolve may as appropriate be referred by the governments of Canada or the U.S. to the IJC pursuant to article 9 of the Boundary Waters Treaty".

Briefly about the U.S. government's action. The commission noted that in the U.S., section 504 of the Water Resources Development Act of 2000 that was amended in 1986. It said in part: "That it's the purpose and policy of the congress to prohibit any new diversion of Great Lakes water by any states, federal agency or private entity for use outside the Great Lakes Basin unless such diversion is approved by the governor of each of the Great Lakes states."

As you know, on June 18, 2001 the Great Lakes states and Ontario and Quebec concluded an annex to the 1985 Great Lakes Charter. Annex 2001 is a good faith arrangement between the Great Lakes states and Ontario which establishes principles for the management of Great Lakes water resources. Annex 2001 commits the Great Lakes states, Ontario and Quebec "To develop and implement a new common resource-based conservation standard and apply it to new water with proposals from the waters of the Great Lakes Basin. This standard will also address proposed increases to existing water withdrawals and existing water withdrawal capacity from the waters of the Great Lakes Basin."

We know that in July the Council of Great Lakes Governors representing the eight Great Lakes states together with Ontario and Quebec released the draft proposals for implementing Annex 2001 for a 90 day public comment period. We know there is also a draft contact released which would only be between the eight Great Lakes states and the U.S. federal government. According to the information I heard provided by officials at your hearing last Thursday a final draft will not be available until sometime in 2005. I

cannot comment yet as chair of the IJC for Canada whether the commission believes the draft proposals to implement Annex 2001 are consistent with our year 2000 recommendations or not and this is because the commission is still actively considering the matter.

However, in our 2004 update we did say: "The commission recommends that the outcome of the Annex 2001 process should include the standard and management regime consistent with the recommendations in our 2000 report and until this process is complete it is not possible to say whether and to what extent Annex 2001 and measures taken under it will give effect to the recommendations in the commission's 2000 report.

Ⓢ (0920)

Finally, there are some other subjects that came up at your committee meeting last Thursday that the IJC has commented on of these reports and to assist the committee I want to talk about them briefly.

First, the commission stated in its 2000 report and I quote

That existing international trade law obligations do not prevent Canada and the United States from taking measures to protect their water resources and preserve the integrity of the Great Lakes basin ecosystem. The governments of Canada and the United States support this view.

Also, the 2000 report stated

Just as important, the commission continues to strongly support the basic principle espoused in our 2000 report that water use standards that treat in-basin and out-of-basin users differently are reasonable.

Then the commission went on say and I've talked about this as well, but I'll give you some additional details, and I quote

The commission understands that at this time the ban for diverted water resides on the U.S. side of the boundary in communities near the basin divide, such as Lowell, Indiana and indeed the commission is aware of a growing number of proposals to allow communities that straddle or lie just outside the surface water divide of the Great Lakes basin to use Great Lakes water.

Now a particular concern to the commission is unsustainable ground water depletion in these communities that could lead to declining water quality, the de-watering of tributaries and destruction of habitat. For instance, large ground water withdrawals in southeastern Wisconsin have reduced ground water flow to Lake Michigan and in some locations have reversed flow.

The commission continues to urge that a new regime, any new regime involving measures to deal with these demands by near-basin communities in a fair and sustainable way be consistent with the commission's recommendation in its 2000 report and in addition, the federal, state and provincial governments should work together to map and characterize ground water aquifers.

With respect to conservation, in its 2000 report the commission found and I quote

That substantial work remains to be done at all levels of government to implement the water saving measures set out in the commission's 2000 report and therefore the commission urges that those conservation recommendations be instituted as soon as possible and governments at all levels should also encourage the development and implementation of policies such as metering and conservation pricing as well as technologies that will reduce the consumption and loss of water as long as low income families are protected.

Finally, I would like to note the following from the 2004 report

Over the years the commission has been asked by governments on several occasions to offer its advice on protecting the waters of the Great Lakes basin from unsustainable use and diversion. While knowledge of the ecosystem has advanced and policies and practices are improving, serious concerns remain and a great deal of work still needs to be done to achieve sustainable management of these resources for the benefit of present and future generations.

Having said that, I want to deal with the matter of lake levels and our Lake Ontario--St. Lawrence study. This study is not primarily a water level study per se, it's a review of the IJC's orders for the regulation of the Lake Ontario--St. Lawrence River system. This study does include an assessment of water level impacts of the current allocation plan, along with newer plans being developed in the study on the environment and all interests around the basin. This is done using historic water supply scenarios as well as climate change scenarios developed from the use of major climate models in 2002 and 2003.

⊕ (0925)

Now I have to point out that the study is not complete. It's in the fourth year of a five-year period but there are interim reports.

Water levels around the Great Lakes and St. Lawrence River are continually monitored by agencies collaborating with the IJC in both countries. The levels though have always been variable and have seen record lows in the 1930s and mid-1960s as well as a higher period between the 1970s and 1990s.

In the upper lakes, Superior, Michigan and Huron have been below average over the past six years since 1998. They have recovered somewhat but still remain below normal.

I should note that while this study involving the lower lakes is underway there is no upper lakes study underway similar to the lower lakes one. The commission has presented a plan for such a study through the two national governments. As yet they have not agreed to provide the necessary funding.

So as I've said the IJC has not yet made the determination as to whether the present draft proposals to implement annex 2001 are consistent with our 2000 report. It will likely not make such a comparison at least until it sees the annex implementation in their final form at some point, probably late in 2005 and likely before they are submitted to the Great Lakes state and provincial legislatures and the U.S. Congress for approval. However, I end with a suggestion for this committee and I hope I'm not being presumptuous in this regard, this committee with the assistance of the research branch of the Library of Parliament and each of the party caucuses' research bureaus could carry out its own comparison of the present draft proposals to implement annex 2001, comparing

them with the IJC's recommendations in its 2000 report, or you could wait until the proposals are in their final form in 2005 and before the Great Lakes states' legislatures and Congress begin voting on it.

I also noted that the officials at last Thursday's hearing said they expected comments from the Canadian federal government to be released in November, which I gather means later this month.

This concludes my statement and I would welcome the committee's questions and comments.

Ⓢ (0930)

[*Français*]

Je serais content de répondre à vos questions et vos commentaires en anglais et en français. Merci, monsieur le président. *Thank you.*

[*English*]

**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):** Thank you very much, Mr. Gray.

Do either of your colleagues wish to add anything to what you've said?

**Right Hon. Herb Gray:** They better not unless I ask them.

But I had better introduce them. Michael Vechsler, on my right is the Counsel to the commissioner on the commission's staff. Dr. Clamen, on my left is the secretary or in effect, deputy minister, of the Canadian section of the International Joint Commission. He has a counterpart in the United States. There's one commission but there are two bodies for administrative purposes and so we work together in our Ottawa and Washington offices with our Great Lakes office in Windsor.

**The Chair:** Good. Thank you, Mr. Gray. Welcome to you both.

Mr. Mills, we'll start off with you.

**Mr. Bob Mills (Red Deer, CPC):** I welcome you Mr. Gray and your long years here.

Two things really. First of all the Great Lakes concerns a huge number of Canadians I think right across this country. They represent that huge resource. As you've mentioned some 40 million people in both countries depend on it.

Two things that I would like to know, and first of all in examining the annex 2001 and comparing that to the International Boundary Waters Treaty, the legality of the document, a number of people have raised that issue in terms of are there contradictions? Is that a natural process in the development of that agreement between them?

The second, I think, and more important question, and you've referred to it, that the eight governors need to go to Congress for approval once down the road next year if a

decision is made. I just wonder why the two provinces don't come to the federal government for the same sort of approval and examination and detailed study because I think you said it and certainly that's what I interpreted that that's not the procedure.

**Right Hon. Herb Gray:**

Thank you. Well, with respect to comparing Annex 2001 and the Boundary Waters Treaty, this is an area that I don't think I can get into at this time because the commission hasn't formed a public consensus.

Now, with respect to the eight governors needing to go to Congress and why the two provinces don't come to the federal government for the same sort of approval, this is because, as I understand it--and here I'm subject to correction by my officials on either side--the Annex 2001 implementation proposals are actually two documents.

One is a good faith agreement between the eight Great Lake states and Ontario and Quebec, and the other is a compact between the eight Great Lakes states and the U.S. federal government, made under U.S. federal law, a separate document, which, once voted on favourably by the eight states and the U.S. Congress, becomes a bonding equivalent, in my view, to out Bill C-6. In other words, rather than one single, federal statute, the U.S. government is using their process to ask for a formal compact under delegated authority, signed by the U.S. states around the Great Lakes and voted on by their legislatures, and, of course, the U.S. Congress. So we're dealing with two documents. What your question involves is a U.S. federal process.

As to what the governments of Ontario and Quebec may want to do, you'll have to ask them. Although I would like to observe that since the work on the proposals to implement Annex 2001 began, there are different governments in place, both in Ontario and Quebec. So whether they will have the same view as the previous two governments, I don't want to speculate.

⌚ (0935)

**Mr. Bob Mills:** So if the two provincial governments don't agree with the eight--now we're supposing this--governors, and it does go through their Congress and so on, what recourse does the federal government have? What can the federal government then do if that scenario were to play out?

**Right Hon. Herb Gray:** Well, this is a question of interpretation of international relations and constitutional law, which I don't know if I'm necessarily qualified to get into, but I would take the risk of observing that before this was voted on, the Canadian federal government would approach the American government and would state its position on how this measure would impact on Canada and what its pluses or deficiencies would be.

**Mr. Bob Mills:** I think that's the bottom line. That's what the citizens around the Great Lakes are concerned about, is that in fact the Americans will have total control of the issue and Canadians won't have that input that they should have. It'll sort of be the 8:2 scenario. How can you win that one?

I guess I would like to think that the IJC, I'm not sure what other international agreements, but certainly the IJC would be the one to pick up the sword and go on the attack for Canadian citizens. Yet, I'm not sure that I have confidence that'll happen.

**Right Hon. Herb Gray:** Well, don't forget, as I explained in the opening to my remarks that the commission is a Canada-U.S. body set up under a treaty. It's not reporting to or accountable to any department or minister in either country. It operates within the framework set up for it by the treaties. It's a unique, binational, but in the printed institution, there are equal numbers of Canadians and American commissioners.

By the way, I found this very interesting over the years, that the U.S. has no greater number of commissioners than Canada, in spite of the disparity of population, and economy and so on. The decision making process involves consensus rather than voting.

I would observe that there's a role here for the Canadian federal government. I heard the officials say to this committee that the Canadian federal government would be publicly issuing its comments this month. You may want to ask them to come back and talk about their comments.

Another thing I want to observe is that, I think this came up, the U.S. State Department has publicly asked the Great Lakes governors to add language to their draft proposals, confirming that these measures are subject to the Boundary Waters Treaty. I think it's interesting that the U.S. State Department has already formally made this request, that the language of the compact be changed or added to on this important point.

**Mr. Bob Mills:** Thank you.

**The Chair:** Thank you.

Mr. Bigras.

[*Français*]

**M. Bernard Bigras (Rosemont—La Petite-Patrie, BQ):** Merci, monsieur le président. Monsieur Gray, d'abord bienvenue au comité. C'est toujours un plaisir de vous recevoir.

J'ai bien compris que ce qui était fondamental dans cet accord pour vous c'était de voir si l'Annexe 2001 répondait aux recommandations du rapport 2000. D'ailleurs votre présentation est bien résumée dans le rapport d'août 2004, page 8, en haut, premier paragraphe: «Jusqu'à ce processus ne soit pas achevé, on ne pourra pas savoir si l'Annexe 2001 et les mesures adoptées à ce titre donneront effet aux recommandations du rapport de 2001 de la Commission.» C'est ce que j'en ai compris aujourd'hui. J'ai également compris que vous demandez au comité de faire l'analyse pour voir si l'Annexe 2001, une suggestion, ainsi qu'à la bibliothèque du Parlement.

Je voudrais savoir si vous avez une analyse quelconque, à savoir si l'Annexe 2001 répondait aux recommandations, en particulier les recommandations 1 et 2 de votre rapport. Est-ce que vous avez fait une analyse quelconque?

Ⓢ (0940)

**Le très hon. Herb Gray:** C'est actuellement le travail que nous faisons. Nos cadres, comme M. Vechsler et son homologue à Washington, travaillent pour rédiger un document consensuel pour les commissaires. Nous-mêmes avons commencé notre étude. Nous devons continuer notre travail. Nous n'avons pas fini. Je regrette de ne pas pouvoir actuellement vous donner les avantages de notre travail. Cependant, j'ai pensé qu'il serait utile pour moi de comparaître devant vous en dépit de cette impossibilité en ce moment de répondre spécifiquement à votre question.

**M. Bernard Bigras:** D'accord.

Monsieur le président, j'ai ici le compte-rendu d'une rencontre de la réunion de direction du 21 septembre 2004, tenue à Ennis, en Irlande. Un des principaux points à l'ordre du jour de cette rencontre était l'envoi d'une lettre au Conseil des gouverneurs avec copie au Département d'État et mandate son personnel pour élaborer un document de consensus préliminaire à la réunion semestrielle d'octobre, document qui examinera les points de convergence et les incohérences avec les recommandations du rapport de la commission ainsi que les questions posées par le Conseil des gouverneurs des Grands Lacs, afin que la question soit discutée en détail lors de sa réunion semestrielle du mois d'octobre.

Un deuxième point, et je vous lis entièrement le compte-rendu de la rencontre:

et mandate son personnel pour élaborer un document de consensus préliminaire à la réunion semestrielle d'octobre, document qui examinera les points de convergence et les incohérences avec les recommandations du rapport de la commission ainsi que les questions posées par le Conseil des gouverneurs des Grands Lacs, afin que la question soit discutée en détail lors de sa réunion semestrielle du mois d'octobre.

Nous sommes maintenant au mois de novembre. Première question: en toute transparence—je suis convaincu que la bibliothèque du Parlement va faire cette comparaison entre les recommandations du rapport ainsi que l'Annexe 2001—étant donné qu'on vous transmettra notre analyse, pouvez-vous nous faire part du contenu du document de consensus préliminaire ainsi que de l'objet des discussions qui se sont tenues à la rencontre d'octobre?

**Le très hon. Herb Gray:** Malheureusement, ce qui est arrivé c'est qu'il a été impossible de compléter un tel document. Des cadres comme M. Vechsler continuent d'en discuter avec leur homologue américain dans leur bureau à Washington. Nous avons estimé que c'était impossible en octobre, c'était trop tôt pour que les commissaires en arrivent à un consensus sur ces questions. Il arrive assez souvent que nous fixions un date aux commissaires pour finir un travail et pour différentes raisons il est impossible de le faire. Nous avons pensé que ce serait possible. Malheureusement, je m'excuse devant le comité, nous ne sommes pas arrivés à ce consensus au mois d'octobre.

**M. Bernard Bigras:** Vous nous dites qu'aucun rapport préliminaire n'existe à la Commission-mixte internationale. Cela, vous nous l'assurez. Il n'y a aucun document préliminaire de convergence ou autre qui existe à la Commission-mixte.

**Le très hon. Herb Gray:** S'il y a des documents préparés par les cadres, ce n'est pas l'opinion de la Commission. L'opinion de la Commission c'est une opinion qui est établie par vote ou par consensus. La seule décision de la Commission c'est une décision faite par les commissaires.

**M. Bernard Bigras:** Premièrement, vous serait-il possible de déposer au comité la lettre qui a été envoyée aux différents membres du Conseil des gouverneurs? Deuxièmement, lorsque ce document préliminaire sera discuté à la réunion de direction, est-ce qu'il serait possible d'en déposer une copie au Comité permanent de l'environnement et du développement durable?

**Le très hon. Herb Gray:** Malheureusement, ce ne sera pas possible étant donné qu'il ne s'agit pas d'un document de la Commission ou qu'il n'y a pas consensus des commissaires à cet égard. Par contre, je pourrais demander à M. Vechsler.

[English]

Mr. Vechsler, did we send letters to the governors?

[Français]

Mes gestionnaires m'informent que nous avons discuté de la possibilité d'envoyer une telle lettre, mais aucune décision n'a pas été prise à cet égard.

Ⓢ (0945)

**M. Bernard Bigras:** Pourtant, le bureau de direction avait approuvé une décision qui avait même été discutée, si je ne me trompe pas, lors d'une autre rencontre. Ce n'était pas la première fois que vous discutiez de la question. Donc, comment se fait-il que cette lettre n'ait pas été envoyée, alors qu'elle avait été approuvée par le bureau de direction?

**Le très hon. Herb Gray:** Aucune lettre n'a été envoyée au gouverneur. Cependant, il arrive parfois, lors des réunions des commissaires, que nous changions d'idée, étant donné que nous travaillons par consensus, tel le caucus d'un parti ou le comité du cabinet.

**M. Bernard Bigras:** Merci beaucoup, monsieur le président.

[English]

**The Chair:** Thank you, Mr. Bigras.

Miss Ratansi.

**Ms. Yasmin Ratansi (Don Valley East, Lib.):** My question ...

**The Chair:** Oh, I'm sorry. Did you wish to take up the time, the balance of the time, Christian?

[Français]

**M. Christian Simard (Beauport—Limoulu, BQ):** Bonjour, monsieur Gray.



Est-ce que j'ai bien compris lorsque vous disiez que lorsque, éventuellement, l'Accord 2001 sera mis en oeuvre, il aura le même pouvoir et que ce sera comme un pouvoir délégué du gouvernement fédéral américain, qui aura le même pouvoir que la Commission mixte internationale, donc il aura sa vie propre, c'est-à-dire qu'on ne pourra pas en appeler à la Commission mixte internationale, s'il y a, par exemple, violation du Traité des eaux limitrophes, parce que dans l'Accord 2001, le département d'État américain a demandé le respect du Traité des eaux limitrophes. Est-ce que j'ai bien compris qu'il n'y aura pas nécessairement de possibilité d'appel à la Commission ou est-ce que je me trompe?

**Le très hon. Herb Gray:** Nous n'avons pas encore fait de décision à cet égard. Cependant, il s'agit d'une question que nous considérons, c'est une possibilité. Je dois vous indiquer que le département de l'État, au nom du gouvernement fédéral des États-Unis, a demandé, au Comité de travail des gouverneurs, d'inclure des phrases dans le document, indiquant clairement que l'Accord entre les gouverneurs n'aura pas plus d'importance que le Traité sur les eaux limitrophes.

Finalement, je vous dirais que nous sommes en train de considérer cette question et que, personnellement, je suis heureux de constater que le département d'État l'ait demandé au gouverneur. J'attends donc, avec un grand intérêt, le document qui sera publié, ce mois-ci, par le gouvernement fédéral.

**M. Christian Simard:** Dans l'état actuel de la science, j'ai participé dans le passé au Citizen Public Advisory Committee de la Commission mixte internationale, sur (inaudible) et le renvoi sur les inondations, fin des années 80. On s'est aperçu qu'on ne connaissait absolument pas l'état physique des eaux, même des lacs supérieurs et intérieurs. Comment sera-t-il possible, d'un point de vue de contrôle, de faire une traçabilité, de quelle façon pourrons-nous véritablement suivre l'Accord 2001 et vérifier, dans les faits, si elle contrevient ou non au Traité des eaux limitrophes ou est-ce qu'il ne s'agit pas d'une grande porte ouverte à n'importe quoi, étant donné que nous n'aurons aucun point de comparaison avant ou après?

**Le très hon. Herb Gray:** On doit avoir des mesures d'affaires avec droit de regard sur ces questions. Une des questions que nous avons considérée, et vous aussi, est celle-ci. Est-ce que l'accord entre les États-Unis et l'accord entre les provinces est de bonne foi et les États-Unis offrent-ils suffisamment d'agences de contrôle et de révision? Aussi, comme vous l'avez indiqué, il y a des questions scientifiques très importantes et très intéressantes, mais il y a aussi des questions d'affaires. Si on permet à une division de (inaudible), quel sera l'effet cumulatif là-dessus? Alors, peut-être que M. Vechsler,

[English]

Monsieur Vechsler, do you have anything to add?

☎ (0950)

**Mr. Michael Vechsler:** I'm afraid I don't.

[Français]

**Le très hon. Herb Gray:** D'accord. Merci.

**M. Christian Simard:** Et l'effet sur la qualité aussi.

**Le très hon. Herb Gray:** Oui. C'est pourquoi la commission, dans son rapport 2000, a dit qu'on doit répondre aux critères de l'accord entre les États-Unis et le Canada sur la qualité de l'eau des Grands Lacs.

[English]

**The Chair:** Ms. Ratansi.

**Ms. Yasmin Ratansi (Don Valley East, Lib.):** Mr. Gray, I'd like to thank you and your team for being here and for providing us with such an exhaustive presentation.

I haven't had the opportunity to read this report, so I do not know what a tight regime you have in here.

My question is regarding Bill C-6. On Thursday a committee member expressed an opinion that Bill C-6 does not ban diversion or bulk exports of water from the Great Lakes, and that it gives the minister the discretion to license under that act. As a member of the cabinet and the government that brought forward this bill, could you clarify this? Is this the way you perceived it? Is this interpretation right?

**Right Hon. Herb Gray:** I think that Bill C-6 was voted on by Parliament. It proclaimed into force just at the end of my period in cabinet. It proclaimed into force after I left. I'll be happy to offer a comment.

Again, you may want to hear directly from representatives of the foreign affairs department and the Department of the Environment. If I look at the bill, I would say that I think you have to read three clauses together, clause 11(1), clause 12(1), and in particular clause 13(1), which to me seems to go further than even what we said in our 2000 report. It says,

Despite section 11, no person shall use or divert boundary waters by removing water from the boundary waters and taking it outside the water basin in which the boundary waters are located.

please verify quote

If you read their regulatory impact statement, which was published at the same time the regulations were published, that expresses the intentions of the government. In reading it--I'm just giving you my own personal observation--it seemed to me that the government was intending that there not be any use or diversion to boundary waters--these have to be Canadian boundary waters, obviously--outside the water basin in which the boundary waters are located.

By the way, this bill is not just about the boundary waters of the Great Lakes. It includes all the boundary waters stipulated by regulation which, among other things, would include the St. Croix, for example, and others listed there. I just observe this.

I have to be clear on this. You're asking me for a legal interpretation. I'm giving you my reading of it and my understanding of the intentions of the government especially as confirmed by the regulatory impact statement. But you may want to ask people from the relevant federal departments, maybe a legal advisor to the federal government Department of Justice, or legal branch, I should say, of the foreign affairs department to come and answer your specific questions on this.

**Ms. Yasmin Ratansi:** As the IJC, how do you see it? Is that your personal opinion, or is that an opinion from an IJC perspective?

**Right Hon. Herb Gray:** All I can say is that our 2004 report spoke about Bill C-6. It stated in the 2004 report that the intention of Bill C-6 was to ban any removals from the basin. I can only cite what I read out to you from our 2004 report.

⌚ (0955)

**Ms. Yasmin Ratansi:** Thank you.

**The Chair:** Mr. Scarpaleggia.

**Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.):** Welcome Mr. Gray.

My first question relates to the role of the IJC. I'm just trying to get a handle on it. It's not an arbiter per se, it's a body that coordinates research and makes recommendations. Is that correct?

**Right Hon. Herb Gray:** It does that but it does go further, if asked to do so by the Canadian and American governments.

In its reports it does just provide information. It states specific recommendations even though under article 9, they do not have the force of binding arbitral awards.

Second of all, if it issues an order of approval with conditions, on a structure for which an application of approval has been submitted, those orders of approval and conditions are binding.

**Mr. Francis Scarpaleggia:** They are binding.

**Right Hon. Herb Gray:** So that refers to the authority to build a structure on, over or under a boundary water which may effect levels and flows in the other country and the conditions of how the water is to apportioned for various uses. Those orders are binding.

**Mr. Francis Scarpaleggia:** But also what you've mapped out here, it seems to me is a whole system of cheques and balances against misuse or harmful diversion of Great Lakes water. You talk about the fact that in the agreement... or that's my understanding anyway, that you mentioned.

Any agreement between the states and the provinces would have to be consistent with the Great Lakes Water Quality Act. It would have to be consistent with the Transboundary Waters Treaty. It would have to be consistent with the policies and standards of the American Congress and so on.

Do you feel that there's sufficient cheques and balances in the system and adding the fact that the IJC has strong recommending powers? Do you feel there are enough cheques and balances in the system to prevent harmful diversion of water? So that would be my question.

My third question would be, in the event that a diversion plan is approved and over the years one finds it hasn't worked out the way we planned and that in fact it's compromising the ecosystem what remedial measures can be taken or if the system is such that there's a state of inertia would be created, whereby the harmful state of affairs would go on and on and on?

**Right Hon. Herb Gray:** I may have to ask you to help me, to restate some of your questions but I'll work backwards.

Because once a diversion is approved you can't get the water back. The water is gone and the system for removing continues to operate. That's why what we call the precautionary principle is so important and this is one of the basic principles on which the IJC bases its work. By that it's meant that where you're not sure that something harmful isn't going to happen, you're better off not making a decision, which could lead to that harmful activity taking place.

That's why the commission says, has to be in place and find the precautionary principle so that there be no diversions unless the conditions that we set out and I read out to you are there. I would say from the point of view of the precautionary principle, the weight of the argument is against the (inaudible) diversions.

Actually the federal government's Bill C-6 goes further than, I think, what our 2000 report said. I mean if you just stop and think, there are diversions into the Great Lakes from...

What's the name of those lakes?

⌚ (1000)

**Mr. Michael Vechsler (Legal Adviser, International Joint Commission):** Long Lac and Ogoki.

**Right Hon. Herb Gray:** Long Lac and Ogoki and Lake Superior, which bounces the water going out of the Great Lakes through the Chicago Sanitary and Ship Canal into the east Mississippi.

It's to say, well someday we're going to turn off the Chicago Ship Canal, I mean that's not realistic nor is it realistic to say that we're going to turn back the Ogoki diversion.

That's why I think the committee may want to conclude that you have to be darn careful about what you start doing because if you're dealing with something of this nature it may be very difficult if not impossible to turn it around. Maybe you could close off the diversion or ban the tankers taking the water out but you're not going to get back the water that went through the system outside the Basin.

**Mr. Francis Scarpaleggia:** I know that precautionary principle more and more is being inserted in legislation in Canada and obviously the IJC is guided by the precautionary principle. Is it as deeply rooted in the U.S. congress and in the U.S. political system in terms of environmental legislation and so on in your opinion?

**Right Hon. Herb Gray:** I'm sorry, I'm not sufficiently informed to answer your question.

**The Chair:** That's the ten minute allocation to the Liberal group.

I may have inadvertently made an error, I'm learning as I go here. Mr. Comartin, I had short changed Mr. Mills and his colleagues by four minutes. By your leave and the committee's permission could I go to Mr. Richardson and allow him the four minutes and then I'll come for the ten minutes for the NDP?

Thank you, Mr. Comartin.

Mr. Richardson.

**Mr. Lee Richardson (Calgary Centre, CPC):** Thank you, Mr. Chairman.

I'm going to just get an overall picture of the IJC here. You've been called a toothless watchdog. Do you even see yourself as a watchdog? Is that part of your role? Do you see the IJC as a watchdog for Canadian interests?

**Right Hon. Herb Gray:** The IJC is not a Canadian body nor is it an American body.

**Mr. Lee Richardson:** I didn't suggest it was, sir.

I asked if you saw the IJC as a watchdog of Canadian interests?

**Right Hon. Herb Gray:** I think the IJC is a watchdog for the interests of the people of both countries when it comes to the waters that form the boundary between the two countries. It has to work for the interests of the people on both sides of the border. That's why unlike most international bodies once the commissioners are appointed they have to sign an additional declaration that they are not there on behalf of their governments they are there on a non-partisan basis to serve the best interest of the populations as required by the treaty. It's a rather unusual structure but this is what was negotiated back in 1909 and those countries have felt it stood the test of time for 100 years.

I think that the treaty has never been amended except in one instance and that is to change the specific provisions in it about portioning the water for the Niagara River and there is a separate little agreement that amends the original treaty. The main thrust of the treaty must have stood the test of time because neither government has approached the

other to amend the treaty since 1909. Unlike most treaties I find there's a layman in these matters but it is an interesting one, the language is much less complicated than technical than most treaties and it has something in there that is remarkable for the year 1909, it says "neither country shall pollute the waters of the other to the damage of the health and safety of the other."

**Mr. Lee Richardson:** Thank you.

Just on that point because I think we have gone over that. I think we at this committee were looking for some kind of security or sense that perhaps there was an authority or a dispute mechanism within the International Joint Commission that might some of the concerns we had about any deleterious effect of Annex 2001 or actions that might be taken unilaterally by U.S. governors for example. If we had that concern is there some assurance that we might derive from the International Joint Commission that you could override some action taken unilaterally by the Americans that would be deleterious to Canadian interest or waters?

**Right Hon. Herb Gray:** There is a dispute mechanism provided for by the treaty to be applied by the IJC but it has to be triggered by the two governments asking that it be used. That's the way the treaty is written. Second of all, the treaty does not create the IJC as a body which can override decisions of the other country nor of sub-national groups unless a clause I haven't mentioned is used and that's clause 10. If clause 10 is used and the matter is referred to the commission under clause 10 then decisions made under it have the force of arbitral awards, they are binding and not simply advisory. However clause 10 can't be evoked unless the U.S. senate agrees, that's the way it was written, I think.

Speaking of my reading of history, at the last minute in order to enable to the treaty to be agreed to, words about the U.S. senate was put into clause 10 so as a result clause 10 has never been used. If it was used the decisions made under it would not simply be advisory, they would have the force of arbitral awards, awards made by a board of arbitration.

⌚ (1005)

**The Chair:** Thank you, Mr. Richardson.

I'll go to Mr. Comartin.

Just before I do, Mr. Wilfert, did you have a point of order?

**Hon. Bryon Wilfert (Richmond Hill, Lib.):** I was probably on the list, but I want to let you know that I may have to leave in order to deal with a bill before this committee ends.

Thank you.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Thank you, Mr. Chair.

Mr. Grey and officials, thank you for coming.

Mr. Chair, last week we had a statement from the State Department that was given out by the representatives from Foreign Affairs. We also had reference to a letter that the Attorney General of Michigan had forwarded expressing concern and opposition to the Annex. I have not received that instruction, Mr. Cullen hasn't either. It actually would have been helpful to have the State Department's statement particularly here today. If we could get that as quickly as possible.

**The Chair:** I will take a note of that. Mr. Clerk, could you give us an update on that?

**The Clerk of the Committee:** I've got some documents from the department yesterday that were sent out electronically. I don't know if that was part of the package. I got them late yesterday.

**The Chair:** We'll double-check that and we'll certainly have them to you for the next go around.

**Mr. Joe Comartin:** I want to follow-up Mr. Bigras' question in terms of the status at this point of the position within the IJC. If I understand the situation some of your officials would have prepared at least a preliminary analysis of the annex and conditions criteria that would be required to be met in order to have water diverted by the council, and compare those to the list that you gave us earlier today. I understand that has to be kept within the commission, but I'm wondering if that analysis is going to be shared with either the federal Environment Canada Department or the Department of Foreign Affairs before they give us their comments, which they've indicated we're going to have by the end of this month or early in December. Will that be shared with them?

**Right Hon. Herb Gray:** What we share is once the commissioners are ready to release a report they will share a draft of the report with relevant departments in both countries solely to see whether we're making any factual or scientific errors. We do not take aboard any comments they make. What we would share with the governments is a draft of our report as a commission solely for the purpose of knowing in advance whether we have made a factual or technical error.

I think I'm right in that, Mr. Vechsler.

**Mr. Michael Vechsler:** That's correct.

**Mr. Joe Comartin:** I'm assuming at the rate the commission work is going that will be after the end of this month.

**Right Hon. Herb Gray:** I think we have to recognize that. As I say, we work by consensus. I think you'll know from your discussions in your caucus, or those who have been in Cabinet, sometimes to reach a consensus it takes longer than you think. We found it's the way to do business over 100 years of successful experience.

⌚ (1010)

**Mr. Joe Comartin:** Let me just express my concern, Mr. Grey, not that I've always been a complete admirer of the IJC, but the reality is that the IJC has been much more

protective of the Great Lakes, in my opinion, and reacted more appropriately and quickly than Foreign Affairs has on a number of issues. I guess I'll just leave it and encourage the work of the commission to be done as quickly as possible so that you can share it with the government, at least on this side of the border.

Let me go to another point and that is the major concern that I've got with regards to the ultimate usage that will be made of the agreement, and more specifically the compact. Mr. Minister, it may be you that needs to respond to this, but I can not see how we're not at some stage going to get into a conflict between a decision made by the council and a decision made by the IJC if an application is made and it gets referred to the IJC. My analysis of the difference in the criteria is that it is quite extensive and that is everybody that I have seen from the environmental groups who have done the analysis, the IJC position on diversion, and what the Annex position is on diversion. The criteria under the Annex is extremely permissive by comparison with the IJC.

Just assume that for a minute—don't take a position—if that is the case, what happens if the council at some point recommends and permits a diversion, and the issue does get referred to the IJC, and it opposes that diversion. What happens then?

**Right Hon. Herb Gray:**

I'll ask Mr. Vechsler to assist me. If the IJC issues a conclusion different from the decision of the council of ministers, I think that its decision is actually a report given to the two governments, and to add weight to the recommendations it's released to the public. We don't give secret reports to governments.

So it will then be up to the Canadian government to weigh in through its links with the U.S. authorities or increasingly through direct contact, through consulates or embassies, with governors and American legislators.

We have to recognize here that we're dealing--if you talk about the Great Lakes--with one water basin but we're dealing with two sovereign governments, eight sub-national governments in the U.S., two sub-national governments in Canada, and the lines drawn on a map by human beings don't fit in with what mother nature has provided us. So it's a continuing challenge and in both countries we're dealing with federal governments and so on.

But I would like to ask Mr. Vechsler to assist us here.

**Mr. Michael Vechsler (Legal Adviser, International Joint Commission):** I think the only thing I'd like to add is that I think it's important to remember that the commission's authority always comes from the treaty which is in essence part of the international relationship between the two countries, so that in the end, one has to look to the international law as it's being applied between Canada and the United States to see what the commission's authority is or is not in any particular case.

**Mr. Joe Comartin:** But unless section 10 of the treaty is invoked....I'm assuming that that reference on a specific application, so Waukesha applies for a diversion, the council grants it, it gets referred to the IJC, the IJC recommends against it. That application and



that report is not part of section 10. There would have to be a further invocation of that section. Am I correct on that?

**Right Hon. Herb Gray:** As I understand it, it has to be invoked from the outset, that is to say the reference to the commission has to specifically say the action is being taken under section 10. Now in order for that to work and for the ruling to be in the nature of an arbitral award, the U.S. Senate has to agree.

Now, whether you think that's the way the clause should have been written in the first place, you'll have to ask people who have been around for almost a hundred years.

Interestingly enough, there is an appeal from any arbitral award made under section 10 to The Hague International Tribunal.

Do you want to add something, Mr. Vechsler?

⌚ (1015)

**Mr. Michael Vechsler:** The only other thing I'd like to add is that if the situation was to fall within article 3 or article 4, if it was a situation requiring an order or bilateral approval pursuant to either of those articles, and if the government where the project was taking place then decided to refer it to the commission pursuant to article 3 or article 4, then of course there's a question of an order and then the commission decision would be binding, but that's a narrow situation.

**Mr. Joe Comartin:** Yes. Has section 10 ever been used?

**Right Hon. Herb Gray:** Not that I know of, I don't think so. Do you have any information?

**The Chair:** One minute.

**Mr. Joe Comartin:** I'm sure I didn't use up 10 minutes. It was Mr. Gray who used it up.

**Right Hon. Herb Gray:** That's right. Deduct that from my time.

**Mr. Joe Comartin:** Mr. Gray, the statement that we did get from the state department last week, quite frankly, gave me some cause for comfort. It may be unfair to ask you this but I'll ask it anyway.

I would have felt more comfortable if there had been a specific reference in that statement to the ongoing role of the IJC and it being supreme over the council. Without asking you to take a position on behalf of the commission, would that give the average Canadian a greater sense of comfort as well?

**Right Hon. Herb Gray:** I have a file here with the words, maybe Mr. Veschler could leaf through there.

I'm not suggesting that what the U.S. government has asked the governors to do is the final word on the subject or that it's the ideal language. I just think from the point of view

of my position as chair of the IJC, I think it's a constructive thing to do and it's consistent with what we said in our year 2000 report where we said anything dealing with removals or consumptive uses is not intended to take anything away from the authority of the IJC.

So I'm saying that the U.S. government's request to the governors is something constructive but I'm not suggesting it's the final word on the subject.

**The Chair:** Thank you.

Unfortunately the 10 minutes encompasses also the questions and answers. We've now gone through the 10 minute envelopes allocated under the procedural bylaw. We now go to the open portion.

The following members have indicated they'd like to ask questions: Mr. Paradis, Mr. McGuinty and Mr. Watson and Mr. Jean.

Okay, Mr. Paradis.

[*Français*]

**M. Denis Paradis (Brome—Missisquoi, Lib.):** Merci, monsieur le président.

**Le très hon. Herb Gray:** Monsieur le président, j'aimerais rajouter un point, en répondant à la question de M. Comartin.

[*English*]

In its 2000 report on both consumptive abuses and removals, the commission said and this is my statement:

It recommended that any transboundary disagreements concerning consumptive abuses and removals that affected governments are not able to resolve may as appropriate be referred by the governments of Canada or the U.S. to the ICC pursuant to article 9 of the Boundary Waters Treaty.

That doesn't rule out trying to use article 10 or what Mr. Vechsler said in a limited way to use article 3. I'm sorry to intrude here.

[*Français*]

**L'hon. Denis Paradis:** Merci, monsieur le président. Bienvenue, monsieur Gray et les autres de l'équipe de la Commission mixte internationale.

Rapidement, tout le monde va s'entendre, bien sûr, sur l'importance de l'eau et le fait que c'est peut-être notre plus grande richesse naturelle au Canada. On voit aujourd'hui le prix du pétrole et je pense que dans peut-être 15 ou 20 ans, etc., l'eau va être rendue aussi une denrée extrêmement rare à l'échelle de la planète.

Au niveau du traité sur les eaux limitrophes, il semble que c'est assez clair que des détournements--et ma question va se poser rapidement sur les détournements--, que les détournements ne sont pas permis si cela influence le débit ou le niveau naturel de l'eau et

que la commission mixte a un rôle à jouer. Deuxièmement, à ce niveau-là aussi, avec C-6, le gouvernement du Canada est intervenu en prohibant des prélèvements et des déviations d'eau.

Par contre, et cela semble tout à fait clair, et je pense aussi que c'est le voeu commun non seulement du gouvernement fédéral canadien mais des deux provinces, l'Ontario et le Québec, parallèlement à cela, je comprends que deux provinces ainsi que huit États signent des accords. La question que je me pose, c'est concernant l'interaction entre le gouvernement fédéral et nos deux provinces. Si je regarde juste le côté canadien, tout le monde s'entend: pas de prélèvements, pas de déviations d'eau. Mais où est la concertation du côté canadien? Où est la coopération entre les provinces et le gouvernement canadien?

Si on est divisés sur notre côté, dans une présentation face aux Américains, on connaît tous la phrase « diviser pour régner ». Alors, si on a une approche, les provinces chez nous ont une approche et le gouvernement fédéral a une autre approche et la commission mixte est dans le milieu de tout cela, j'ai l'impression qu'à plus ou moins long terme, on va tous être perdants là-dedans. Alors, que faudrait-il faire, d'après vous, et c'est ma première question, pour avoir un peu plus de concertation et de coopération au niveau fédéral-provincial, du côté canadien?

Ma deuxième question est celle-ci. Si on avait ce côté hermétique non divisé sur notre côté, en ayant une approche claire, une approche concertée par rapport à cela, quel pourrait être le rôle de votre commission pour pousser, inviter et inciter les États-Unis à adopter une approche aussi claire et simple qu'on pourrait avoir du côté canadien dans ce que je viens de mentionner, une approche simple, mais encore une fois, en limitant la discussion autour de tout ce qui s'appelle prélèvements et déviations d'eau?

(1020)

**Le très hon. Herb Gray:** Tout d'abord, il y a des instruments de coopération entre le gouvernement fédéral et les gouvernements du Québec et de l'Ontario et il y a un accord entre le gouvernement fédéral et l'Ontario qui s'appelle le Canada Ontario Agreement. Son but est de faciliter les améliorations dans la qualité d'eau des Grands Lacs. Le but de l'accord est la qualité de l'eau des Grands Lacs. Il y a aussi un accord semblable sur le fleuve Saint-Laurent. Je ne me rappelle pas le nom exact, mais

[*English*]

Do you remember the exact day or the ... the Quebec Federal Agreement.

[*Français*]

En tout cas, il y a des liens de coopération entre les deux gouvernements par l'entremise des départements comme le ministère de l'Environnement et le ministère des Ressources naturelles. Il y a aussi au moins deux accords entre le fédéral et les provinces de l'Ontario et le gouvernement du Québec.

**L'hon. Denis Paradis:** Monsieur le président, ça va pour la qualité de l'eau, mais précisément quant aux déviations ou aux prélèvements massifs, c'est à ce égard que je suis très inquiet.

**Le très hon. Herb Gray:** D'accord. Quand il y a eu une controverse sur les déviations et prélèvements au cours des années 1997-1998, le gouvernement a soulevé cette question avec les gouvernements provinciaux. C'est pourquoi les deux gouvernements ont leurs propres projets de loi et règlements en vigueur pour empêcher et défendre de tels prélèvements et déviations. M. McGuinty peut peut-être nous informer ou confirmer ce que j'ai dit. Il y a au Québec et en Ontario des règlements et des lois pour empêcher de tels déviations et prélèvements. Ai-je répondu à toutes vos questions? Sinon, si vous pouvez les répéter je...

**L'hon. Denis Paradis:** Peut-être à la fin, monsieur le président. Souhaiteriez-vous une plus grande coopération entre nos divers paliers de gouvernement quant aux problèmes de déviation et de prélèvements massifs, mais au plan de l'intégration de tout cela de façon à faire une espèce de front commun, une position commune sur les déviations et prélèvements face aux États-Unis? Je comprends qu'il y a notre loi fédérale C-6 et qu'on a demandé aux provinces d'agir de la même façon pour empêcher les prélèvements massifs dans chacune des provinces.

⌚ (1025)

**Le très hon. Herb Gray:** En ce moment il y a une telle coopération. Si vous parlez d'un front commun sur l'accord de l'Annexe 2001, je pense que c'est quelque chose que considère le gouvernement de la province de l'Ontario. Cependant, si on parle de la situation actuelle, il y a une bonne coopération selon mon information. J'ai peut-être tort mais selon mon information il y a une coopération pour empêcher de tels prélèvements et déviations sur les territoires provinciaux.

[English]

**The Chair:**

Thank you, Mr. Gray.

We're now going from side to side, the clerk has informed me. The order that I have is Mr. Watson would be the next questioner; Mr. Watson, Mr. McGuinty, then Mr. Jean and then Mr. Comartin, we go back and forth, and Mr. Simard.

Mr. Watson.

**Mr. Jeff Watson (Essex, CPC):** Thank you, Mr. Chair.

Thank you, to Mr. Gray, for being here. Gosh, five minutes, I think I need another two hours to try to figure this out. Forgive me, I'm not very analytical in my thinking. I'm much more of a global thinker. Broad strokes are easier for me to understand. I need to probe a few things here with you if possible. I need some understanding here.

The International Joint Commission, you've said, can be an arbiter if both the U.S. and Canadian governments make a reference to it. What happens if only government makes a reference to the IJC?

First of all, can only one government make a reference to the IJC?


**Right Hon. Herb Gray:** Yes, only one government can make a reference. The approach has developed, sort of the conventions, that references are always brought by both governments. I think the reason for that is simple. If a reference is brought by only one government and the report is advisory, then it's more likely that the report will be taken seriously by the other government if it asks for the reference to be made.

So I'm not aware of any instances where a reference has been brought by only one government, although that's clearly permitted by the treaty. I think the practice of both governments agreeing on a reference to be made and the language has helped make the recommendations of the commission have more weight than would otherwise be the case.

**Mr. Jeff Watson:** Okay.

This is an important question to probe. Mr. Fawcett's testimony last week when Quebec and Ontario, the federal government were currently not happy with the process currently underway with respect to the compact, their course of action was to seek consultations with the U.S. government, which is what they're preparing some comments on, apparently. Then they would say they would likely refer the issue to the IJC.


The question I didn't hear answered is whether anything binding can be issued if only one country references to the IJC. Is there any action that can come from IJC which would be binding on the other party as well?

**Right Hon. Herb Gray:** This could be done I think. You use the word "arbiter," if the reference was made under Article 10, but for that to come into force you need the approval of the U.S. Senate as well as the Canadian cabinet. I repeat, it's a fascinating part of the treaty, but we can see why it's never been used. Perhaps it should have been, but it hasn't been. 

**Mr. Jeff Watson:** If I can move to a different line of thought, there is some concern that the compact creates a new standard of diversion approval that goes around the IJC. Is it your understanding that there's a unilateral mechanism that's being created here that would go around the authority of the IJC with respect to it?

**Right Hon. Herb Gray:** Speaking as the Canadian chair of the IJC, I can only say that is an issue that we're considering.

**Mr. Jeff Watson:** Nobody seems to have an answer on that question.

**Right Hon. Herb Gray:** Perhaps this is something that the Canadian government will beat us to the punch on by offering its comments before the month is up, this month. 

**Mr. Jeff Watson:** There is one other interesting point of contention. I'll make this brief because I know my time is running down, I'm switching gears again to a difference

of legal opinions. We were able to probe this somewhat last week. The Council of Great Lakes Governors says it cannot distinguish between in basin and out of basin withdrawals. It has a legal opinion that's different from the International Joint Commission's over the distinguishing between in and out of basin transfers. Could you please explain the difference in the legal opinions between the governors and the IJC?

⌚ (1030)

**Right Hon. Herb Gray:** First, I'd like to observe that legal opinions are not the equivalent of court judgments. Second, as Mr. Comartin, a distinguished senior counsel, will tell you, we can find as many opinions sometimes on a subject as there are lawyers willing to comment.

*Gray*

The commission has in fact stated with approval the advice they received from counsel of the Canadian and American federal governments on matters like the application of NAFTA and so on. I don't think I'm qualified to analyze and parse the two sets of opinions, but I do refer you to what the commission as such has said in accepting the opinions provided it to formally by the Canadian and American governments and the non-applicability of World Trade Organization, WTO, or NAFTA provisions provided the water is dealt with or regulated in its natural state. I realize that's not on specifically what you're asking me, but it may help you to see how governments approach these legal issues.

**Mr. Jeff Watson:** Okay, thank you.

**The Chair:** Thank you, Mr. Watson.

Mr. McGuinty.

**Mr. David McGuinty (Ottawa South, Lib.):** Thank you, Mr. Chair.

Mr. Gray, it's good to see you again. Thank you for coming with your colleagues.

I wanted to hearken back to some opening remarks you made, during which you alluded to something that simply jumps out on every second page of your report in 2000 and jumps out even more clearly in the review of August 2004 of the report, which gets to some of the systemic challenges you talked about, and that is the state of science, the state of research. It picks up on what my colleague, Monsieur Paradis, alluded to about potential cooperation between the Government of Canada, the governments of Ontario and Quebec and governments in the United States, state and federal.

First of all, congratulations again on this report from 2000. I have a penchant for looking at the back of a report first to find out who in fact participated and when you look at the multi stakeholder input, the huge efforts you went to for public outreach and dialogue and for consultation, I can only assume as one member of the committee, Mr. Chair, that this is a strong representation of where the common understanding would be and where common ground might be.

I'm trying to find out, given our very important global stewardship responsibility, as the wealthiest continent on the planet, what can we do to ratchet up the seriousness with which this is taken at government level so that we can build on cooperation that you mentioned in your answer to Monsieur Paradis? You said earlier that there are two new governments in Ontario and Quebec since the beginning of the Annex process. That is the case. Is it time for us to revisit how we're approaching the water issue? Should we be launching a national water project for the country in order to pick up on all of the recommendations that are in this report and all of the important comments made by the commission following up the recommendations in 2000? How do we get this on the radar screen? yes

**Right Hon. Herb Gray:** Well, I think one way is through hearings like that open to the public and the press and sometimes broadcast. You have an important role to play in conjunction with other committees like the fisheries and oceans committee. I look forward to this committee playing that kind of role.

Second, I should point out that the Great Lakes Water Quality Agreement requires that approximately every six years there be a full review of it by the national governments, the signatories. They intend, as you may know, to carry out a very detailed, indepth, transparent review and they will likely formally ask the IJC to carry out the public consultation process. Right now, there's a scoping committee of the two governments working out the details of that review. So that can play at least a part of a role regarding what you were talking about.

In addition to that, you might ask the people from foreign affairs and environment and, say, CIDA, to brief you on what they're doing in international forum. There's a meeting every two years, roughly, called the World Water Forum that brings together stakeholder groups and governments on these issues. There are a number of programs at the UN, as you know, under UNESCO and the department of economic affairs on water. In fact, the UN has just set up a virtual coordination system of all the water activities within all its agencies called UN Water, which you might want to be briefed on.

This is a world problem and we in Canada have to do our part as global citizens, so to speak. At the same time we have to be aware of our own obligations for stewardship, bearing in mind and this may seem strange standing on the shores of the one of the Great Lakes, that the Great Lakes aren't an ever renewable resource. If anything, as we said in our 2000 and 2004 reports, calls for conservation measures are as important for the populations around the Great Lakes as in the southern U.S. and I think you can, as a member of this committee and as an MP, add from your own professional experience in this regard.

⌚ (1035)

**The Chair:** Thank you, Mr. McGuinty.

Mr. Jean.

**Mr. Brian Jean (Fort McMurray—Athabasca, CPC):** Thank you, Mr. Chair and thank you for coming, gentlemen.

The more I read, the more fearful I become about our future in Canada and the northern U.S. I certainly have a lot of questions, but I'll try to frame them so they can be yes and no.

**Right Hon. Herb Gray:** I'm sorry, I never was able to give yes or no answers very easily. I warn you in advance.

**Mr. Brian Jean:** You must have had a history in politics, sir.

My question is first, does the IJC have authority over these other tributaries that feed the Great Lakes? My understanding is they did not, for instance, the Algonquin diversion in the other lakes. Does the IJC have any authority to either stop any damming project that would stop the feed or....

**Right Hon. Herb Gray:** I'm going to ask Mr. Vechsler to help us here.

You have to look at the preliminary article defining boundary waters. To the extent, let's say, hypothetically--Mr. Vechsler, I'm sorry, here I'm perhaps doing your job--what if the Government of Ontario said they wanted to stop the diversion of the lake and the Nipigon River into Lake Superior? Maybe that we'd want to question.

**Mr. Brian Jean:** That is my question.

**Right Hon. Herb Gray:** We may want to reflect on some of your questions and provide you further written answers.

**Mr. Michael Vechsler:** I think there are two parts to your question.

The first part is clearly the preliminary article states the term "boundary waters" would not include tributary waters. If you're talking about work on a tributary to the Great Lakes basin, it appears it does not fall within the boundary waters.

**Mr. Brian Jean:** So, in essence, there would be no authority to take any steps?

**Mr. Michael Vechsler:** Well, it comes under article 4. There might be some circumstances, if you were backing the water up, but that's unlikely. So the answer is generally yes to the question that the commission would not have authority on tributary waters.

**Mr. Brian Jean:**

My next of seven questions is, not more than 5% removal per year and 1% replenishing--it doesn't take a genius to figure out that in 50 years we could be down to 30% or 40% of our current water in the Great Lakes. Does it not seem that we should limit the amount that is able to be withdrawn, especially on a commercial basis, or have some sort of user fees or taxing system to replenish this or have some sort of conservation program funded?

**Right Hon. Herb Gray:** There are those who would argue that if there are, as you say, user fees, it may cause a commodification of water and bring NAFTA into play. Second,



the reference to 5% was in our year 2000 report and this is not as strong as what the Canadian government has set out in clause 13 of Bill C-6. This is a question that interested me because I came aboard two years after this report was issued, about the 5% and 1%. Perhaps I can ask Dr. Clamen and Mr. Vechsler to show us the difference. The 5% is the accumulation, I think, of consumptive uses, not diversions out of the basin.

Ⓢ (1040)

**Murray Clamen (Secretary, Canadian Section, International Joint Commission):** The 5% was essentially an average amount of what was consumed over time through all the various uses. There's quite a diversity and difference between an irrigation use and another use. The commission looked at the data and the 5% seemed a reasonable average amount.

**Mr. Brian Jean:** But it still is 5% of the total, from my reading, so it seems quite astronomical, to put it bluntly. Considering the total use of the water, it just seems like a number that is very large, considering the ramifications.

Two more very quick questions, if I can.

**Right Hon. Herb Gray:** Mr. Vechsler, your handwriting is getting as bad as mine. Could you read this out, please.

**Mr. Michael Vechsler:** Of course. It's 5% of the water withdrawn; it's not 5% of the total of the Great Lakes.

**Mr. Brian Jean:** The 50,000 gallon per day removal from the Great Lakes. Is that on an average over a year or is that, for instance, if a commercial enterprises uses 50,000 gallons per day, is that done on a yearly basis or a daily basis?

**Right Hon. Herb Gray:** (inaudible) I think. I don't remember. I'm afraid I can't answer that, although one fact in the regulatory impact statement that fascinated me was, that's the equivalent of one tanker truck with a trailer behind it. How much you can take out cumulatively on that basis is an interesting question, but you'd have to direct that question, at this point anyway, to people who are responsible for Bill C-6.

**Mr. Brian Jean:** A final quick question. Michigan seems to be the one state that does not have any conservation programs. Of course, Lake Michigan has reverse flow rivers on it. Has there been any quantification as far as what this means to the Great Lakes, with the reverse flows on underground rivers, etc.?

**Right Hon. Herb Gray:** I'm not aware of the commission doing this, but certainly we felt that what we knew was sufficient to create concern because this water, at one point, would be draining into the Great Lakes and with the heavy use, draining the aquifers at the other side of the dividing line, which, by the way, comes very close to the Great Lakes. It's fascinating to look at a map on this. This is a problem, so there are two issues: taking water from the Great Lakes for near basin communities, what does that mean, and second, bearing in mind what they're doing with their water, how does that affect the flow of water to aquifers into the Great Lakes? We're raising that as a question in which there

has to be more work, but we're ready to say in what we know now, that this is an issue that has to be dealt with.

**The Chair:** Thank you, Mr. Jean.

Now, I'm in a dilemma. When I said, who was the next speaker, I'm now empathizing with Mr. Caccia, who was here when I used to think I was the next questioner, and then someone else would come on the list when we were into the back and forth. I had announced that Mr. Comartin was the next questioner, but we were on this side of the opposition and then Mr. Paradis had indicated that he wanted to ask a question. Technically, I should go to the other side and ask Mr. Paradis, but I wonder, Mr. Paradis, if you would bow to Mr. Comartin and then I would come to you. Is that okay, and then we'll go to Mr. Simard.

Mr. Comartin.

**Mr. Joe Comartin:** Thank you, Mr. Chair and than you, Mr. Paradis.

I think some factual questions, Mr. Gray. Has the IJC been able to determine to give us a number as to how many citizens on the American side, that are close enough to the Great Lakes basin to be looking at quick diversion to them, and are there any Canadian communities that are in that state, where they would be looking to divert water out of the Great Lakes?

🕒 (1045)

**Right Hon. Herb Gray:** I'll ask the staff to help me.

It depends on what you're looking at. It's my impression, because in my work I have to visit Chicago from time to time, that on the other side of the divide...but in the metropolitan area of Chicago, there may be some very large suburban communities--and there are other communities, you mentioned Wakisha, Wisconsin, and so on--that the number could be substantial and growing. I ask my staff to help if there's any number we haven't quantified. You could just look at this, shall I say, subjectively. If you visit Chicago you can see what's involved.

**Mr. Joe Comartin:** But the commission has not done a specific analysis.

**Right Hon. Herb Gray:** No, we haven't. actually.

**Murray Clamen:** There is a map in the 2000 report that shows potential...but we didn't check the number of people involved in those locations.

**Right Hon. Herb Gray:** As far as Canadian cities are concerned, I don't think there are any sufficiently large outside the basin that are pressing.... There may be issues about water movement within the basin, say in Ontario from Lake Huron to communities close to Lake Erie, but looking at the clock, that's another issue I guess we'll have to discuss on another day .

**Mr. Joe Comartin:** Mr. Gray, you made reference to the IJC requesting support in natural resources for the Great Lakes Study. Do you know how much the budget was for that study?

**Right Hon. Herb Gray:** It's interesting to note that the so-called lower lakes study involves a five-year commitment by both governments of a total of \$30 million. I stand to be corrected by Dr. Clamen, but I would presume the upper lakes study would have to extend for the same period, about five years, with its own permanent staff with technical boards and so on. It could involve the same amount. Although we have argued to the government that there could be economies using some of the administrative structure that we already have in place for the lower lakes. It wouldn't necessarily cost the same as the study now coming down the homestretch.

Do you have anything you could help me with?

**Murray Clamen:** It's essentially what you said. It's roughly about \$2 million to \$3 million a year, but there are actually two options to have it within three and five years, so it could be anywhere from \$6 million to \$9 million to as high as \$15 million Canadian on our study.

**Right Hon. Herb Gray:** Are you talking about from each government? Or do you mean both governments?

**Murray Clamen:** From each government, yes.

**Mr. Joe Comartin:** Neither government indicated a willingness to...?

**Right Hon. Herb Gray:** Nobody said no. They're still considering the matter.

**Mr. Joe Comartin:** Okay.

**Right Hon. Herb Gray:** Am I right there?

**Murray Clamen:** The Government of Canada at our last semi-annual meeting indicated some support, but we haven't had any financial commitments. The U.S. government has not provided any thanks to the U.S. Congress.

**Mr. Joe Comartin:** There are other studies that the IJC would like to pursue along the lines of getting additional scientific information so we understand much better how water flows in the Great Lakes, what affects the levels, and I think in particular at this period of time more work on what the likely outcome is to be of global warming and climate change. Are there additional urgent studies, if I can put it that way, that the IJC is looking to press--

**Right Hon. Herb Gray:** I should remind the committee--and I'm sure they already know this--that under the Great Lakes Water Quality Agreement, we have a number of scientific boards reporting to us. These are binational boards, each with a Canadian and an American chair, composed of scientists seconded by both governments and sometimes as well from universities. We have a science advisory board, a water quality board, a Great Lakes research management board, and under a different agreement, we have the

international air quality board. They have an ongoing program of work in these areas and certainly if there was additional funding, these scientists would be very happy to tell us where they could add to the existing work.

**Mr. Joe Comartin:** Thank you.

**The Chair:** . Mr. Paradis, and then Mr. Simard.

[Français]

**L'hon. Denis Paradis:** Rapidement, monsieur le président, encore une fois, plus cela va, plus je suis inquiet pour vous renouveler cette inquiétude que j'ai par rapport à tout ce qu'on entend. Je pense qu'au niveau fédéral, on a dit un non clair aux prélèvements massifs. Suite au projet de loi C-6, en tout cas, je pense que c'est un non clair aux prélèvements massifs.

Quand on regarde le document du 19 juillet 2004, l'accord entre les huit États et les deux gouvernements provinciaux, Québec et Ontario, un peu partout, on établit des normes. À l'article 1, par exemple, « créer un accord de coopération sur la gestion des prélèvements d'eau », 1d), « des mécanismes communs et régionaux pour l'évaluation des demandes de prélèvements d'eau ». Un peu partout, le demandeur, à la définition, c'est une personne qui soumet une demande de projet de prélèvements d'eau. Il y a l'article 200 régissant les prélèvements d'eau du bassin des Grands Lacs. À l'article 2001, on dit que cela prend un examen régional avec une norme d'une demande concernant une dérivation nouvelle ou augmentée de 1 million de gallons par jour ou plus, et à l'article 2, c'est 5 millions de gallons par jour ou plus que 5 millions. Moi, j'appelle cela de la dérivation et du prélèvement massif. D'un côté, on a un gouvernement fédéral qui dit « pas de prélèvements massifs au Canada » et de l'autre côté, j'ai deux provinces qui s'en vont signer tout un *scheme* pour faire du prélèvement massif. Je suis très inquiet, monsieur le président.

Ma question au président de la Commission mixte est celle-ci. N'y a-t-il pas lieu, en quelque part dans ce document du 19 juillet, de leur suggérer qu'on a déjà passé une loi au Parlement du Canada pour empêcher les prélèvements massifs?

⌚ (1050)

**Le très hon. Herb Gray:** Vous me demandez une opinion légale, et je suis avocat, mais je ne présume pas une expertise sur ces questions. Je dois cependant vous indiquer que si on parle du projet de loi C-6, c'est un projet de loi fédéral et je pense que cette loi sera plus importante qu'une loi provinciale si on parle des eaux limitrophes dans le côté canadien du bassin. C'est intéressant que le projet de loi C-6 est une série d'amendements aux lois qui mettent en vigueur au Canada le traité limitrophe de 1909. Je pense que c'est parce qu'on parle d'un pouvoir du gouvernement fédéral qui est plus important dans ce domaine-là qu'une loi provinciale.

[English]

Did you want to add something to that? My counsel says that I'm on the right track.

**The Chair:** Thank you.

Mr. Simard.

[Français]

**M. Christian Simard:** Sur la question, je pense qu'il faudrait réagir aux commentaires de M. Paradis et de M. McGuinty. Je crois qu'autant le Québec que l'Ontario n'ont pas d'intérêt à faire, à long terme, vider le Saint-Laurent ou le Lac Érié ou le Lac Huron et le Lac Supérieur. Donc, je pense qu'on est en discussion et en consultation actuellement sur l'accord 2001 et je ne crois pas nécessairement qu'on doit revenir avec *Ottawa knows best*. Je pense qu'il doit y avoir coopération et échange d'information. C'est l'utilité de ce comité-là.

Maintenant, en ce qui concerne ma question, et il me semble que c'est peut-être le plus grand défi qu'a eu la Commission mixte internationale depuis 1909, c'est le défi des dérivations. Sur la qualité de l'eau des Grands Lacs, tout le monde est intéressé à avoir une eau qui soit potable et une eau qui soit de qualité et les États se sont échangés et ont fonctionné par consensus. Dans ce cas-ci, il y a un intérêt tellement disproportionné pour utiliser l'eau des Grands Lacs et des eaux limitrophes du côté américain qu'on risque de voir les limites de la Commission mixte internationale et du traité des eaux limitrophes.

Je fais une interprétation. Je vois la difficulté d'envoyer une simple lettre au conseil des gouverneurs par votre commission et la possibilité de se rencontrer sur un rapport comme étant des tensions internes très fortes à l'intérieur de la Commission mixte internationale entre une volonté d'une population qui est assoiffée, la population américaine, et la volonté de la population, de l'ensemble soit du Canada ou du Québec de préserver ses eaux, et cela m'inquiète énormément.

Il y a aussi toute l'inquiétude, et j'aimerais avoir votre opinion là-dessus, entre le fait que... À partir du moment où l'eau dérivée ou l'eau puisée est embouteillée, quelle est la relation entre vos juridictions et celles concernant l'ALENA, c'est-à-dire des dispositions dès que quelque chose est commercialisé, qui devient hors de la juridiction des traités d'eaux limitrophes, mais devient dans les accords de commerce? Avez-vous une opinion sur ce sujet?

⌚ (1055)

**Right Hon. Herb Gray:** La Commission a déjà dit que si on parle de l'eau dans son état naturel il n'y a aucun droit de regard en vertu de l'ALENA ou même du Traité sur le commerce international. C'est l'opinion des deux gouvernements, les États-Unis et le Canada. Il n'y a aucune différence d'opinion à ce sujet.

Si on parle des eaux déjà mises en bouteille, c'est autre chose. Il s'agit d'une commodité commerciale. Je ne pense pas qu'il est possible, en mettant de l'eau dans les bouteilles d'avoir des quantités équivalent à de grandes dérivations, etc.

Deuxièmement, je pense qu'il y a déjà une bonne coopération entre le gouvernement du Québec, le fédéral et le gouvernement de l'Ontario et le fédéral. Je vois moi-même des

fonctionnaires du gouvernement du Canada, par exemple, postés dans la ville de Québec, avec leurs homologues du ministère provincial de l'Environnement, travailler ensemble. Je vois la même chose à Toronto avec les fonctionnaires d'Environnement Canada, les gens de l'Ontario et leurs homologues du ministère de l'Environnement de l'Ontario. Comme l'a dit M. Paradis, il y a toujours une possibilité d'amélioration. Pour être juste par rapport à cette question, je vois moi-même une coopération très intéressante. Il y a toujours une place à l'amélioration.

J'espère que j'ai fait mon possible pour répondre à vos questions. Cependant, je dois répéter que nous n'avons décidé d'envoyer une lettre à tous les gouverneurs. Une fois que nous aurons notre consensus, ce sera dans une lettre adressée aux deux gouvernements nationaux et au public. Évidemment nous allons envoyer des copies aux gouverneurs mais nous communiquons surtout avec les deux gouvernements nationaux.

[English]

**The Chair:** We have witnesses and the next committee lining up.

Mr. Jean, could you just finish with your question? Then we'll bring this to a close.

**Mr. Brian Jean:** Very simple, yes or no, sir. I was wondering if there were any studies done on the consumption, an analysis between north-south, between our U.S. neighbours compared to us, what portion of consumption they utilize of the Great Lakes, either on a commercial basis or a private basis. Have there been any type of studies done on that?

**Murray Clamen:** Within the Great Lakes, we did do some studies. There is some data in the 2000 report on consumptive use.

**Mr. Brian Jean:** I saw those. Does it go into any further detail? Are those reports available? Could I get a copy?

**Murray Clamen:** We can make more detailed reports available.

**Mr. Brian Jean:** If I could get a copy, that would be great.

The last question is: Have there been any studies on what the ramifications would be if water in its natural state was actually viewed as a commodity, what the economic ramifications would be for Canada? Of course, free trade under NAFTA does not necessarily mean free product or free transportation.

**Right Hon. Herb Gray:** That's a legal issue I regret I'm not prepared at this point to comment on. There are those who argue that if the product came under NAFTA, then the chapter-11 arbitration rights would arise where private interest could challenge Canadian policy, or American policy, etc. Chapter 11 would become quite controversial. There may be similar clauses in the World Trade Agreement.

I just want to end in repeating that the commission has in effect agreed with the position of the two national governments, that water in its natural form can be regulated by the two governments, regulated differently in basin and out of basin, without attracting any activity under either the NAFTA or the World Trade Organization.

**Mr. Brian Jean:** My question was actually if there had been any studies done relating to that, as far as the economic ramifications of the definition itself.

⌚ (1100)

**Right Hon. Herb Gray:** I would just offer--and I'd like Mr. Vechsler to assist me here--it depends on the project. The project could have massive economic ramifications. It depends, in my view, on what's the nature of the project that would be challenged under, say, chapter 11.

**The Chair:**

Thank you to the Right Hon. Herb Gray.

It has been pointed out to me by one of the members, Jeff, that we do appreciate you being here. We are going to follow up on some of the suggestions, in particular a research, a combined research document that perhaps we could feed back into the staff, in line with what you are suggesting.

Thank you very much.

To the members of the committee, just some housekeeping issues. First of all, members of the committee, when you are referring--and I don't mean to be presumptuous because it's hard to know what line of questioning one wants to use, but when one has access to a document or a letter or something that is going to be germane to the deliberations of committee--it's helpful that other members of the committee might have access to that. So would you kindly keep that in mind and then the clerk can also follow up and make it available to our translators.

The second things is we will be getting those two documents that Mr. Comartin had asked for. We'll have that. The clerk has noted that.

The agenda on Thursday, we will have two pieces of legislation before us. The steering committee has met. We have a draft, with respect to the Kyoto framework, that the committee had asked for. We are getting some other responses from the steering committee. Hopefully we will have that back to you after the break next week, on the agenda for the first committee's meeting after break.

I think that's all at this point.

**Mr. Joe Comartin:** Are we dealing with the annex at all on Thursday?

**The Chair:** No, not on Thursday.

Thank you very much.

The meeting is adjourned.

NOVEMBER 16, 2004

EVIDENCE

MR. JIM BRUCE

MR. RALPH PENTLAND





CANADA

## Standing Committee on Environment and Sustainable Development

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NUMBER 006

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1st SESSION

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### EVIDENCE

## Tuesday, November 16, 2004

*[Recorded by Electronic Apparatus]*

▼ (0905)

*[English]*

▼

**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):** Good morning, members of the committee.

Mr. Pentland, Mr. Bruce, thank you for being here.

Today we'll continue our overview of the Annex 2001 agreement. Both Mr. Pentland and Mr. Bruce are great authorities in many areas, not the least of which are those matters related to the Great Lakes Water Quality Agreement, the International Joint Commission, the boundary agreement. We're very appreciative, Mr. Pentland and Mr. Bruce, that you would give us the time to share your thoughts on the Annex 2001 agreement and associated matters around Great

Lakes water quality issues, diversion issues, and so on. So thank you very much, on behalf of the committee, for being here.

With that, we'll begin. Have you flipped a coin with respect to who will go first? You'll bow to the gentleman on your left.

Mr. Bruce, the floor is yours, and thank you once again for being here.

▼ ▲

**Mr. James Bruce (As Individual):** Thank you very much, Chairman Tonks, and honourable members of the committee. It's a great pleasure to have an opportunity to meet with you this morning to discuss this issue of the Great Lakes annex agreements.

In 1967 I was appointed chief of the Great Lakes division in then Energy, Mines and Resources, and I was the first director of the Canada Centre for Inland Waters, in Burlington. Since then I've retained a really major concern for protection of waters of the Great Lakes-St. Lawrence system. Fortunately, to provide that protection we've been able to use and build upon the Boundary Waters Treaty of 1909. One way we did that was through negotiations of the Great Lakes Water Quality Agreements of 1972 and 1978.

Once again, however, debate is raging about the quantities of water in the system and how best to retain the large values--ecosystem values, economic values, social values--of the waters. The most recent attempt to address this concern is this pair of draft agreements pursuant to the Great Lakes Charter annex of 1985. While the effort is commendable, I contend that the resulting drafts are seriously flawed and a revised approach is needed. I'm delighted to see that the Ontario government may have come to something of the same conclusion.

I will address four main flaws in the draft agreements and will especially suggest an alternative basis for proceeding on these agreements.

The first flaw I would like to mention is that there is an inherent problem in one of the main concepts proposed in the agreements. Basically, the drafts propose to compensate for withdrawals of quantities of water--an action that would be fairly vaguely defined in the agreements as a "resource improvement to the ecosystem". In other words, water could be drawn for diversion out of the basin, or for consumption in the basin, provided the proponent somehow improves the ecosystem.

One of the problems is how to balance these two. It's sort of like apples and oranges. You have water withdrawals, and you're not compensating for it by putting water back in; you're compensating for it by some kind of ecosystem improvement, whatever that may be. In addition, if these improvements require funding, many people have considered this to be something like the selling or commodification of the water withdrawn, because they're compensating for the water withdrawn by paying for these ecosystem improvements. So trying to balance the resource improvements against taking quantities of water is an inherent problem in this whole thing.

My second point concerns the impact of additional losses of water from the system. It's often been said that losses of the magnitude of individual takings, or even the cumulative effect of a number of them, would result in only a centimetre or a few centimetres off the lake levels. I think it's more instructive to think of what this would do to the flow of the channels between the lakes, and from Lake Ontario out to the sea--the St. Lawrence.

It has to be recognized that every gallon or litre of water taken from the lakes above Niagara Falls--Lake Erie, Lake Michigan, Lake Huron, and Lake Superior--results in a reduced flow over the falls, and a reduced flow by a gallon down the St. Lawrence. This is less water for production of the vital hydroelectricity at the power plants at Niagara, Cornwall, Massena, and at Beauharnois in Quebec.

It's very hard to estimate the costs and the value of that, because the value of the power goes up and down with the time of day and the season of the year. But as a rough guess, if about 5% of the average flow were lost by water takings from Lake Erie and the upper lakes, this would result in an annual loss of about \$40 million worth of hydro power in Ontario at Niagara, and about \$15 million per year to Ontario in the upper St. Lawrence. These figures do not include the probable equal loss to New York State at these locations, and the downstream losses to Quebec on the St. Lawrence.

↓ ↑ (0910)

Perhaps even more seriously, the most likely action to replace the hydro power would be to fire up coal-burning power plants, further increasing the regional air and water pollution problems and contributing more to the burden of greenhouse gases in the atmosphere.

Other economic impacts, in addition to those on hydro power, would be on shipping, where depth of water available in the connecting channels is very critical, especially in the shallow Detroit and St. Clair rivers and in the port of Montreal.

My third point about the flaws is that these proposed agreements for taking more water come at a time when we are, I think, seeing the early effects of greenhouse-induced climate change in reducing Great Lakes levels and flows.

The Intergovernmental Panel on Climate Change has determined that it was only about 1970 when the global trends in climate could be attributed almost completely to human-caused greenhouse gas increases. Before then, signals from natural causes, like changes in the sun's energy reaching the earth, volcanic emissions, and so on, were important factors. But they are now, from 1970, overwhelmed by the greenhouse gas increases that have been put up there by human activities. Of course, the climate of coming decades will be determined mainly by the increasing greenhouse gas concentration. So the period since 1970 is a foretaste of things to come.

In the Great Lakes system, we have seen the flow of the Niagara River decrease by about 7% since 1970. This has been mainly due to increased evaporation in the cold season from the upper Great Lakes. They have experienced higher surface temperatures with the warming climate, and with higher surface temperatures you get more evaporation. In addition, they have less ice cover, so there's more water surface open for evaporation to take place. This loss of about 500 cubic metres or 17,000 cubic feet per second between 1970 and 2000 has been attributed about 80% to climate change and about 20% to increased water consumption and diversions upstream of Niagara.

Future water losses from the system due to climate change are inevitable, I believe. But the rate of loss is a bit uncertain because of uncertainty in future climate projections. This strongly suggests to me that additional diversions and consumptive uses would be very unwise in the face of the likelihood of less water and major uncertainties in how much less water we're likely to see in the Great Lakes system in the future.

A fourth concern is whether the proposed agreements give more protection to the Great Lakes waters and the ecosystem than we now enjoy through the Boundary Waters Treaty of 1909 and, in Canada, the acts that were passed pursuant to the Boundary Waters Treaty, the International Boundary Waters Treaty Act, and the recent Bill C-6.

I'll remind you that article III of the International Boundary Waters Treaty states that:

no further or other uses or obstructions or diversions, whether temporary or permanent...affecting the natural level or flow of boundary waters on the other side of the line shall be made, except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of the International Joint Commission.

Article VIII of the treaty, as you will recall, goes on to require the IJC to be governed by the principle that the U.S.A. and Canada are to have equal and similar rights to the use of waters defined as boundary waters.

↓ ↑ (0915)

These provisions are claimed to be inadequate by some proponents of the draft agreements on two grounds: that the IJC approvals are limited to very large uses, and that groundwater within the basin and tributary rivers is not covered. However, it's quite clear from the wording that the first of these charges is not necessarily so; that is, the IJC's consideration is limited to very large uses. If one or both federal governments refer any water takings or diversions to the IJC, no matter how small, the commission would be required to consider it according to the guidelines of equal or similar rights of the two countries to the Great Lakes water. Of course, in practice, only sizeable consumptive uses or diversions would be referred by their government to the IJC, but that's exactly what is envisaged in the Great Lakes annex agreements. Only diversions greater than 3.8 million litres per day, or consumptive uses greater than 19 million litres per day, would be subject to any review by a joint international body.

The second objection that people have is that the Boundary Waters Treaty does not deal with groundwater and tributary river removals within the basin. The IJC, in its 2000 report--the figures that were compiled by my colleague and others for the IJC--suggested that only 5% of the withdrawals from the basin that affect the lake levels and flows come from groundwater and only 5% come from tributary streams; 90% comes from the lakes themselves. Thus, from the point of view of Great Lakes levels and flows, these groundwater and stream withdrawals are of quite minor importance.

Groundwater and tributaries may, however, be very important to nearby communities back in the basin and are generally dealt with in each jurisdiction. The IJC has taken groundwater factors into account in some cases, and there's no reason why they couldn't. Thus, the Boundary Waters Treaty could, I would submit, if fully implemented and fully used, provide a high level of protection for the waters of the Great Lakes ecosystem. The new agreement would, I believe, seriously compromise the equal and similar rights to the use of the Great Lakes water provision, because most of the diversions being proposed are really on the U.S. side. It would also compromise, in a way, the performance of the IJC on its treaty duties because the agreements would set up an eight-state, two-province body to review these large diversions and consumptive uses.

Finally, let me say that if these serious flaws make the draft annex agreement unwise, especially for Canada, is there a way in which they could be rewritten or revised to be acceptable? I think if they revised these based on two quite straightforward principles, we could have a very good set of agreements that would be supportive of the Boundary Waters Treaty and of the protection of the waters of the system.

The first goal or principle would be no additional net loss from the Great Lakes. If a state or province wished to divert water out of the basin or have it consumed within, it would be required to replace the amount they take out by mandatory water conservation measures within the lakes' watershed. Now, this would not pose insuperable problems since citizens on both sides of the basin are very profligate water users, using two or sometimes up to four times as much water per person as people in European countries. Many water conservation measures could be used, and indeed, in appendix 2 of the draft agreement there's an excellent optional list.

The second principle should be that return flows of used waters do not violate the water quality objectives of the Great Lakes Water Quality Agreement of 1978 and do not permit foreign invasive species to enter the lakes system.

▼ ▲ (0920)

I believe that adoption of these two principles as a basis for a new agreement would give jurisdictions some flexibility. They could still withdraw some water provided they made it up in conservation measures, and it could lead to a state and provincial agreement based on a sound foundation, rather than on the shifting sands that they're now based on. I think this would truly protect the waters and ecosystems of the Great Lakes-St. Lawrence Basin and complement the Boundary Waters Treaty.

Let me summarize very briefly. The main flaws are as follows. First, basing the agreement on compensation for water taking by resource improvement is, I believe, a fundamental mistake. Second, effects of additional losses on the flows of the rivers will be much more pronounced than those on levels and can have significant economic impacts, especially on hydro power production and shipping. Third, any additional diversions in consumptive uses might be very unwise in the face of the uncertainties of climate change and the likelihood of less water in the system. And fourth, the proposed agreements may provide less rather than more protection than we now have under the Boundary Waters Treaty of 1909 and, in Canada, the acts pursuant to that.

So the recommendation is, first, to focus on the full implementation of the International Boundary Waters Treaty Act, and secondly, to significantly revise the state-provincial agreement to address two primary goals: (1) achieve no additional net loss from the Great Lakes; and (2) ensure that return flows of used water do not violate the water quality objectives of the Great Lakes Water Quality Agreement of 1978.

It is very gratifying to see that the Province of Ontario has rethought their position somewhat on this and have announced that they are going to go back into the negotiations in January with a much stronger position. And I hope they will take on board something along the lines of what is being proposed here and may be proposed by your committee later.

Thank you.

▼ ▲

**The Chair:** Thank you very much, Mr. Bruce.

Before we go to Mr. Pentland, members of the committee, I need some direction. We did have the press release this morning that was provided by the provincial government on the announcement that Mr. Ramsay has made and that Mr. Bruce has referred to. It is only in English, and I would need permission and seek permission from the committee to distribute these. Is that okay? At least we can have a cross-reference with respect to the--

**An hon. member:** No.

**The Chair:** No, you don't want to. Okay, we'll have them translated and we'll have them sent out to members of the committee.

Thank you.

Mr. Bruce, thank you very much for that. That input is extremely helpful.

Mr. Pentland, perhaps you would like to take over from this point.

▼ ▲

**Mr. Ralph Pentland (As Individual):** Thank you very much, Mr. Chairman, committee members.

Before I start, I should note that I'm speaking as an interested and concerned citizen only. In

the past, I've co-chaired three International Joint Commission committees on this topic. The most recent one was about two years ago. At this time, however, I'm not associated with any government agency or organization involved in the issue.

My most recent exposure to this issue came about a few months ago, when I was contracted by the Woodrow Wilson centre in Washington to analyze the proposed agreements and report my findings. I did that at a meeting in Washington on September 14 of this year.

Jim gave you some idea of how this issue fits into the broader Great Lakes context. The Great Lakes net water supplies and water levels face a number of uncertainties, not just diversions, related to climate change, unpredictable future consumptive use patterns, potential diversions and other forms of bulk removal, and possible modifications to the connecting channels. What's most disconcerting is that each and every one of these factors points in the same direction, to a lowering of levels in supplies and outflows.

For that reason, the International Joint Commission in its year 2000 report on protection of the waters of the Great Lakes concluded that there should be a bias in favour of retaining the water in the basin and using it more efficiently and effectively. They also suggested that no water should be removed from the basin unless it can be demonstrated with certainty that the integrity of the Great Lakes ecosystem would be preserved.

In the analysis I did for the Woodrow Wilson centre, I arrived at two primary conclusions.

First, if the draft agreements were implemented in their current form, they would, for the first time, put Great Lakes water in its natural state up for sale.

Second, the draft agreements would risk starting the region down a very slippery slope that could seriously jeopardize both the economy and the ecology of the entire region, and perhaps the two countries.

The draft agreements originated with concepts recommended by a Denver law firm in 1999. In essence, that firm suggested that decisions regarding new or increased withdrawals of water, either for use in the basin or for removals from the basin, should be based on a common benefits standard. Jim has talked a little bit about what that means in terms of apples and oranges and so on.

There are clearly two unreasonable assumptions underlying that common standard. The first is that anybody, anywhere in the world, has the same right to Great Lakes water as do basin residents. The second is that one could equate damages caused by a diversion with an improvement to water or some other resource within the basin, such as wildlife, fisheries, or water quality.

Although it's buried deep in the bowels of the agreement and renamed "resource improvement", that standard, which came forward in 1999, is still the most critical feature of the proposed regime. The reason it's so important is that it's the enabling provision. It's enabling in the sense that it's the provision that opens the door very wide to removing water from the basin. It not only opens the door very wide, but may actually put it up for sale, potentially making it a commodity or good, subject to interstate and international trading rules.

Admittedly, there are other provisions in the agreements that selectively plug some, arguably even the majority, of the leaks, but the most fundamental flaw in the agreement is the fact that it starts with an inappropriate assumption and a common standard that opens the door very wide to removals, with no limits on the quantity of water that can be removed, the duration of the removals, the purpose of the removals, or the geographical region to be served by the removals.

At the time the standard was proposed in 1999, I was asked by a staff member at the Council of Great Lakes Governors for my opinion. I'll just repeat four of the points I made at that time.

First, it's absolutely impossible to compensate for bulk removals in the sense of being able to maintain enough resilience to cope with such future unpredictable stresses as climate change.

Second, we cannot at this time quantify the negative effects of bulk removals in order that they could be mitigated. Consultants like me could make a case for almost anything, but they would in reality be meaningless.

Third, one might argue that the Great Lakes ecosystem could be compensated by doing something else good in the same or some other area, but that would merely encourage harmful bulk removals and at the same time excuse other bad environmental actors from meeting their responsibilities. While environmentalists might like the idea initially, they would eventually realize that it's conceptually self-defeating environmental policy.

Fourth, with respect to the primary objective of discouraging or preventing large-scale irreversible diversions, it would have the opposite effect. It would end up being a "water chasing dollars" approach, and once the public figured that out, it would become extremely bad politics.

↓ ↑ (0925)

Before the council chose a specific way forward in the Great Lakes Charter annex in the year 2001, they had the advice of not only the Denver law firm but also the International Joint Commission. The IJC recommended very different approaches for in-basin and out-of-basin withdrawals, and a regime centred on preserving ecosystem integrity. Others have suggested regimes based on no diversions or no net loss of water.

Any of these would have been preferable starting points to the resource improvement or water for sale standard. The superficial appeal of the resource improvement approach is obvious. Citizens outside the basin would get access to Great Lakes water, and those inside would somehow be convinced that the Great Lakes are being improved, even as the water disappears.

Despite all the obvious flaws with the resource improvement standard, when the council issued Annex 2001 three years ago and initiated negotiations on the agreement, they unfortunately chose that standard as the central feature. The good news is that they also added some other safeguards recommended by the IJC--for example, those related to return flow, cumulative impact, and conservation. The bad news is that the return flow requirements are very much weaker and fuzzier than those recommended by the IJC.

When the draft agreements came out for public review, my concerns became even greater than they were in 1999 and 2001. There are really three primary tests, plus a few other conditions, that would have to be satisfied to remove water from the Great Lakes Basin. The way I think those tests would be interpreted eventually is as follows. First, I think the resource improvement standard, as defined, eventually would be interpreted as a water for sale sign. It necessarily implies an exchange of money, or at least bartering, with the proceeds going toward meeting the responsibilities of resource abusers or to agencies dealing with resource abusers or abuses within the basin.

Second, the return flow requirements will discriminate, probably quite arbitrarily, between who gets to buy and who does not.

Third, the cumulative impact requirement is a very loose way of deciding when to stop selling, especially when the term "impact" is limited to "significant".

My copy of *Webster's* dictionary defines the word "sell" as "to give up...for money or other valuable consideration". Reading that definition, along with the way the resource improvement standard is to be applied in the agreements, leaves no doubt, at least in my mind, that the draft agreements do in fact put Great Lakes water up for sale. But for what price? If one has to figure

out how many buckets of water are equivalent to a dozen ducks in order to set that price, the logical conclusion would have to be that the price would have to be entirely arbitrary.

Let's look at who gets to buy. In my Woodrow Wilson essay, I gave several examples of wiggle room, or possible loopholes, in the return flow regime. By the way, I went back yesterday and looked at them again. I stopped enumerating them when I got to the seventeenth loophole.

I'd be the first to agree that at least some of these examples are arguable, as are several others that have been pointed out to me. All I'm trying to say is that I, or anyone else, could interpret the many return flow provisions either very stringently or very loosely, and make a good case for saying yes or no to almost anything.

If that's the case, the choice of buyers will also be quite arbitrary. If you contrast that with the IJC proposal, it made it very clear exactly how much water must be returned and exactly where it will be returned. Their recommendation read:

The governments of the Great Lakes states and Ontario and Quebec shall not permit any proposal for removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that...there is no net loss to the area from which the water is taken and, in any event, there is no greater than a 5% loss....

Let's look at when they might stop selling. Based on numerous studies and workshops over the past several years, it's quite clear that the use of the cumulative impact concept in a regulatory or quasi-regulatory way in the Great Lakes water level context will pose serious conceptual problems as well as difficult scientific challenges. The simple fact is that nobody knows how to define the straw that will break the camel's back, and even if they could, nobody can convince me that any government would allow proposals to proceed until that point is reached, and then suddenly prohibit all further water-dependent development.

I'd now like to deal very briefly with this slippery slope issue that I mentioned earlier. Why would these agreements take us onto a slippery slope? In the first instance, the agreements would facilitate several small diversions to nearby communities right away, to places like Waukesha County in Wisconsin, Lowell in Indiana, and urban sprawl around Chicago and Milwaukee. In fact, some people suggest that may be the tail that's wagging the dog. That in and of itself would not likely be a major problem. The amount of water involved would be very small. I'd venture a guess of, in total, something like 1% of the Chicago diversion. But those smaller diversions will have established the respectability of new and formerly sanctioned removals.

↓ ↑ (0930)

If the proposed regime is really as flexible or elastic as I have concluded, we all know that elasticity will eventually be stretched to, and likely even beyond, its limits. So the precedent of small and formally sanctioned diversions, combined with a conceptually flawed regime that will necessarily be applied quite arbitrarily, will eventually lead to larger diversions over longer distances. In the water business, no means no, but maybe almost always ends up being yes.

At this stage in my slippery slope, the diversions may or may not still be contained within the agreement jurisdictions of the States. There won't be any diversions in Canada, and there is no physical possibility of that happening. I'm talking about the States now.

The more serious problems will likely come about when the Great Lakes jurisdictions begin to be accused of discriminatory practices under interstate commerce or international trade rules. They can still try to say no, but they may not be successful. If the agreements do proceed in their current form, with the unreasonable assumption that anybody anywhere in the world has the same right to Great Lakes water, at some point in the future, some or all of the restrictions could be struck down as being disguised protectionism, and Great Lakes water could flow to anyone who can afford it.



I'm not a lawyer myself, but for those wishing to explore the legal risks in greater detail, I refer you to the IJC task force report in 2002 or to a recent analysis by Steven Shrybman done for the Council of Canadians. I think it's a very good analysis, the Council of Canadians one. For the first time, it's a legal analysis on the topic that I could understand.

Over the longer term, the slipperiness of the slope will be accentuated by the fact that, by merely entering into the agreements, some existing safeguards will be weakened. For example, even though the relevant Boundary Waters Treaty provisions will continue to exist, they're less likely to be invoked where there is state-provincial agreement. As well, existing protections afforded by the public trust doctrine in the United States portion of the basin will be weakened because the agreements do not include any public purpose or other standards required by the public trust.

In my Woodrow Wilson essay, I considered five basic alternatives. The first one is basically the no-diversion option of no diversions or other forms of bulk removal, combined with wise use inside the basin. The second one is the IJC recommendations, which were built around preserving ecosystem integrity, plus very strong return flow requirements. The third is a no-net-loss option, the fourth is the status quo, and the fifth one is the draft annex agreements.

The options are presented according to my assessment of the level of protection they would provide to the Great Lakes ecosystem, with the option of no diversion or other form of bulk removal providing the highest level of protection, and the draft agreements the lowest level. The IJC and no-net-loss options would lie somewhere between the two, but either would be preferable to the draft agreements.

I'll clarify a few things about those rankings. Why do I rank the IJC recommendations well ahead of the draft agreements? In the draft agreements, as I said earlier, the resource improvement standard starts by opening the door very wide for removals by allowing trade-offs between different components of the ecosystem, and then very selectively plugs some, but not all, of the leaks. In the IJC proposal, the ecosystem integrity standard only leaves the door for diversion slightly ajar, and then closes it even further with very water-tight return flow requirements. The IJC proposals also begin from the more sensible assumption that standards that treat in-basin uses and out-of-basin removals differently are reasonable.

The no-net-loss option would obviously provide better protection than the draft agreements, because it would place an absolute cap of zero on net removals. No net loss could be achieved in a number of ways, including a requirement for a 100% return flow or by limiting the amount of water removed from the basin to the amount of water saved through water conservation in the basin.

By the way, the last few diversions that have taken place from the basin have been done on the basis of no net loss. It's not "no net loss" in the way that Jim explained it, but "no net loss" in the sense that they were required to return 100% of the water. In essence, they were allowed to borrow the water, but they had to return it. The last few have taken place, since about the last ten years, on that basis.

I ranked the agreements well below the status quo because they would both loosen the removals regime and weaken some existing safeguards.

I should say a few words about the press release from Ontario. I guess you don't have it in front of you, or some of you do and some of you don't, but yesterday they did put out a press release. They started from the assumption that the agreements are very much weaker than their own laws in Ontario.

They said:

We have listened to feedback from stakeholders, First Nations and the general public.... Ontario remains committed to its provincial law that bans diversions. For the purposes of the Annex agreements, Ontarians, and the McGuinty government, clearly want a "no diversions" agreement, or the position of "no net loss" as proposed by the International Joint Commission. In addition, we regard conservation measures as significant for the protection of Great Lakes waters. Ontario is not prepared to ratify the agreement in its present form.

↓ ↑ (0935)

I would view this announcement as quite a positive step forward. It's certainly setting out a very sound negotiating position, at least, for the next round of negotiations that begin in January.

Thank you. That's all I have for now.

↓ ↑

**The Chair:** Thank you very much, Mr. Pentland and Mr. Bruce. We appreciate that input.

Just to the point that both of you raised, we now have copies of that press release in both languages. Do I have permission to have that distributed now? Okay. Thank you very much.

We'll now go to questions.

Mr. Mills, would you like to lead off, please.

↓ ↑ (0940)

↓ ↑

**Mr. Bob Mills (Red Deer, CPC):** Sure.

Welcome, gentlemen.

My first question goes back probably quite a bit in terms of where Canada is at in regard to understanding our aquifers, our groundwater, understanding the positive and negative charge of these aquifers. In exploring that with Environment Canada, I find that we're pretty much a long way behind many, many countries in understanding just where we're at.

It depends where you are in Canada, and certainly some areas....

My first question would be, what is your opinion of that? Is this not putting the cart before the horse? Before you even made a decision on this, wouldn't you have those facts, that science, in your hand?

↓ ↑

**Mr. Ralph Pentland:** I did a report on groundwater in the Great Lakes Basin about a year ago for the Monk Centre at the University of Toronto, together with an American counterpart, Gerry Galloway, who used to be with the IJC in the U.S.

You're right, in a sense. We did conclude that our knowledge of groundwater is very, very bad, but I can't agree with you that it's not as good as that in other countries. In the last decade I've worked in seven or eight different countries, and I'd suggest that even though our knowledge is very bad, it's better than it is in most other countries and may be sufficient for policy purposes.

The main problem with groundwater in the Great Lakes context and in terms of diversions, and so on, is that the groundwater divide does not coincide with the surface water divide. So if you're making decisions about where and when to divert water, it's difficult. We don't even know where the groundwater divide is, but we do know that in most places it's different from the surface water divide.

For the moment, the policies that are laid out are all in terms of diversions from the surface water divide, even though the groundwater divide may be different and may be moving. In fact, it does move with time as you suck water out of the groundwater.

So yes, we do have a deficiency of data, but it's better than in most other countries and may be as good as it's going to be in the next decade or two.

↓ ↑

**Mr. Bob Mills:** I guess that doesn't really reassure me that we have the science in place before we make some of these major decisions.

Again, I believe we have the technology now to get the science. It would seem to me that's what you would push before you could make any decisions, whether it's the Great Lakes or any aquifer anywhere.

Secondly, as you mention, Mr. Pentland, this becomes a commodity. Obviously we're well aware of the southwest U.S. and the huge shortfall they have in water, and where their aquifer is and how in the next few years....

Do you see any possibility that, as a commodity, that could be sort of a long-term threat or a mid-term threat? Is that where we're really going with something like this?

Again, it would seem to me that we should be alert to that very early on and not let that happen. Of course, in our experience with NAFTA and the rules and the challenges compared to softwood lumber, if water becomes a commodity like that, obviously I think we would have a lot of concern.

↓ ↑

**Mr. Ralph Pentland:** I think it's a very valid concern, and one you should have. I see it as a slippery slope; it's not going to happen overnight. You're not going to say that tomorrow we're going to decide to move water to Texas, but it will happen gradually. With an agreement of this sort, it could happen gradually; you'd have small ones, then bigger ones, and bigger ones.

I did spend some time with the Texas Water Development Board a few years ago, and I know they have plans on the shelf for getting water from the Mississippi River over to that part of the country. Certainly, getting water into the Mississippi would not be difficult, because you have a Chicago diversion with a flow right now of 3,200 cubic feet a second, but a capacity of 9,000 cubic feet a second. If somebody were to approve an increase in the Chicago diversion, then at the same time somebody implemented plans to take water from the Mississippi over to that part of the country, it could happen. It's fairly feasible for it to happen. You just mentioned that the groundwater under seven of those states is 150 feet lower at the moment.

It's something you should very much worry about. I'm not accusing anybody of anything here, but certainly that agreement, with its resource improvement standard and its loopholes, would certainly take you in that direction, if you wanted to go in that direction.

↓ ↑ (0945)

↓ ↑

**Mr. James Bruce:** I'd like to add to Ralph's comment that the Southwest and Midwest of the United States are likely to experience even drier conditions with climate change. That might come on fairly quickly, in which case we would be faced with this kind of problem in decades, not centuries.

↓ ↑

**Mr. Bob Mills:** My final question is that when you talk about taking water out and improving an

ecosystem, it seems to me you're saying that it would be extremely difficult to measure. Secondly, who's going to pay for that measurement? Again, it would seem nice if a consultant were honest, but we could get a consultant to tell us that it's been improved and another one to tell us that it hasn't improved. Whoever is paying the bill can set it. I was involved in some consulting in the past, and it's pretty much the case that whoever is paying the bill will get the result they want.

Again, I think you're agreeing that it would be very difficult to measure that sort of thing and to enforce it.

↓ ↑

**Mr. Ralph Pentland:** The problem is that it doesn't talk about an ecosystem improvement, but about an improvement to the water resource and water-related resources in the basin. What it's in fact doing is encouraging a trade-off between different resources, a trade-off between water and wildlife or water and fish. In fact, by definition, that's bad for the ecosystem. What you're doing is trading off components of the ecosystem against each other. That's the absolute worst thing you can do to the ecosystem. I can say a priori that's a bad thing to do. I don't have to measure it; it's just a bad thing to do.

↓ ↑

**Mr. Bob Mills:** Thank you.

↓ ↑

**The Chair:** There are a couple of minutes left in your round, if anybody else wishes to ask a question.

Mr. Epp.

↓ ↑

**Mr. Ken Epp (Edmonton—Sherwood Park, CPC):** Thank you.

I find this presentation quite interesting. You talked about a net zero change in flow. I wonder whether you've done any work with respect to the physics of evaporation. From what I know of it, the rate of evaporation increases as the area increases, so if you spread the water more thinly, then of course the rate of evaporation is going to be faster. Actually, if you were to divert the water, the return to the atmosphere would be increased if you increased the area exposed to the surface. The other factor, as you indicated, is of course the temperature; the higher the temperature the higher the rate of evaporation.

I remember computing many years ago that we'd get 110 tons of water per acre when it rained one inch. I get 1,000 gallons of water off the roof of my house with one inch of rain. So the rate of return via that normal hydro cycle is quite significant. I wonder whether you've done any studies, or studies have been made, with respect to that way of returning the water back to the lakes as compared to actually having it run back in terms of a water channel, or whatever you use to actually use the water instead of going through the vapour cycle.

↓ ↑

**Mr. James Bruce:** Starting in 1962, I did some work on the water balance of the Great Lakes system for the American Association for the Advancement of Science, and I've worked on that since. One of the things that are very different about the Great Lakes compared to small water bodies is that they have a large amount of heat storage; so they warm up over the summer months and fall, and then in the winter they're much warmer than the overlying air. That results in very large evaporation rates in the winter months. If the temperature goes higher, then, as you say, Mr. Epp, the evaporation goes up. And as the ice melts in the upper lakes, the amount of water exposed to evaporation goes up.

Now, the question of how much of that comes down in the basin in the form of snow or rain is a very interesting question. The thing about the Great Lakes Basin is that if you look at it on a map, the boundaries of the watershed are, in most cases, not very far from the lakes themselves. The lakes form fully a third of the total area of the basin, so most of the snow and rain that may be a result of evaporation from the Great Lakes fall outside the basin or beyond the boundaries of the basin. Some fall within the basin, as in Buffalo, for example, or along the Lake Huron shore, but most of it falls outside the basin. So it's really lost water.

The records over the past 30 years or so show that the evaporation loss in the cold season has really dominated the trend in the levels of the lakes and the flow at Niagara.

↓ ↑ (0950)

↓ ↑

**The Chair:** We're going to have to go to Mr. Simard.

Mr. Simard.

[Translation]

↓ ↑

**Mr. Christian Simard (Beauport—Limoulu, BQ):** You appear to be saying in your extremely interesting presentations that the present agreements do not really comply with the precautionary principle. In fact, you both agree on that score.

You seem to have more faith in the International Joint Commission than you do in the agreement between the provinces and the States, when in fact a number of legal opinions maintain that the IJC exercises no real control, is not really interested in diversion on a massive scale and, given the current state of the law, is not in a position to have accurate information on diversion or system changes. Furthermore, it would have no control over the way in which States divert or manage their water.

Even Great Lakes United, the organization that speaks for all NGOs in the Great Lakes vicinity, seems to prefer a bad agreement between the States to no agreement at all, or to the status quo.

Truly we are on the horns of a dilemma. As the saying goes, you're damned if you do, damned if you don't. Both sides come out on the losing end.

Is there some way for the people who live along the St. Lawrence and in the Great Lakes basin to break out of this impasse?

[English]

↓ ↑

**Mr. Ralph Pentland:** The issue you're raising is an interesting dilemma, as you say. There's been a lot of debate about whether it's better to have a state-provincial agreement or a federal agreement, or amendments to the Boundary Waters Treaty, or other ways. In fact, the Ontario press release—which you probably haven't seen yet—says at the end that they would prefer a provincial-state level negotiation to a federal one, because if the federal government did it they would have to deal with the federal government, and the federal government in the U.S. would look after the interests of other parts of the U.S. and not just the Great Lakes states.

So this is an interesting dilemma, as you say. I guess the ideal situation would be if the states and provinces could or would negotiate an agreement that would actually protect the Great Lakes. So far they haven't been able to do that, but if they were able to do that, say with a no-

diversion or no-net-loss agreement, and if the two federal governments and the IJC and everybody agreed with that, it would be the ideal situation, wouldn't it? If there were an actual agreement in place negotiated by provinces and states, implemented by provinces and states, but with the concurrence of the two federal governments, and with the IJC technically agreeing that it was a good thing, it would be the ideal situation, I guess. The question is whether or how you get to that situation.

↓ ↑

**Mr. James Bruce:** I might add a couple of points.

We have to remember that the IJC is, in a way, a creature of the two federal governments. If issues get referred to it by either of the two governments, they can address it. If they are not referred to it by either of the two federal governments, then they don't have a good opportunity to address it.

My feeling is that the wording of the Boundary Waters Treaty is stronger and more direct than any of the wording in the annex agreements. If the governments do want to make use of that IJC mechanism, they could, given the wording of the Boundary Waters Treaty.

I think we have to remember that under the IJC and the Boundary Waters Treaty provisions, there are three members of the commission from Canada and three members from the United States. Under the annex agreements, there are eight states and two provinces. The way the thing is now worded, the two provinces are only advisory on many issues. They don't have a clear vote on whether more water is diverted at Chicago or somewhere else. It's an eight-to-two situation, with the two not having a lot of power. Under those circumstances, the question of whether that's a more favourable regime to Canada than a three-to-three arrangement through the IJC is something we should think about.

↓ ↑ (0955)

[Translation]

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**The Chair:** Mr. Simard.

↓ ↑

**Mr. Christian Simard:** Where do you stand on this matter? You say that we need to give it some thought. Have you done so? You seem to be leaning more in favour of the IJC. Personally, I have my doubts.

Elsewhere, I find it rather odd that under the current agreement, diversion is prohibited. However, it's possible that up to 5% of the water could be diverted, and that's an enormous amount. At first glance, it would not appear that the precautionary principle... Users are exerting so much pressure that one has to wonder how it will be possible to preserve the basin for future generations. As I see it, that is the crucial question on a continent-wide scale. When either you or Mr. Pentland—I'm not sure which of the two—compare the situation to that of the Aral Sea, I have to say that it sends shivers up my spine.

However, if you're more a proponent of the IJC and agreements, I'd like to know if... I believe you said you don't have an answer at this time and that you want to give the matter more thought.

[English]

↓ ↑

**Mr. James Bruce:** Let me start, and Ralph may want to comment.

What I had proposed in my final remarks is that we do make more use of the IJC until the provinces and states come up with a stronger agreement. The IJC does have the capability, if the federal governments want to use it, to prevent serious loss of water from the Great Lakes. I also then suggested that if the provinces go back to the negotiations, as Ontario has said it will, they should go back on the basis of either no net loss or no diversions and on the basis of protecting the water quality of the return flows. Those two principles should be the key principles in any revised annex agreement.

↓ ↑

**Mr. Ralph Pentland:** Maybe I'll just add a little bit, specific to the 5% that you mentioned.

At the moment, there are no rules specifying 5%. The 5% was a recommendation by the International Joint Commission to the states and provinces. In other words, they recommended that a negotiation take place toward a return flow of 95%, which means they're going to allow a 5% loss. You have to appreciate that's already quite a compromise. As you say, even the 5% could be a problem.

David Schindler, who is a very well-known, award-winning environmental water scientist, suggested at a meeting in Toronto recently—as you do—that even the 5% could be very bad. If there's no limit to the amount of water, then even 5% could eventually be a problem.

So the 5% was already a compromise. It's not a rule that's in place; it was a recommendation from the IJC to the states and provinces. It may be very well that this committee or the federal government will want to take a stricter position. In fact, Ontario seems to be leaning toward a stricter position than that. They're looking for either no diversion or no net loss.

So people are worried, as you are, about the 5%.

⊕ ↓ ↑ (1000)

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**The Chair:** Mrs. Simard, one minute.

Mr. Bigras, one minute. No? Fine, thank you.

I'm going to the other side now.

Mr. Wilfert.

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**Hon. Bryon Wilfert (Richmond Hill, Lib.):** Thank you, Mr. Chairman.

Thank you, gentlemen, for coming.

I have a couple of points.

First, I'd just say by way of comment that, living in a part of the country where the Oak Ridges Moraine has been and continues to be a very important issue, from both my municipal and federal days I can tell you that I'm very familiar with the impact on the three main rivers that flow into Lake Ontario--the Humber, the Don, and the Rouge--and the impact on aquifers, particularly from any type of development, as well as issues dealing with diversion of water.

I'm somewhat concerned about where the public purpose and the public trust come in. In your comments you mentioned these agreements would weaken both the public purpose and the public trust. Can you elaborate on that?

In the press release from the Ontario government, which I welcome, they clearly state that if the federal government is involved directly with the United States, it opens up the wider picture. Maybe this is what some Americans would like, for us to talk about water generally. What role do you see the federal government playing?

At the moment, we seem to be.... We've made it extremely clear, and the Minister of the Environment has been emphatic in the House, in saying that we oppose any bulk water diversions. But what is the role, effectively? Is it referral to the IJC? Is it, in fact, consultations with Ontario and Quebec? Is it direct representations to the American government? What's the best option?

At the moment, I think we as a government are extremely clear as to what our position is. It's trying to make sure that Ontario, Quebec, and clearly the eight border states get the message that we will not support diversions of any kind.

I think the tip of the iceberg--and I'll complete with this, Mr. Chairman--is the Chicago diversion issue, where only about a third of it is being used at the present time. It wouldn't take very much to have a very negative impact on the water levels.

I guess we'll start off with the public trust.



**Mr. Ralph Pentland:** I'll start with the public trust.

The public trust is a legal concept in the United States, not so much in Canada. When I did my Woodrow Wilson piece in Washington, the theory was that a Canadian and an American were supposed to do these two papers and go to Washington to debate the issue. The unfortunate thing was that we, a Canadian and an American, did the two papers, and we went there and agreed on everything.

The public trust doctrine was dealt with at great length by Mr. Olson, who is an environmental lawyer from Michigan. It's a concept in U.S. law. It has been for approximately 25 years.

I'll just mention some of the standards that are required by public trust in the U.S. for a water diversion:

It must be for a primarily public, non-private purpose. It must be consistent with public trust uses or needs such as navigation, boating, swimming, fishing, or other recreational purposes. The present and future uses of the water must be protected; this means planning for the foreseeable and unpredictable future. It must not impair the public trust uses or resources. The di minimis harm rule does not apply; "nibbling effects" cannot be ignored.

Within the U.S. it's clear, the public trust.... The main essence of his thesis was that this public trust doctrine was being greatly undermined by these proposed agreements. He was very serious about that.

He's a man who has been fighting Nestlé for many years about a particular issue in the U.S., and doing it very successfully. He's very well known and a very prestigious lawyer in the United States.

Public trust, within Canada, is sort of notable by its absence. It doesn't exist in any federal or provincial laws except for two environmental protection laws in the northern territories. It's a concept that could be developed and gain some recognition in Canada. But at the moment, it's sort of notable by its absence.

I'll let Jim handle the other one.



⊙ ↓ ↑ (1005)

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**Mr. James Bruce:** I get the more difficult one here.

What should the federal government do? I think it's very important to clearly state your position--I think the government has done that to some extent--and convey that position to all of the parties concerned: the provinces, the states, and the U.S. government.

Then second, be willing to refer to the IJC any issue you think might result in significant removals from the lakes, so that the Boundary Waters Treaty, which is very strongly worded, can be invoked to prevent any unfortunate loss of water until such time as a state-provincial agreement can be strengthened.

Those are the roles that I would like to see the federal government play. First of all, come out strongly for your position; and second, don't hesitate to refer things to the IJC if you think they might even slightly violate the no-diversion provisions.

↓ ↑

**Hon. Bryon Wilfert:** Well, Mr. Chairman, then other than what we have already stated--and you said we've done that clearly--would be the issue of the IJC, is there a timing issue that you think would be more appropriate than others, given that Ontario has now released their position? They're going to go back to negotiating in January. Is it helpful for the federal government to invoke that sooner rather than later, or should we simply watch and see what...obviously, consult, as the Ontario government said they would, with the federal government?

We often get accused of stepping on certain toes. Would it be, in fact, more beneficial to let the negotiations continue and, if at some point we don't see what we want, then intervene?

↓ ↑

**Mr. James Bruce:** Well, I would suggest.... I was an assistant deputy minister in Environment for a long time, so I'm a bit used to thinking of these kinds of questions.

I think you should not intervene through the IJC unless an issue comes up, unless there's a specific proposal to divert more water out of Chicago, or a specific proposal to serve some municipality outside the basin, or a large consumptive withdrawal is proposed. If such an incident occurs before the negotiations between the provinces and the states have been completed, then I think you should intervene by referring that issue to the IJC, so that we don't.... These negotiations are not going to be easy for Ontario and Quebec. But I don't think you should intervene in those negotiations early on.

↓ ↑

**Hon. Bryon Wilfert:** Thank you very much, Mr. Chairman.

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**Mr. Ralph Pentland:** Could I just add that it would be helpful, of course, if the federal government were to state, through this committee or through the Minister of Foreign Affairs or whatever, a clear position before the negotiations reconvene, a position on the negotiations.

In that regard, when the annex came out in 2001, the federal government did come out with a very strong and appropriate statement saying why the annex was going to violate the Boundary Waters Treaty and this and that--a very good statement. That same sort of statement again today, maybe even a little stronger, might be in order, but before they recommence the negotiations.

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**Hon. Bryon Wilfert:** Thank you.

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**The Chair:** Mr. Scarpaleggia and Mr. McGuinty, I'll put your names for when we come back to the next round. We're out of time on this side now.

We'll go to Mr. Comartin.

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**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Thank you, Mr. Chair.

Maybe just to follow up on that point, I'm not sure where, but both the Department of Foreign Affairs and the Department of the Environment were here before us a couple of weeks ago. They are preparing a response, Mr. Pentland, which they're supposed to issue by the end of this month.

In that regard, I'm assuming because of your comments that neither one of you has been consulted by either one of those departments?

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**Mr. James Bruce:** Not formally.

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**Mr. Joe Comartin:** Not formally. Are we getting any information through to them?

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**Mr. Ralph Pentland:** Yes. We regularly communicate with people in those departments, but just to exchange views. As far as I know, neither of us is involved in the drafting of a specific response, but we do let our views be known.

↓ ↑

**Mr. James Bruce:** I should say that my work on this topic has been supported by the Gordon Foundation. The Gordon Foundation has distributed to these two departments both my comments on the agreement and those of several other experts whom they engage to comment on the agreement. All these comments were reasonably critical of the present draft.

↓ ↑

**Mr. Joe Comartin:** Mr. Bruce, I'm just a bit concerned about the recommendations you've made. The IJC representatives, when they were here--I think this is fair--and not only while they were here but in terms of the work they've done on the issue of diversion and bulk export over the last couple of decades, are very concerned about the lack of knowledge that we have about the Great Lakes system. I think a significant part of their position on a moratorium on any diversions is based on the need to get that research into place.

That said--and I see you're nodding in agreement with me--I'm concerned that your recommendation would in effect allow for diversions if there were corresponding conservation within the basin. I don't think that's the position of the IJC if you look at the totality of the history they've had on the issue in the last couple of decades. I'd just like a response from you as to whether you think....

I want you to rethink or maybe justify your position. I guess that's what I'm asking you to do.

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**Mr. James Bruce:** Well, sir, I agree with you very much about the lack of really good, solid knowledge. We've had the issue of groundwater flows in and out of the lakes, both from quantity and quality points of view--quality being very important there. Our specific knowledge of the amount of water now being diverted and consumed is very chancy. The data that the IJC has cited is very approximate. We don't have a good handle on the amount of water we're losing through consumption in the Great Lakes Basin and we don't have a good handle on the groundwater contributions.

So I agree with you that more research is needed. That's partly why I suggest that a no-net-loss provision is really important. That is, if you take water out, you have to put the same amount back into that same lake system. That seems to me to protect the integrity of the ecosystem and the water availability for hydro power and shipping.

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**Mr. Joe Comartin:** How much more time do I have, Mr. Chair?

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**The Chair:** You have five or six minutes.

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**Mr. Joe Comartin:** Great.

Let me just pursue that a bit, then. If we go the route of saying, okay, you're within the basin; you're going to conserve that 50% more that we use than most people in the world by far. In effect, by not having the same requirements for the people outside the basin to whom the water is going, are we not encouraging overuse--profligacy, I guess, was the word you used.

You haven't put that on as a requirement. We don't see the conservation requirement in your recommendation to the people the water is going to, the region the water is going to, outside the basin.

↓ ↑

**Mr. James Bruce:** Yes, I intended it to apply there. In other words, if Wisconsin wants to divert water to a community outside the geographical boundaries of the basin, then Wisconsin is responsible for ensuring that the same amount of water gets put back into Lake Michigan, whether it comes from that community or by practising strong conservation measures in other water takings within that jurisdiction.

⌚ ↓ ↑ (1015)

↓ ↑

**Mr. Joe Comartin:** I guess I see the flaw in that. You're in effect imposing conservation on the residents within the existing basin as an excuse--to be that blunt--for diverting it out of the basin.

↓ ↑

**Mr. James Bruce:** I would look at it in a different way. I'd suggest that it would be a provision that would make a jurisdiction very uneasy about diverting water outside the geographical boundaries of the basin, because then they would have to take water away from some of the people within the basin. So it would be a choice of that jurisdiction, but it would protect waters in the lakes and rivers.

I think it would be a very hard choice for them to make. That's why I think it would prevent those diversions out of the system.

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**Mr. Joe Comartin:** I want to pursue one of the points you've raised as I don't think it has had enough notoriety applied to it--that is, the impact on our energy production.

One of the things that have surprised me as I've watched this develop since the annex was released for public consumption is that I've not heard any expression of concern from the U.S. states--New York State, in particular--on the impact it's going to have on their hydroelectric production. Have I missed anything, or have they in fact just not responded?

↓ ↑

**Mr. James Bruce:** I've heard individual expressions of concern, but no official expressions of concern by the Great Lake states. I think Ontario, New York State, and Quebec would all suffer seriously from loss of hydro power production for any significant amount of water taken out of the lakes.

Earlier the question of a 5% reduction was discussed, and I tried to give you some figures about how economically large it would be in terms of hydro power production if we lost 5% of the water.

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**Mr. Joe Comartin:** Has anybody done an analysis on the effect on New York State if it went as high as 5%?

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**Mr. James Bruce:** It would be about the same as it is for Ontario, because they produce power equally at Niagara Falls, and again, at the Cornwall-Massena plant on the St. Lawrence.

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**Mr. Joe Comartin:** I have one final point on the economic consequences. You made no reference to the impact of lowered water levels on the fisheries sector. Have you seen any analysis on that?

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**Mr. James Bruce:** I have not. It's a more difficult issue to address.

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**Mr. Joe Comartin:** That's not just a question of the impact of the loss of the water. It's also the question raising the water temperature in the Great Lakes generally, which lower waters end up producing.

Mr. Pentland or Mr. Bruce, perhaps you might know about this. I know certainly the environmental movement on the U.S. side of the border has been pretty strong in their opposition to the annex in the charter. Has there been any shift or any movement by any of the states, either individually or collectively, in their positions as a result of the reaction? We know we have a letter from the Attorney General in Michigan, but is there any other indication that they are recognizing that these negotiations have taken us on a wrong route?

↓ ↑

**Mr. Ralph Pentland:** I think they stick pretty close together. Publically, they won't say anything. I know there are concerns.

Anecdotally, I had a call from the New York legislature when they were going to have public hearings. They almost begged me to come and criticize the agreement. So I have that kind of anecdotal evidence, but publicly I don't think you have anybody, other than the Attorney General of Michigan, who has come out against it.

I might just add a little bit about the energy situation in New York. I know many of the industry associations in the U.S. have come out against the agreement. I think you are going to hear the complaints through those kinds of associations as opposed to through the states themselves, because they kind of have to stick together at least until it falls apart.

Ⓜ ↓ ↑ (1020)

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**The Chair:** I'm going to have to break it there, Mr. Comartin. We are out of time.

We are going to go back to Mr. Richardson in a five-minute round.

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**Mr. Lee Richardson (Calgary Centre, CPC):** Thanks, Mr. Chairman. I'll try to be brief, so that we can get the other fellows in.

I would just like to thank you both very much for coming, Mr. Bruce and Mr. Pentland. I think this has been a remarkable presentation, and we on the committee, in a few minutes, have benefited from what obviously is years of research, study, and reflection. I very much appreciate the testimony you brought and the way you've presented it, as well. It's very clear.

And may I add our thanks—I'm sure Mr. Bruce wouldn't mind—to the Gordon Foundation for having supported your work, and I suppose, to a somewhat lesser extent, to the Woodrow Wilson International Center in Mr. Pentland's case. I was encouraged to hear that his proposed opponent in the Woodrow Wilson International Center debate tended to agree with many of his findings.

I really have nothing to question in your remarks. I was curious about one thing, stemming from what Mr. Comartin was just saying with regard to the hydroelectric generation.

Maybe I could take off from your point, Mr. Pentland. You said it is absolutely impossible to compensate for bulk removals. "Absolutely" is a pretty strong word. To what extent do these hydro projects affect...? Is there any way to quantify the negative effects that they might have on the lakes? Is there any relevance, by way of comparison, or are the negative effects of bulk removal just so small as to not be relevant?

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**Mr. Ralph Pentland:** When I said it's absolutely impossible to compensate, it was in the context of it being absolutely impossible to compensate for removals in the sense of being able to maintain enough resilience to cope with future unpredictable things, such as climate change.

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**Mr. Lee Richardson:** Yes, I accept that.

↓ ↑

**Mr. Ralph Pentland:** On hydro generation and other uses, such as fisheries, navigation, and so on, it's relatively easy to calculate the impacts on those kinds of things. In fact, we do it all the time in Great Lakes regulations studies. There's a major study going on in Lake Ontario regulation right now, for example, where they do tie down the impacts of various lake level and outflow changes on things like hydro and navigation, shore property, beaches, fisheries, and other things.

So that's done all the time, but you don't really do it in this case, because you have nothing specific. Diversions might be 10 cfs or they might be 100,000 cfs eventually, so it's uncertain as to what it is you're evaluating. If one knew exactly what kind of diversion you were talking about,

it would be relatively simple to evaluate the impact of that on things like hydro, navigation, and so on, where there is an economic value.

It's a little more difficult calculating the impact and the cumulative impact on ecosystem things, the relationship between living things and so on. That's more difficult, but the economic things are relatively simple to do.

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**Mr. James Bruce:** I believe you were asking, sir, if the hydro projects themselves have an impact on the ecosystems.

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**Mr. Lee Richardson:** Yes, essentially, but I don't want to drag this out. It was more of a curiosity raised from Mr. Comartin's questioning. Is there any relevance, any balance here, if we're causing this kind of damage?

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**Mr. James Bruce:** No, I think the ecosystems may have been affected when hydro plants were first put in at Niagara Falls and along the St. Lawrence, but they've been in there for a long time and the ecosystems have adjusted nicely to the change in flow regime that these hydro power plants have caused. At the moment, I think you could say their impact on the ecosystems is virtually undetectable, yet they're a very clean source of energy for all of us.

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**Mr. Lee Richardson:** Thank you.

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**The Chair:** Thank you, Mr. Richardson.

Mr. Scarpaleggia.

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**Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.):** Thank you, Mr. Chair.

I have basically three questions and they're not of a technical nature. I would like to access your combined wisdom and get your impressions on some general issues.

I had the opportunity to go to UNESCO last week and spoke with some individuals who were involved with global water issues and the recent "Water for People, Water for Life" report, which you're familiar with. The impression I received from them in terms of North America--of course we discussed Canada, but I'm sure it applies to all of North America--in regard to our concern with conservation is that they had a pretty dismal view of it. My first question was, are we making progress? We talk about conservation and the principles of it within this agreement, but are we making progress, and what needs to be done and what can be done?

Second, it appears to me that you both have done work on both sides of the border. I'd be interested in knowing your impression of how Canadians view water vis-à-vis how Americans might view water. And here I'd like to draw the parallel with cultural products, because I have done some work on heritage issues. In Canada we view television programming and other cultural products as culture, whereas in the United States these things are viewed as products. I'm wondering if you find the same situation in the U.S., which might affect whether or not American legislators are cautious vis-à-vis their policies on water. In this case I'm just linking up with the comments of one of my colleagues about the use of the precautionary principle in the United States vis-à-vis water.

Third, you mentioned that the science is very good in Canada, that in North America water

science is very good compared to the rest of the world, or you seemed to say that. Does the federal government have the resources to do necessary scientific work on water? Should we be doing more? Could we become the leaders in water science in the world and export our expertise around the world?

I was thinking of David Schindler. Mr. Pentland mentioned David Schindler, and I remember David Schindler a few years back coming up to Parliament Hill. He was quite upset that the federal government was shutting down the experimental lakes area, because he thought the government should be doing more work on water science. Should we be doing more as a federal government on science?

⌚ ↓ ↑ (1025)

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**Mr. Ralph Pentland:** I'll start, but Jim can probably add more on the science than I can.

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**The Chair:** Yes, one minute.

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**Mr. Ralph Pentland:** Progress on conservation, there's no way to measure that. There's an OECD report that came out about three or four years ago comparing conservation in all the countries of the world, and we do stack up rather badly.

Just in the Great Lakes context, though, the latest data on water use in the Great Lakes Basin in 1998 shows a reduced amount from the year 1993. That may be because of bad data, it may be because heavy industry is leaving the basin, or it may be partly due to conservation, but at least water use seems to have levelled off, perhaps maybe even dropping in the Great Lakes Basin.

As for Canada's view versus the U.S. on water, I see that as more east versus west rather than Canada versus the U.S. In the west, water is something to use and use it all. There, whether it's Canada or the United States, water is something you use all of, and in the east it's something to preserve and protect, and most of the uses are in situ uses for navigation, hydro, and so on. So the difference is more there.

In the particular case that we're talking about, the problem is that the diversions issue is a U.S. issue. There's no place to divert water to in Canada. So the big difference is that they want to divert water, they want a regime that will let them divert water; we want a regime that won't let them divert water.

Let's let Jim handle the science question.

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**Mr. James Bruce:** I would tend to agree with David Schindler that water science in Canada has suffered serious losses since the 1980s, especially in the federal government. The water agencies that Ralph and I worked in have largely disappeared, and research on water has seriously declined.

At the same time, a certain amount of additional research has been supported by the granting councils like NSERC and universities on water. So there has been some upsurge in the universities, but it doesn't compensate for the decline in water science in the federal government.

⌚ ↓ ↑ (1030)

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**The Chair:** Mr. Simard and then Mr. McGuinty.

[Translation]



**Mr. Christian Simard:** One can always accuse me of being a copycat, but I truly believe that's the case. I'd also like to thank you for the quality and thoroughness of your briefs. I found them truly edifying. To my mind, they are the product of a lifetime of work and reflection.

I have two questions pertaining to two separate matters. First off, either Mr. Bruce or Mr. Pentland spoke about Lake Champlain and about the fact that Vermont was a possible signatory to the agreement, since Lake Champlain is part of the St. Lawrence Basin. As far as Quebec is concerned, the St. Lawrence River is part of the St. Lawrence-Great Lakes Basin, although it has its own basin. Moreover, nearly one third of all of Quebec's major waterways flow into the St. Lawrence.

At what point does the agreement apply or not apply? Have you given that matter any thought or obtained any pertinent information? Maybe you have not, but from a legal standpoint, the answer isn't obvious. I'd like your opinion on the subject.

My second question concerns commodities. When is bulk water processed into water that can be deemed a commodity? This does not appear to be spelled out clearly in the agreement. I don't quite yet understand how we can be certain that bulk water is not included in the NAFTA. That's not clear to me.

[English]



**Mr. James Bruce:** Maybe I'll take the first question and let Ralph talk about commodification.

One of the curious things about the annex agreement is that although it says that the St. Lawrence is part of the agreements down to Trois-Rivières, it does not include Vermont, and Lake Champlain, and the Richelieu, which is a very curious geographical issue. And for the St. Lawrence downstream of Trois-Rivières, you need to consider what is happening in Lake Champlain and in Vermont. The main concern, I suspect, along the St. Lawrence may be the question of availability of sufficient depth of water for shipping in and out of the port of Montreal and also the loss of hydro power at Beauharnois. I think those are the most immediate concerns from a relatively small loss of water from the system.



**Mr. Ralph Pentland:** On the question of commodification--I hate to try to play lawyer, I'm not a lawyer, but I base this on what little I know about the topic--most of the trade agreements, NAFTA, GATT, WTO and so on, treat certain types of water as if they are commodities already, automatically. Water in products, bottled water up to a certain size and so on, is already treated as a commodity automatically. So all the same rules apply that apply to any other product.

Then you get drinking water. Drinking water is a grey area in the sense that some people in the U.S., for example, say you already pay for your drinking water and therefore it's already commodified; we've already commodified it, so all the rules are going to apply. Of course, that's not true because you don't pay for drinking water, you pay for drinking water services. You pay part of the cost of getting the water to you and delivering the waste from your house, but you don't pay for the water. So that's a false argument. Drinking water is not commodified.

But once you commodify water in its natural state.... I've argued, the Council of Canadians has argued, and Jim Olson has argued--many people have argued--that this agreement would in fact commodify water in its natural state, and then throw into the mix the NAFTA, GATT, and WTO



rules and so on. So one should be a little bit careful about how you structure these agreements so that you don't commodify water, obviously.

⌚ ↘ ↗ (1035)

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**The Chair:** Mr. Bigras, one minute.

[Translation]

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**Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ):** You spoke at length about shipping on the St. Lawrence River. Have you also looked into the quality of drinking water? It's a known fact that in the Montreal area in particular and elsewhere in Quebec in general, over three million Quebecers draw their water directly from the St. Lawrence or one of its tributaries. Therefore, an anticipated drop in the river's water levels could very well have an impact on the quality of people's drinking water, particularly in the case of Quebecers, which could result in a need to invest more in infrastructures. Have you considered this possibility?

[English]

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**Mr. James Bruce:** There is no question. You are correct, sir, that if you have less water, the concentration of the existing pollutants in that water becomes higher and this can become a problem. The amount of reduction that we've been talking about, unless the Chicago diversion is tripled in size, might be a bit hard to detect in terms of water quality, but there's no question that there would be a negative impact on water quality in the St. Lawrence.

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**The Chair:** Mr. McGuinty.

↘ ↗

**Mr. David McGuinty (Ottawa South, Lib.):** Thank you, Mr. Chairman.

Thank you for coming in. It's good to see you both again.

I want to pick up on some comments made by a number of questioners about where we're at and where we're going.

I put a question to Mr. Gray when he was here a couple of years ago. Having reviewed his report from 2000 or 2001 and its update of August 2004, the thing that screams out on every single page under every recommendation is the fact that we just don't know.

I appreciated your comment, Mr. Pentland, in response to the question from Mr. Mills, that it's important to have real baselines and not fictitious ones in terms of how well we're doing as a nation state compared to other actors out there in terms of what we know and what we don't know about water.

This seems to me to be another in a series of flashpoints. Here we have a flashpoint issue where there is risk around exporting bulk water. This morning on the front page of the local paper there is a flashpoint about the quality of 5,000 lakes within an hour and a half radius of this city, chiefly in the Outaouais and the Quebec region, where these lakes are now showing advanced signs of eutrophication. People are becoming increasingly scared about water quality and the potential and possibility of pharmaceuticals appearing in the drinking water.

Perhaps I will ask you for the first two things that you would recommend happening on a

national level. For example, is the systemic challenge here that we haven't priced water properly? I haven't heard much in our debates and discussions, Mr. Chairman, since we started this debate on the economics of this question. Is the growth in the use of water rights and water permitting and water auctioning in the southwest a good thing? Is Ontario's move to look at water pricing for abstraction licensing a good thing?

This is the other issue I want to throw on the table. I hope we would all agree that there probably isn't enough science and technology and science funding left. This has been diagnosed for over a decade. However, there is work going on all over the place. The Monk's doing work, you're both doing work, and the provinces are doing work. The states are doing work, and the federal government is doing work, and perhaps the question of coherence and the integration of that work should come first.

What two things should we be doing first?

The question I put to Mr. Gray was, for example, this. Should we be launching a national water project or a NAFTA water project?

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**Mr. Ralph Pentland:** Thank you.

Perhaps we'll both say a little about this.

We've talked before about water pricing. Of course, that's been an issue for a long time in Canada. It's better than it was 30 years ago, but it's not there yet. We still probably in our municipal supplies pay 70% or 80% of the price of the delivery at this point in time. I don't know; I'm just guessing. If you had the price right you would certainly have improvements in terms of both quality and quantity.

Water rights are handled differently in Canada and the United States. In western Canada we have a water rights system where you get a right to use a certain amount of water, and if you don't use it, it goes back to the state. This is different from the system in the United States. They have a prior appropriation system where, if they get a water right, they get to keep it whether they use it or not. A large part of the problem in the southwest United States is that they have a lot of these prior appropriation rights and they use them even though they don't use the water because they want to keep them. Now they're starting to sell these waters.

It's good in the sense that water is flowing from lower-valued uses to higher-valued uses, but it's bad in the sense that they're messing up the water system because they have the rights in the first place when they don't really need them. Even when they use them, they're using them to grow hay, etc. Their legal system is the largest part of the problem in the U.S. southwest. They could solve their problems by fixing their legal system, which they can't do because of politics.

Perhaps I'll let Jim add something.

⌂ ↓ ↑ (1040)

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**Mr. James Bruce:** One of the things I think should be considered is to restore, to some extent, the level of water research monitoring and study within the federal agencies. Water is a public good, and what we have seen in the trends in water science in Canada is a significant decline in the capability of the federal agencies. At the same time, we have seen some increase in the capability at the universities. The problem is, it seems to me, that if you don't do that study within the federal agencies, you don't have the basis for making wise choices and decisions about water management. I would say that the trend has been unfortunate in terms of helping federal agencies make sound water policy.



**The Chair:** Okay. Thank you very much.

We're out of time. We have three final questions--Mr. Comartin, Mr. Paradis, and Mr. Watson.

Mr. Comartin.



**Mr. Joe Comartin:** Thank you, Mr. Chair.

I'm sorry, Mr. Bruce and Mr. Pentland, I didn't thank you for coming when I started. I have a bad habit of not doing that. We do appreciate having you here.

Mr. Pentland, you stated twice that it would be practically impossible--I don't know if it would be uneconomical or from an engineering standpoint--to divert water out of the basin within Canada. Perhaps you could just explain that. And then secondly, are you aware of any demand within Canada for diversion into other areas such as we're having in the Great Lakes states?



**Mr. Ralph Pentland:** I don't know of any demand within Canada for diverting water out of the Great Lakes Basin. It's just the population pressures in Canada. Canada's population tends to press on the U.S. border like a screen, so there's nobody there to divert water to, north of the lakes.

I didn't add anything about the economics of water export internationally, which perhaps is a topic you might be interested in. Some of you may or may not be aware that the Province of Newfoundland did a study on that about two years ago and determined it would be uneconomical to divert water even from Newfoundland, and they're best situated to export water from Canada. So if it would be uneconomical from Newfoundland, it would certainly be uneconomical from anywhere else in Canada to send water to another country, other than the U.S.



**Mr. James Bruce:** I can remember during some of the debates leading up to NAFTA being at a water meeting, and one of the senior advisers to the negotiator from Mexico was saying they were hoping, out of NAFTA, that some access to Canadian water might be available to the very dry northern states of Mexico. I think they were thinking more of the Columbia Basin than of the Great Lakes, but still that desire to have water from a water-rich area like Canada to a very water-poor area like northern Mexico is there.



**Mr. Joe Comartin:** You were asked, I think by Mr. Wilfert, about whether there was some way the federal government could send a clearer message. I'm just wondering about this. You didn't respond at all that the federal government take the position that the 5% formula be repudiated. At this point we simply are clear it's a moratorium until we know more. Is that fair? Would you advocate that the federal government take that position?

🕒 ⏪ ⏩ (1045)



**Mr. James Bruce:** Yes, with some hesitation I would advocate it. I do know that the IJC, through long negotiation, arrived at that position, but in my view, the no-net-loss approach makes more sense for the protection of the ecosystems, the hydro power production, the shipping capability, and so on in the Great Lakes Basin.



**Mr. Ralph Pentland:** The Canadian government has responded twice on this issue. I'm not sure if you are aware of the second time, but when the annex came out there was a strong statement in opposition to many of the features of the annex. At the time the IJC report came out the Canadian government, the Minister of Foreign Affairs, made a statement about the IJC report, which you may want to have a look at.

Basically what they said is, we don't like the 5%, but we might be able to live with it.

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**Mr. Joe Comartin:** Could you tell us, Mr. Pentland, when that was? I have not seen that. I saw the first response.

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**Mr. Ralph Pentland:** That was in 2000. It was a letter, I guess.

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**Mr. Joe Comartin:** My understanding is the 5% formula is not based on science. In particular, you heard the IJC come forward with reasonably accurate scientific analysis that the water in the basin only replaces itself to the tune of 1% per year. So do you agree that the 5% is not based on science?

↓ ↑

**Mr. Ralph Pentland:** The 5% is based on science, in the sense that if you look at withdrawals of water within the basin and consumptive use within the basin, consumptive use is about 5% of the withdrawals. So they applied the same 5% to diversions, ostensibly to create a non-discriminatory situation. So you have 5% losses within the basin, and 5% outside. The 5% is based on the consumptive use as a proportion of withdrawals.

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**The Chair:** I'm going to have to interrupt that, Mr. Comartin, so we can finish our questioning.

Mr. Paradis, and Mr. Watson.

[Translation]

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**Mr. Denis Paradis (Brome—Missisquoi, Lib.):** Thank you, Mr. Chairman.

I too would like to begin by congratulating the witnesses on the clarity of their presentation. I found it totally refreshing.

Now then, Mr. Chairman, I believe Mr. Pentland referred to Lake Champlain in his presentation. This body of water is located in my riding of Brome—Missisquoi. Therefore, I'm certainly interested in issues that pertain not only to Lake Champlain, but also to Lake Memphrémagog, as both of these lakes straddle the Canadian-US border.

Quebec, Vermont and New York are signatories to an agreement respecting Lake Champlain and Lake Memphrémagog. It differs somewhat from this proposed agreement on the Great Lakes, because it pertains more to water quality. What steps can the various parties take to improve water quality in the Great Lakes?

That agreement makes no provision for diverting water from the basin and that fact sets it apart from the agreement currently under consideration.

In your opinion, how might this qualitative agreement—and I'm all in favour of negotiating these types of agreements—be combined, since you do refer to Lake Champlain in your

submission—with the other agreement that Quebec would be called upon to sign with Ontario and eight US states?

Secondly, Mr. Chairman, it's been my observation that when negotiations are undertaken, there are usually two positions and the parties try to reach some kind of agreement. In the case of the IJC, it's a three-to-three arrangement, and in the case of this agreement, it's an eight-to-two situation. Therefore, the dynamics are entirely different in this case.

Where should the Canadian government or the IJC stand on this matter? In this instance, we have two Canadian provinces and eight US states that are involved in negotiations and trying to reach an agreement, while the federal government and the IJC are excluded from the process. Shouldn't our side be more involved given that, as you mentioned earlier, the US is more interested than Canada in bulk water exports?

⌚ ↕ ⬆️ ⬆️ (1050)

[English]

↕ ⬆️

**Mr. Ralph Pentland:** On the issue of Lake Champlain and Lake Memphremagog, I'm aware of the water quality agreements there. In my written version I talked about an omission in the agreement. As Jim mentioned, because the agreement goes down a certain length of the St. Lawrence, Lake Champlain and Lake Memphremagog should have been included because of the geographical area. Therefore, Vermont should have been included in the negotiations, but weren't. So that's one question.

There's a broader question here about the roles of the provinces, the federal government, states, and so on in water matters. When I first started working in the federal government some 40 years ago, they did almost everything on boundary waters. Over the years, the provinces and states gradually gained more and more capability. We found that in many cases it was better to let the provinces and states work out their little disputes all by themselves, because there were hundreds of these things and they were able to do it. Over time they got better and better at it. It may be that over the four decades or so we've gone too far.

Here you have a case where provinces and states are negotiating in an area of almost exclusive federal jurisdiction. Diversions from boundary waters is a question of almost exclusive federal jurisdiction. We've gone to the point where we have eight states negotiating with two provinces--a very uneven situation to start with--and the two provinces are negotiating from a weak position, essentially because the Americans can more or less do what they want.

In this case, we'll have to wait and see. If Ontario is able to negotiate the kind of agreement they've set out in their press release, that will be very good, and everybody will be happy. If not, there's the possibility that the eight states will go it on their own and just leave Ontario and Quebec out of it. They can do that; there's nothing stopping them from doing that. If they do that, the federal government will have to take a strong stand of some sort.

↕ ⬆️

**The Chair:** Thank you, Mr. Paradis.

Final question, Mr. Watson.

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**Mr. Jeff Watson (Essex, CPC):** Thank you, Mr. Chair. Eventually I'll get this whole questioning process figured out. My apologies here.

↕ ⬆️

**The Chair:** The chair will also, Mr. Watson.



**Mr. Jeff Watson:** Thank you.

My hat's off to the two witnesses here today. You've both done excellent presentations, and I appreciate your being here. I'll make my questions very brief so you have more time to answer than I do to ask the questions.

First--and you may have already answered this--you said diversions are a U.S. issue; they want the water. So is this agreement, as written, a unilateral mechanism for water withdrawals that goes around the IJC?

The second question I have is about the Boundary Waters Treaty supremacy over the annex. We heard testimony about the U.S. State Department suggesting that there be a non-abrogation clause that puts Annex 2001 within the parameters of this. Have you heard about that, and will it be enough to ensure that the Boundary Waters Treaty prevails over Annex 2001?

The third one has to do with referring to the IJC. If only one country refers, if we continue to refer these issues, there will be no binding action that comes from the IJC. So what benefits accrue to us by referring to them?

How about that? I've been waiting two hours to construct these.

**Some hon. members:** Oh, oh!



**Mr. Ralph Pentland:** On the first one, yes, it's basically a unilateral initiative. There are two agreements. The compact is the binding one, and it's strictly U.S., eight states. The Canada-U.S. one is non-binding, and one could say it's a gentleman's agreement. Basically you have a unilateral U.S. initiative here.

The Boundary Waters Treaty would prevail over the agreement, but in a practical sense it wouldn't. The Boundary Waters Treaty would have more legal authority, but the agreement might be more important because it would just happen gradually, and we wouldn't get around to invoking the Boundary Waters Treaty.

Jim.

⌚ ↑ (1055)



**Mr. James Bruce:** I was going to point out that a number of people, including a large number of environmental groups from U.S. and Canada, have called for specific reference to the Boundary Waters Treaty in the agreement. At the moment, it's silent on whether the Boundary Waters Treaty would take supremacy. But the environmental groups on both sides of the border have been saying we have to include the supremacy of the Boundary Waters Treaty, or the idea that anything done under the agreement has to be entirely consistent with the Boundary Waters Treaty. So there's a lot of pressure to build that into any agreement.

As Ralph says, there is a good possibility that things will happen gradually and circumvent the Boundary Waters Treaty. It will really give Canada an enormous amount of protection if we can ensure that it's met.



**The Chair:** Mr. Watson, you have a couple of minutes for an equally well-phrased question.

↓ ↑

**Mr. Jeff Watson:** I didn't get the question answered on the IJC. If one country refers to it, what benefits accrue to us? There will be no binding action that comes from the IJC.

↓ ↑

**Mr. Ralph Pentland:** I don't have time to check it, but I think the wording in the treaty is that if there were a diversion proposal, one country could refer it to the IJC and the IJC would have to approve it before it happened. Canada could make a referral to the IJC and the IJC would have to approve the diversion. It's fairly strong in that respect, but it's weak in other respects. The Boundary Waters Treaty arguably doesn't cover groundwater and tributaries, so it has some loopholes. That's why Steven Shrybman's legal analysis suggested there was a need for something else to fill those gaps.

↓ ↑

**The Chair:** On behalf of the committee once again, Mr. Pentland and Mr. Bruce, thank you so much for coming in. I think the comments of committee characterized the appreciation we have collectively for your being here today. You will now leave it with us, and we will benefit, I'm sure, as we put our report together from the comments you have made. Thank you so much.

Mr. Epp.

↓ ↑

**Mr. Ken Epp:** Thank you. I think you would find unanimous consent for a motion I'd like to propose.

As we know, the Sierra Club has just recognized Minister David Anderson and also Clifford Lincoln by giving them an environmental award. I think it would be appropriate for this committee to send congratulations to them. I would therefore like to make a motion that, perhaps, you could write a letter to each of them informing them that this committee is congratulating them.

↓ ↑

**The Chair:** Do I have unanimous consent?

**Some hon. members:** Agreed.

**The Chair:** Thank you very much.

Members of the committee, before we adjourn I would remind you that next Thursday we are going to have the Canadian Environmental Law Association and Great Lakes United here. They will bring a different perspective to this discussion. I would point out that we are moving to the draft report, so I would like to leave time next week for discussion of the draft report.

Mr. Bigras has asked if it would be possible--and I'm going to seek your guidance--to have the Union québécoise pour la conservation de la nature also come in. I would suggest that we combine them with the two deputations that are coming in and then we could have them together. If I have unanimous consent on that, I think we can move toward next week, which would be a discussion of the report.

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I thought we had Elizabeth May coming as well from Sierra. There is a difference between Sierra and Sierra Legal; they are different in their positions.

↓ ↑

**The Chair:** Oh, I see. Yes.

That would be three, but we would add the--

↓ ↑

**Mr. Joe Comartin:** And I'm fine with adding the Union québécoise pour la conservation de la nature.

↑

**The Chair:** Thank you. I have unanimous consent.

We stand adjourned.

E-mail thi



NOVEMBER 18, 2004

EVIDENCE

ELIZABETH MAY SIERRA CLUB OF  
CANADA  
SARAH MILLER CANADIAN ENVIRONMENTAL  
LAW ASSOCIATION  
DEREK STACK GREAT LAKES UNITED  
STEVEN SHRYBMAN COUNCIL OF  
SARA ERHARDT CANADIANS.



CANADA

## **Standing Committee on Environment and Sustainable Development**

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NUMBER 007



1st SESSION



38th PARLIAMENT

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EVIDENCE

Thursday, November 18, 2004

[Recorded by Electronic Apparatus]

Ⓜ ↓ (0905)

[English]

↓

**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):** Good morning, members of the committee, witnesses who are here today, and ladies and gentlemen in the committee room. Pursuant to the standing orders with respect to Annex 2001, the committee has been deliberating with respect to the implications of it. We thank you very much for being here today.

We have, representing the Sierra Club of Canada, Elizabeth May; the Canadian Environmental Law Association, Sarah Miller; Great Lakes United, Derek Stack; and the Council of Canadians, Steven Shrybman and Sara Ehrhardt.

Have you resolved the order in which you would like to make your presentations?

↓ ↑

**Ms. Elizabeth May (Executive Director, Sierra Club of Canada):** Mr. Chairman, we aren't actually a joint panel by choice, so we've made no selections whatsoever.

**Some hon. members:** Oh, oh!

↓ ↑

**The Chair:** So some degree of arbitrariness on my part won't be taken personally by any of the organizations. Okay. Then I would suggest that whoever would like to lead off do so, and then we can play it by ear in terms of who would like to follow.

I would like to say that the committee is more interested in getting your encapsulated position so that we can enter into a dialogue through the question and answer period.

Elizabeth.

↓ ↑

**Ms. Elizabeth May:** Mr. Chairman, can we have some guidance from you as to timing, because there are four different presenters with not entirely identical positions. I want to make sure that everyone has a fair chance to present, and then of course that committee members have a fair chance to answer. So could you give us some guidance, and then we don't mind moving down the ranks fairly arbitrarily.

↓ ↑

**The Chair:** That's fair enough.

It should be roughly 10 minutes for each entity or organization, and then we go into a first round of questioning, which is 10 minutes for each of the parties represented on the committee. Then we go to a five-minute round in approximately the same order. So it's 10 minutes.

I'll start on the right this time.

Ms. May, perhaps you'd like to start.

↓ ↑

**Ms. Elizabeth May:** I'm not used to being on the right, but I'll accept that from you, Mr. Chairman.

**Some hon. members:** Oh, oh!

**Ms. Elizabeth May:** With apologies to Mr. Richardson.

Good morning.

First, I would like to say that it's an honour to have the former chairman of this committee in the room, the Honourable Charles Caccia, as we begin our first ever appearance before the committee in the new Parliament. It's a real pleasure to see such a great group of members of Parliament on the environment committee, so thank you for that.

I also want to start by saying this is unusual. Usually, when the Sierra Club of Canada appears before the Standing Committee on the Environment, there's a bill before you or something the government has asked you to take on, and every now and then we appear before the committee when it's something the committee itself has chosen to investigate.

I particularly want to thank this committee, because I know it took all-party support to have the Great Lakes annex as one of the first items on your agenda for this session of Parliament. Your intervention in this issue is extremely important, and we're very grateful for the opportunity to appear before you. We're also grateful to you for undertaking what is not an easy task in sorting out this very complicated issue of the Great Lakes annex.

Just parenthetically, we were appearing at the Ontario government's public consultations on this annex agreement between the eight Great Lakes states and the two Canadian provinces within the Great Lakes Basin. Senator Jerry Grafstein was there and got to the microphone and said, "As a senator, I'm used to giving bills sober second thought and looking at issues for sober second thought. I thought I knew a lot about the Great Lakes and was keeping on top of all the issues, but I don't think this has had a first thought, much less a sober second thought". So the work of this committee is much appreciated.

I think you have our full evidence before you. Given the 10 minutes I have, I'm going to move through it in abbreviated fashion and not read my entire evidence.

We are aware of the fact that this piece of work, this Great Lakes annex, has engaged a number of my

colleagues here at this table and people in both countries in government and the private sector, and non-government organizations, for quite a long time. I think there is a premise of goodwill on the part of all of those engaged to come up with what is best for the protection of the Great Lakes. There's certainly no question that the issues are complex and that those who are engaged in trying to develop what is essentially a permitting scheme for diversions have actually done so with the aim of protecting the lakes from diversions. You'll see in my evidence that I think the major problem here—unusual for an environmental issue—is a misunderstanding, or the acceptance perhaps of a false premise, about U.S. law. So it's a legal question more than an ecological question that primarily brings us here.

The fundamentals that brought people together to negotiate the Great Lakes annex was a conclusion that the status quo would not hold and that none of protections for the Great Lakes, whether through the Boundary Waters Treaty of 1909 or the U.S. Congress and the Water Resources Development Act, or various agreements between Canada and the U.S., or Canadian law, and so on, would be sufficient to protect the Great Lakes. It's that premise that brings us here.

We are particularly heartened by the recent announcement of Ontario's Minister of Natural Resources, the Honourable David Ramsay, that Ontario is not prepared to accept this agreement in its current form. The Attorney General of Michigan has made similar comments. I think this committee is particularly well placed to provide very timely advice, both to the Parliament of Canada and to the other jurisdictions jurisdictions struggling with what can be done to either fix the current agreement or compact before us, or to start over and develop a different approach.

I begin by looking at our substantive concerns; so I'm actually beginning at page 4. The first and most fundamental point, as many of you may have noted from the lack of answers from previous witnesses, is that governments collectively have far too little information available to take risks with the hydrology of the Great Lakes. Key information is missing. The Great Lakes Charter of 1986 required that an inventory be prepared of water uses and conservation plans within the basin. That has not yet been done. The need for the public, not to mention decision-makers, to be fully informed about current uses and withdrawals from the Great Lakes is essential.

 (0910)

No agreement should be concluded without this essential foundation of knowledge. This is a key point I noted in your questions to Ralph Pentland, Jim Bruce, and Environment Canada on different days before this committee; you were also seeking answers that we simply don't have at this point.

The second level of concern is about the concepts of the agreement. The essential purpose of the agreement and the annex is to create a process for regulating uses and diversions of Great Lakes water. Under the proposed agreement, requests for diversions would be judged under a review relying on eight criteria, including requirements relating to the development of conservation plans and the assessment of significant cumulative impacts of such withdrawals on both the quantity and quality of Great Lakes waters.

A benefit of the proposed approach is that it would be more transparent than decisions under the current U.S. law, the Water Resources Development Act, or decisions under current Ontario or Quebec law. Additional improvements include that the proposal clearly applies to groundwater, as well as to the surface water, of the Great Lakes. However, the Sierra Club of Canada does not believe that these improvements are sufficient grounds to accept the agreement in its current form.

A careful review of the proposal makes it clear that, regardless of the intent, in practice the agreement

could facilitate diversions of Great Lakes waters. In particular, the agreement does not place limits on the amount of water that could be diverted, no limits on the duration of diversions, nor on the purpose for which the waters may be used, nor on the geographic area to be serviced.

The agreement appears, in our view, to be contrary to the advice of the International Joint Commission. I note that when the Right Honourable Herb Gray appeared before you, he said they were still conducting that analysis and that the commission, as a whole, had not yet come to a conclusion as a commission. But in our review of it, it appears to us that this is contrary to the advice of the IJC.

Now, getting back to this point about the legal foundation, the legal foundation for the approach being taken by the agreement stems from some questionable legal opinions. These opinions are not universally shared. In fact, the International Joint Commission came to a different conclusion. For instance, the document that they rely on, and I refer to, is the legal opinion of Lochhead et al, from the two firms of Brownstein Hyatt & Farber in Denver and Davies, Ward & Beck in Toronto. They prepared this opinion on May 18, 1999, at the request of the Council of Great Lakes Governors. In this legal opinion, they hold out the threat of what would happen if there was a World Trade Organization dispute about Great Lakes water.

We think that by ignoring NAFTA, this particular legal opinion made a really serious mistake. We are far more likely to see disputes over water, and we've already seen, as I think one of the committee members asked Peter Fawcett from Foreign Affairs Canada, when he was here, about what would happen under NAFTA and the Sun Belt case. We know the Sun Belt case is pretty dormant, but NAFTA, chapter 11, is what really worries me about treating water as a commodity in Canada. This particular legal opinion did not look at the NAFTA regime at all. In fact, it is the NAFTA regime that will open the taps for both countries from all water bodies, not just the Great Lakes, should the Great Lakes scheme inadvertently treat water in its natural state as a good in commerce.

Worse yet, this legal opinion from the Denver firm reaches a poorly reasoned and unresearched conclusion that water in its natural state, in the Great Lakes Basin, is already a commodity. This completely erroneous and dangerous view is made based on domestic U.S. case law relating to restrictions on commerce in groundwater based on two cases that dealt with interstate water issues between Nebraska and an adjacent state and between New Mexico and Texas. Rather than making the logical distinction between these cases based on the fact that the Great Lakes Basin is subject to an international treaty and that it has the IJC and there is also U.S. law already in place, they merely state, quote: "Great Lakes Basin water is even more likely than Nebraska or New Mexico groundwater to be held to be an article of commerce".

They didn't cite any case law for this. They don't have any deeper analysis than these one or two paragraphs I've repeated in the brief before you, so this breathtakingly audacious opinion is supported with not one legal reference, not one case citation, much less with any biological or ecological background.

This is my conclusion, but it seems to me that the whole Great Lakes annex mess traces back to a few paragraphs in the conclusory opinion from two law firms. In order to satisfy conditions set out by this one legal opinion, the whole house of cards of the Great Lakes annex has been constructed. If there was ever a call for getting a second opinion, this is it.

I'll examine this deck of cards one at a time and try to get to recommendations before my 10 minutes is up.

⊕ ↓ ↑ (0915)

You've heard a lot about the resource improvement standard from other witnesses, so to save some time, let me just say I share their concerns. I think Ralph Pentland summed it up quite well in asking, how many buckets of water are worth a dozenducks?

That's the one-minute warning? Let me move to my recommendations.

The Sierra Club of Canada believes of course that we cannot support the current draft, but we also recognize the status quo may not be sufficiently robust to protect the Great Lakes from diversions. Achieving the goal of workable, enforceable, legally defensible agreements and compacts to ensure the Great Lakes are not eroded in quantity or quality is within our reach but not yet within our grasp.

There is no external time limit to be imposed on such significant negotiations. Both the Canadian and the United States federal governments and the International Joint Commission must be granted sufficient time to offer their legal and scientific opinions. As the committee has noted, there has been no clear indication from the Council of Great Lakes Governors that the Canadian federal government's views will still be accepted following the extremely limited review time offered to the public. If political will exists to protect the lakes, then the Council of Great Lakes Governors must continue the analysis of this draft, provide a foundation in ecological principles, and not become overawed by a handful of legal opinions from private law firms.

The development of the agreement to implement the annex must be grounded in the precautionary principle, which at this point is not mentioned in any of the documents before you. Therefore, we urge this committee to call for a stronger federal government role. The issue of protecting the Great Lakes should be elevated on the binational agenda with the United States. We have a good opportunity for that with the upcoming visit of the U.S. President.

It must be made clear to the Great Lakes governors that the current draft compact and agreement are not to proceed. The Canadian and United States federal governments, as well as the provincial and state governments within the Great Lakes Basin, should commit to undertaking the following work before any new regulatory instruments for preventing diversions are negotiated.

In brief, the four things we call for before any new agreement is accepted are the following. One, we believe that inventory is essential and must be completed. Two, we believe a law commission with senior counsel for Canada and the United States should be created to address issues in a more impartial way; to assess whether U.S. constitutional law, and particularly the dormant commerce clause, is actually the threat to water that the Denver law firm believed. Three, we believe there should be a science commission within the jurisdiction of the IJC to better inform the current debate. Last, we believe there are some elements within the compact and agreement, particularly those related to conservation, consumptive uses, and protecting the water, that could proceed at the state and provincial levels while the issue of diversions could be left to federal governments and ensure that no diversion--no diversion--is the position of all jurisdictions that have any mandate to protect the Great Lakes.

Thank you, Mr. Chairman.

⊕ ↓ ↑ (0920)

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**The Chair:** Thank you, Ms. May. We appreciate that input.

We'll go immediately to Ms. Miller. Ms. Miller, would you like to start?

↓ ↑

**Mrs. Sarah Miller (Coordinator/Researcher, Canadian Environmental Law Association):**

Actually, Derek Stack and I are going to present together, if that would be all right, and Derek is going to start.

[Translation]

↓ ↑

**Mr. Derek Stack (Executive Director, Great Lakes United):** I thank the members of the committee for inviting us.

[English]

Before I get into the text and the spiel that was prepared, there are a couple of points I think need to be addressed.

One is that, as I think Commissioner Gray indicated earlier in his testimony, there are as many legal opinions available as there are lawyers. I think the honourable members have before them today legal opinions that fail to address the conservation impacts of not proceeding with the annex--not in its current form, of course; obviously in improved draft agreements--and to have legal opinions that do not address the conservation impacts, frankly, as far as our environmental groups are concerned, we, Great Lakes United and CELA, question the usefulness of such an opinion.

[Translation]

The Canadian Environmental Law Association is a legal assistance clinic of public interest which offers legal and representation services to the population, and whose mandate covers both environmental law and environmental policy reform.

Founded in 1982, Great Lakes United is an international coalition devoted to the preservation and restoration of ecosystems in the Great Lakes and the St. Lawrence.

In 1984, both organizations were already involved in efforts to reinforce the Great Lakes Charter and were among those who opposed each of the seven American proposals for massive and damaging withdrawals and diversions from the American side of the Great Lakes, following the signature of the Charter in 1985. We also actively opposed the two major withdrawal projects submitted in Ontario since the inception of the Charter, the Great Recycling and Northern Development canal proposal, and a proposal for diverting water from Georgian Bay to the York region. In 1998, CELA and GLU gained the right to intervene before the Ontario Court of Appeal. The purpose of the appeal was to consider the permit delivered by the province of Ontario to the Nova Group for the exportation of bulk water in tankers from the Canadian waters of Lake Superior to the East. Following negotiations with the government of Ontario, this permit was withdrawn before a dangerous precedent was created.



In our 1997 publication, *The Fate of the Great Lakes--Sustaining or Draining of Sweetwater Sea?*, our organizations chronicled the continuous problems affecting the management of the Great Lakes water following the inception of the Great Lakes Charter. Here are a few of this report's conclusions.

The decisions relating to water diversion proposals between 1985 and 1997 were strictly political and did not protect the environment.

Despite the fact that the provinces received notices from the United States regarding diversions exceeding five million gallons, they did not play a direct role in the decision-making process for these diversions.

The report accurately predicted that the communities established near the limits of the Great Lakes Basin, but outside of these limits, would turn to the Great Lakes for their future water supply.

After signing the Great Lakes Charter, the states and provinces did little to reduce water consumption and loss in the Great Lakes Basin.

The Great Lakes states may not have enough power to refuse the requests from the thirsty states of the American Southwest.

The collection of data on water consumption in the region is uneven and incompatible, and it has not yielded reliable scientific data on the cumulative and individual impacts of the water volumes already withdrawn from the Great Lakes.

Demand for water from the basin continues to increase, and we will need to manage this demand with conservation measures.

Our report concluded that it would be unreasonable to maintain the status quo. This is why our organizations, during the last three years, participated in the work of an advisory committee including representatives of governors and premiers responsible for negotiating preliminary agreements on the annex. This is also why we will continue to work on reinforcing the two agreement projects relating to Annex 2001.

We agree with the Ontario government on the fact that maintaining the status quo is no longer an option. Even though the governments of Ontario and Quebec and the federal government of Canada took measures to avoid diversions from the Canadian side, we must continue to get involved to ensure protection is provided on the American side of the Great Lakes.

Ⓢ Ⓣ Ⓠ (0925)

[English]

So before Sarah addresses the issue of the federal Canadian government, I'd like to address the point of possibly decoupling the question of diversions from the annex negotiations. Clearly there are political, industrial, and commercial interests within the annex negotiations that are at the table, because they're hoping to keep Great Lakes water in the Great Lakes Basin for their industrial and political purposes. If the issue of diversion is removed, those people are likely to leave the table and the issues of conservation and proper water management, and an allocation framework in states such as Michigan, where those frameworks are sorely lacking, will likely be abandoned and the regional perspective in the ecosystem approach to dealing with water use in the Great Lakes Basin is in peril.



**Mrs. Sarah Miller:** Thank you very much for inviting me here today. I am also going to edit my remarks because I have read the transcripts, at least from your first two days of hearings, and I know a lot of what I'd say would have already been covered by the Honourable Herb Gray and by testimony from government staff.

Even though I'm from the Canadian Environmental Law Association, I'm not a lawyer. The association has been involved in this issue since 1984 because we did want to see a legally binding set of environmental principles that would put us on the road to having a conservation culture in the Great Lakes Basin. Almost 20 years after the signing of the charter, I don't think we've even begun to move up that road, in the basin, and that has been central to our involvement in this issue.

After the Nova Group proposal on which CELA and GLU were prepared to go to the appeal, as you know, the federal government reacted very strongly with a three-part strategy. They looked for federal-provincial accords, which weren't entirely successful but did result in Ontario and Quebec strengthening their water law regimes. They requested the IJC reference.

From my view around the table, being on the advisory committee to the annex--and I expect that you'll have a lot of questions for me from that perspective, because I guess for the last three years I've been closer than other people to some of the negotiations, though not in the room--I think there is a feeling among the jurisdictions that they are actually responding to the IJC reference, that their efforts under the annex are addressing the recommendations that enshrine protection for the Great Lakes. If you take the 2000 recommendations from the reference and look at the annex, you'll see actual clauses that are trying to respond directly to recommendations. The annex can't address all of the IJC recommendations, because some of the issues, such as invasive species and climate change, are going to take far, far more effort.

Our concern has been to protect all of the Great Lakes Basin. When the Boundary Waters Treaty in 1909 established the IJC and set up a hierarchy of uses, the environment really wasn't considered to be a use at that point in time, and the environment isn't included in that hierarchy. There was little understanding at that time about the significance of groundwater in the Great Lakes Basin. So as you heard from Herb Gray, the boundaries of the International Boundary Waters Treaty Act amendments are only really covering the surface waters in the Canadian side of the Great Lakes Basin. As well, WRDA does not cover groundwater in the United States. So the IJC reference was very clear that there needs to be considerable work done on groundwater in the Great Lakes Basin to ensure that we're protecting the full basin.

I would also recommend that you look at a document done by the Great Lakes Commission, a decision-making support framework document where they basically looked at the status of science in the Great Lakes Basin on all these issues. They have also been collecting what sparse data has been coming in from each of the jurisdictions since the Great Lakes Charter. So this is a document that I think very much sets out what needs to be done.

We think the Great Lakes annex actually plugs some of the loopholes, because it includes looking at groundwater.

 (0930)

Around the table there is an intention, I think, to look at a new definition, perhaps, in the long term, of

the boundaries of the Great Lakes Basin. We have heard about Waukesha and the fact that in Wisconsin there is pumping happening in the Great Lakes Basin at such a rapid rate that it's drawing down Lake Michigan. But what that probably means, the scientists think, is that groundwater is in the Great Lakes Basin. So as our science grows, I think we are going to be seeing that the boundaries of the Great Lakes Basin may be revised.

The weaknesses in WRDA make the region vulnerable, and I think it also means that Ontario and Quebec need to be involved in those U.S. vulnerabilities.

Under the Great Lakes Charter we have monitored all the applications that have come forward for harmful withdrawals and diversions from the Great Lakes Basin, and our organizations have written letters. We have worked with the Ontario government often in opposing many of those proposals, and we are on record. But what has happened, essentially, under the prior notice and consultation under the charter is that we get notice, but there is no forum we can attend. There are no tables that Ontario and Quebec have been able to sit around. Most importantly, there are no tools to protect the environment.

One of the misconceptions about the annex that I would like to address is that the regional review is going to be deciding on a yes or no vote on a proposal. This isn't true. There is an intent to work in consensus, to examine proposals with the decision-making standards that are set up both in the compact and in the annex. A recommendation of findings of whether or not the proposal is consistent with the decision-making standards is then going to be sent to the jurisdiction, but the ultimately responsibility for the decision still rests with the jurisdiction of origin, where the diversion or consumptive use proposal came from.

Therefore, like the IJC, part of the development of the ecosystem approach around the Great Lakes is a real willingness to try to enter into a consensus-building exercise. As Derek said, what is at risk here is that, if we walk away from this, Quebec and Ontario will again not be at the table and will continue to be sidelined, and we will continue not to be able to bring our own wisdom to bear.

I'd like to say, because we have been working very closely with Ontario on this, that Ontario is the leader in the Great Lakes Basin, having the most protective and rigorous program for examining water allocation. Currently they examine everything under 20,000 litres, which is 13,800 gallons. It is the size of a small to medium-sized farm. So they know what's happening to all their water at that level. That's considerably more than any other Great Lakes jurisdiction is willing to even contemplate, as you see with the numbers in the trigger level.

I think there's a misconception that the drafts that came out under great pressure because Governor Engler, when he originally announced the annex, gave a three-year deadline...they are really very much in draft form. I can say from being at the meeting on Monday and Tuesday that I couldn't predict what the next drafts will look like, because there is still so much dissent around the table among the advisory committee members.

I would just like to say that the character of the negotiations has been such that we don't know what the negotiators are doing on the advisory committee. They throw out ideas just before an advisory committee meeting, and the members of the advisory committee then react to those ideas, but we had never seen the complete draft language before anyone else saw it in July of this year.

   (0935)

But most of the members of the advisory committee are very large users of the Great Lakes Basin and

are going to be experiencing huge challenges and huge financial implications. They think the standards are huge deterrents to water use in the Great Lakes Basin. The Council of Great Lakes Industries estimated at the meeting that it would cost an applicant anywhere from \$445,000 to \$1 million U.S. to even begin to put together proposals for a diversion—and that isn't even implementing it.

So we do believe that the environmental standards are rigorous and feel that they will act as a deterrent. We feel that the mere fact that there will be 10 jurisdictions' eyes examining a proposal is a deterrent.

I will conclude there.

↓ ↑

**Mr. Derek Stack:** Our lead recommendations are on page 9, for those of you who'd like to see them. We're not supporting the drafts in their current form; we've had lots of recommendations to improve them. There's a summary of those recommendations available to the members on page 9.

↓ ↑

**The Chair:** Thank you very much, Mr. Stack.

Mr. Shrybman, can we go to you now, please?

↓ ↑

**Mr. Steven Shrybman (Legal Counsel, Council of Canadians):** Sara is going to begin, and we're going to share our 10 minutes.

↓ ↑

**Ms. Sara Ehrhardt (National Water Campaigner, Council of Canadians):** I'll begin by thanking everyone for giving me the opportunity to speak today. I just want to take a moment to describe citizens' concerns about the annex and also briefly mention a few items I didn't see appearing in the transcripts.

The Council of Canadians is Canada's largest public interest group, with 100,000 members across Canada. Since 1999 we have been fighting to stop water diversions, water privatization, and bulk water export, and we have been calling upon the federal government to recognize the human right to water, to develop a new national water policy, and to protect all of Canada's waters from diversion and trade threats.

[Translation]

I would also like to mention that the Council of Canadians is a member of Eau Secours!, a Quebec coalition for the responsible management of water. Several representatives of the coalition participated in the consultations with the Quebec government and also expressed several major concerns.

[English]

This year the Council of Canadians commissioned an Ipsos-Reid poll and found that 97% of

Canadians overall expressed their support for water to be recognized as a human right.

Despite the threats of bulk water exports, climate change, recent drinking water scandals, and the government's own reports, such as the comprehensive report in 2003 of the National Water Research Institute on the threats to Canadian freshwater--despite all of this, the federal government has ignored Canadians' concerns by refusing to revamp the 1987 federal water policy and to take action on national water issues.

Today the Council of Canadians is calling on the federal government to take immediate action to condemn the annex and to stop water diversions from the Great Lakes. We are demanding that the federal government assert its jurisdiction over the Great Lakes and do everything in its power to protect our shared waters from water diversion threats.

As the final point, I did not see any mention made in the transcripts of first nations. At the governors' consultations in Canada, there was clear criticism from both the Chiefs of Ontario and the Union of Ontario Indians of the relations between governments on this agreement. While I cannot speak for first nations' concerns, it is clear that more consultation is needed with all Canadians, and also that it is required with first nations, who have unique rights regarding consultation and governance.

   (0940)

**Mr. Steven Shrybman:** Thank you, Mr. Chairman and members of the committee.

We have a difference of opinion with two of my friends sitting next to me on this panel from the Canadian Environmental Law Association and Great Lakes United. I used to be the counsel with CELA for years. But let me begin by saying that we have much more in common in what we agree about than disagree about. Certainly, the need to preserve the ecological integrity of the Great Lakes and the fundamental building blocks of environmental policy, like the precautionary principle, are values we share. We greatly admire and respect the commitment that CELA and GLU have made to protecting the Great Lakes. I don't think there are any environmental organizations who have done more or would even be able to compete with their record of commitment on that issue. So our disagreement with them is really about strategy more than it is about the fundamental principles we all adhere to.

I just want to make three points today. I'm one of the authors of a legal opinion that Elizabeth May has warned you against being overawed by, but just having great deference would be fine from my point of view!

The points are these. The first is that the federal government got it right when it commented on the annex in early 2001. I don't get to say that often enough about the federal government and its commitment to conservation and environmental policy, but it raised two fundamental concerns at that point, and I highly recommend their critique. I'm sure you've seen it. It's dated February 28, 2001. Their response to the annex was, first, that the standard was too permissive and would open the door to long-distance, large-scale removals of water from the basin; and second, that implementation of the annex could "clash", to use their word, with the Boundary Waters Treaty and thereby undermine the role of the IJC.

We think both of those points were well taken. As the annex has been given expression in the compact and this agreement between the provinces and the governors, we think those concerns are

amply underscored. In terms of a too permissive standard, this is a regime to facilitate diversions without without establishing any cap on the amount of water that can be removed from the basin, without establishing any geographical constraint on how far that water can be taken, without imposing a time limit on those diversions, and without even specifying the purposes for which those diversions could be used. So that's too permissive in our view.

With respect to the clash between the compact, in particular, and the Boundary Waters Treaty, we think those concerns were well taken as well. In the Boundary Waters Treaty, article 3 provides that the IJC is to approve diversions that, in the key words, "affect the level or flow of...waters on the other" side of the boundary. If you look at the approach that Bill C-6 has taken to that issue, it clearly references the treaty; it deems any diversion of water from the lakes to have that consequence, thereby invoking the jurisdiction of the IJC. It's true that the compact refers to the Boundary Waters Treaty, but it sets out and establishes an entirely parallel regime, including an appellate process absolutely indifferent to the role of the IJC in the process. That's very problematic. I think the federal government had it right.

The second point I want to make is on trade, which happens to be my area of expertise, and this is simply to say two things. One is that trade issues are important when fashioning public policy and law related to conservation in the Great Lakes, but not for the reasons underlying the creation of the compact. It isn't the WTO. A challenge by another nation to this compact or to Canadian conservation water management laws is extremely unlikely, but that's not true of a foreign investor claim under NAFTA.

There are two things that are fundamentally different about NAFTA. One is that the investment rules can be privately enforced.

The other critically important thing is that the conservation exception under the GATT and the WTO doesn't apply to foreign investor and foreign service provider claims under NAFTA. Conservation is no excuse under NAFTA. You can't justify a measure that interferes with the rights of foreign investors or service providers because it's necessary for conservation reasons. They wrote that fundamental exception of the WTO out of NAFTA.

⊕ ↓ ↑ (0945)

The third point is that everyone agrees that the existing framework is inadequate. We're reminded that the Boundary Waters Treaty doesn't deal with groundwater, it doesn't deal with tributaries to the Great Lakes, and it doesn't embrace the precautionary principle. All of that's right.

The answer, from our point of view, is to strengthen the framework of international law with respect to the management of Canadian water resources. That's ultimately where we have to go in order to ensure that conservation and environmental policies trump the rights of foreign investors and service providers, and free trade objectives.

We need to strengthen law so that it does apply comprehensively to all the water in the basin. We need to strengthen the international framework of law to establish a binational approach to dealing with these problems, not simply an approach that resides with the provinces and the states, who have an important role to play, but that role must respect the sovereign prerogatives of both the United States and Canada. When it comes to water, the federal government has an important jurisdiction, the most important element of which, for this purpose, is to negotiate international treaties that bind the nation.

So that, we believe, is the right answer. The type of agreement that has been negotiated among the

governors and between the governors and the provinces are an important complement to strengthening that framework of law, but until we do that, Canadian water will be at risk, Canadian sovereignty is at risk, and more so, undermined by this initiative rather than strengthened.

Thank you very much.

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**The Chair:** Thank you very much, Mr. Shrybman.

Thank you to all the witnesses. We'll now go to the committee.

Mr. Richardson, would you lead off, please?

↓ ↑

**Mr. Lee Richardson (Calgary Centre, CPC):** Thank you, Mr. Chairman. I won't take but a minute because of the shortness of time.

I want to begin by apologizing to our presenters today for not only the shortness of time that you were allowed for presentations, but also time to prepare the specific written presentations, which were very helpful.

I particularly want to thank Ms. May for the thoughtful and thorough outline of this program. Again, I won't go on with that, but I found it very informative and useful.

Mr. Chairman, I would like to defer to Mr. Watson, who is on this issue for our party and whose riding happens to be on the Great Lakes.

Jeff, do you want to take it from here.

↓ ↑

**Mr. Jeff Watson (Essex, CPC):** Sure. Wow, I get some respect! Thank you to my colleague.

Thank you to all of you for your presentations. Again, I'm sorry there's such a short timeframe for you here as we're drawing this issue to a close, but it's an issue that's incredibly important, and we certainly recognize that on this side of the table as well.

I want to probe some of the differences here. Ms. May, I'm looking at one of your recommendations-- recommendation 7 on page 5 of your submission. Essentially it's about improving the regional body approval process, if I understand that correctly. If you're strengthening this regional body that's proposed, what happens to the role of the IJC?

↓ ↑

**Ms. Elizabeth May:** I'm not sure it's my brief that you're referring to.

⌂ ⌵ ⬆ (0950)

⌵ ⬆

**Mr. Jeff Watson:** Do I have the wrong organization?

⌵ ⬆

**Ms. Elizabeth May:** We're not connected in any way to the Sierra Legal Defence Fund.

⌵ ⬆

**Mr. Jeff Watson:** Goodness, I have the wrong person here and the wrong recommendation in front of me. My apologies. Hopefully I have the right folks on this one now.

You believe the proposed compact lessens U.S. federal government interference. What about NAFTA?

I'm speaking specifically of independent non-government challenges to treatment of water as an article of commerce, or possibly as a commodity. The compact may lessen what the federal government does, but what about independent bodies that are non-governmental--business, corporate, or whatever--through NAFTA?

⌵ ⬆

**Mr. Derek Stack:** I think in their approach to dealing with diversions they've very clearly taken an approach that won't appear discriminatory to out-of-basin users, and that's why we're not seeing the compact come up with language such as "ban" and "prohibition". We're seeing all these measures built in place that are designed and geared to basically make it impossible for large-scale diversions and, most importantly, diversions outside of the basin. I think that might partly address your question, but I'm certainly not a trade lawyer able to deal with NAFTA.

⌵ ⬆

**The Chair:** Ms. May, do you want to expand on that at all?

⌵ ⬆

**Ms. Elizabeth May:** I'd yield to Steven Shrybman on this point, but I would think that it's not relevant to a private investor suit under chapter 11. Discriminatory or not discriminatory is not a factor. All that's a factor is that once you treat water as an article of commerce any private company can complain, regardless, as Mr. Shrybman has pointed out, of whether there was a valid conservation purpose. None of that makes any difference under chapter 11.

⌵ ⬆

**Mr. Jeff Watson:** Do you want to comment on that as well?



↓ ↑

**Mr. Steven Shrybman:** I think the issue of discrimination is relevant in terms of the requirement for national treatment under not only chapter 11 but the GATT as well. So the question is, would this compact pass that non-discrimination test, and those that favour it think, yes, it would because it establishes a conservation standard. If you look at the jurisprudence, the tribunals have had no difficulty, in fact, in consistently looking behind the face of the measure. So even if it's non-discriminatory on its face, they will look behind the face of the measure to discern its impact and true intent.

There are examples of this. Canada was challenged by U.S. investors successfully for banning PCB exports from Canada in the SD Myers case. The measure in Canada banned exports and it didn't matter whether you were a Canadian investor or a foreign investor, or a company operating in Canada. So it was non-discriminatory on its face, but it looked behind the face of the measure, at the memos that were written by Environment Canada bureaucrats and the motivations that some of those memos discussed for implementing the measure. We suspect that will happen in this case as well. It's the consistent approach the tribunals have taken. So they will look behind the face of the measure to find all of the talk, I gather, by governors and others explaining how this is really about protecting users in the basin, and they've come up with an ingenious device for doing that.

So is the approach reliable? We think it isn't, and our reasons for having doubts about that derive from the jurisprudence itself, which is pretty consistent and pretty corrosive of public policy objectives other than commercial public policy objectives. If you're trying to protect the environment, you're not going to do nearly as well with a foreign investment tribunal as when your goal is protecting the commercial interest of investors.

↓ ↑

**Mr. Jeff Watson:** On page 4 of your submission you contended that the treaty provisions combined with the annex protect all of the uses in all of the waters making up the Great Lakes ecosystem. Wait a minute, maybe that's not the one I'm looking at here. Sorry.

You seem to suggest that the annex and the International Boundary Waters Treaty are compatible. Are you aware of the State Department's opinion that there needs to be a non-abrogation clause inserted into this agreement? That almost seems to imply that the two are not compatible.

↓ ↑

**Mrs. Sarah Miller:** Who are you directing your question to?

↓ ↑

**Mr. Jeff Watson:** Let me check whether I have the right one here. I believe it's to you guys.

↓ ↑

**Mr. Derek Stack:** On page 4, sir?

↓ ↑

**Mr. Jeff Watson:** I think that's page....

↓ ↑

**Mrs. Sarah Miller:** There is language in the last drafts that we saw--

⌚ ↓ ↑ (0955)

↓ ↑

**Mr. Jeff Watson:** Page 3, sorry. Under point number two about halfway down. It says you believe that the annex and the treaty are compatible. The annex addresses weaknesses and limitations of the treaty. The State Department of course has an opinion that a specific clause, a non-abrogation clause, needs to be included so that this is more specifically put within the boundaries--

↓ ↑

**Mrs. Sarah Miller:** Sorry, in chapter 7, article 702 states: "Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any person any right claim or remedy under any international Agreement or treaty".

So there is language already in there. Whether it's adequate or not, I don't know.

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**Mr. Jeff Watson:** Maybe this is a comment for the honourable parliamentary secretary too in light of the change of head at the State Department. I'm interested to find out if the government knows whether this stance on that non-abrogation clause will continue under them or change. Maybe you can tuck that under your hat for later. I know there will be perhaps a new direction, which we sense may not be as friendly towards Canada as previously.

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**Mrs. Sarah Miller:** That opinion was with the previous draft of the annex, I think.

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**Mr. Jeff Watson:** This was issued very recently, if I'm not mistaken, about two weeks ago. We had it before the committee---

↓ ↑

**The Chair:** We're actually in the witness section here, and I think that as you had characterized with the tucking under the hat, the parliamentary secretary is up to that challenge, and when we come to our open discussion he can address that.

↓ ↑

**Mr. Jeff Watson:** That's fine. I wasn't asking him to answer the question, I was just going to ask him to tuck it.

How much time do I have left?

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**The Chair:** A couple of minutes.

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**Mr. Jeff Watson:** I'm coming back to you guys here again. On page 5 you seem to indicate, about halfway down, that Ontario can almost pick and choose which measures it can incorporate to strengthen, and you suggest that its laws won't be weakened. We've had some testimony before on this committee, and I've asked the question a couple of different times about whether bringing Canadian law into standard with these agreements may not weaken our laws in any respect. Are you of the opinion that it may?

I'm not sure if we have the ability to just pick and choose here, I think that's what I'm probing.

↓ ↑

**Mrs. Sarah Miller:** There are clauses in the current drafts of the annex that say there can be higher standards, stronger standards, among any of the jurisdictions, and that language is already in there. The Ontario government in fact is right now strengthening its water-taking permitting system even more, as we speak.

I think that if they decide they are going to commit themselves to the final draft of the annex, when it comes out, what Ontario would do would be to incorporate by regulation whatever they needed to that wasn't already adequately protected into their own domestic law, if they needed to. But I certainly don't think they are going to weaken their own laws. In fact, I think it's very important Ontario be around the table, because Ontario is leading by example to show other, more reluctant jurisdictions that indeed you can actually have very strong programs, it is affordable, it is doable, and they have been doing it for quite some time.

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**The Chair:** I'm going to go to Mr. Simard now, please.

[*Translation*]

↓ ↑

**Mr. Christian Simard (Beauport—Limoilou, BQ):** Good morning and thank you for being here. I read your submissions with a great deal of interest, and I even noted the difference in the approach.

I would like to continue with this question, because it is fairly fundamental. Based on what I understood of presentations by experts and many publications, there currently seems to be a gap between the treaty and its application by the provinces and states. According to the terms of the treaty, there can

be referrals to the International Joint Commission, and these must necessarily come from the two states if they are to be considered by them. In addition, there is absolutely no possible arbitration. This is like trade agreements, but there is no arbitration. In theory, the treaty provides for arbitration at the International Joint Commission level, but the American Senate approval is required. So in fact, there is no arbitration, and this has been evidenced. According to me, we have a major application problem.

I rather agree with the position adopted by Great Lakes United and the Sierra Club, i.e. that status quo is a false protection. The treaty is great, but it is not applied in municipal, provincial and state jurisdictions. So it's a problem.

Now, as is the case for any legislation or agreement having impacts on the environment, there is always this danger--which is enormous in this case--of standardizing pollution, of not reducing it. In this case, it's not pollution but water withdrawals. There is a danger of saying that there will be a legal framework, but this framework will be made for water users, not for the conservation of the basin, and as for any project, there will be mitigation or conservation measures. However, there is absolutely no guaranteed of balance. This is the flaw in the current 2001 agreement as it is drafted.

I would like to hear the positions of Mr. Shrybman and Mr. Stack, or maybe of Sarah or Elizabeth--if I may call you by your first names--on the strength of the agreements from the Canadian provinces' perspective, Quebec and Ontario. On the one hand, we have an enforceable compact which, as I understand it, will become enforceable for the eight states; on the other hand, we have two Canadian signatory provinces, but there does not seem to be any right of veto or balance, because it's two against eight. Have you given some thought to the matter, and do you propose--it's not clear in your texts--a way to reinforce this aspect, from the provinces' perspective? As for Ms. May's comment, I think we should be very careful with the idea that the federal government should be involved, as well as the provinces and just about everybody else, to improve this. This is often a source of confusion and could be dangerous. Witnesses told us that the approach for reinforcing the current agreement should rather be used.

Finally, how could we ensure there would be the equivalent of a Canadian or Ontario-Quebec compact? How could we reinforce this fundamental aspect of the agreement?

   (1000)

[English]

**The Chair:** Ms. May, would you like to begin?

**Ms. Elizabeth May:** Yes, I'll be first again.

Thank you.

[Translation]

Thank you Mr. Simard. I will answer in English, because it is better for everybody.

[English]

The reason the Sierra Club of Canada stresses the role of the federal government.... There is no question of multi-jurisdictional mandates here. But if the real problem here, as I understand the premise of the whole negotiation being, is the flaws within U.S. protection, that's much more the concern. We have a shared body of water. Diversions from anywhere in the Great Lakes Basin affect the whole Great Lakes Basin ultimately. Yet it's the U.S. Constitution commerce clause that is most often referenced as a source of problems in weakening the current protections for the Great Lakes that exist within the Water Resources Development Act of the U.S. Congress.

If that's the nature of the threat, then actions at the state level are more likely under U.S. constitutional law to trigger the commerce clause than an action at the federal level. That is why we think we should fortify all conservation efforts. The people in the Great Lakes Basin, as you've already heard, are profligate wasters of water. We need to focus on that aspect.

But in terms of the diversion issues, which are also, as you've heard from Mr. Shrybman, quite enmeshed in trade issues, it's the federal level of jurisdiction in both nations that stands the best chance of locking down an agreement that will prevent diversions, period. That's our view.

We also premise that with saying--although it's easy to take pot shots at lawyers and there will always be as many opinions as there are lawyers--the point is that governments should not be afraid to look at the laws they've already signed, look at their constitutions, and look at trade rules, and figure out what is the best way to fashion a law that prevents us from being victimized by these agreements. Then the governments can do that. I think it's at the federal level in the United States that we can best protect the Great Lakes and the Water Resources Development Acts that already exist in the U.S. Congress.

⌂ ↓ ↑ (1005)

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**The Chair:** Ms. Miller, you wanted to respond on that to Mr. Simard.

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**Mrs. Sarah Miller:** Yes.

One thing I don't think is too clear to people--and it hasn't really been well articulated in the annex drafts that have come out now, but it has certainly been stated around the table--is that the way decision-making would take place is that the compact approvals and the regional approvals would be done essentially by the same people and would be almost consecutive, i.e., in the same room or in the next room, because there would be the same people on the committees considering the same thing. Working towards consensus is the goal. There has been quite a bit of discussion about what if consensus couldn't be reached, and what means of arbitration there could be, and the IJC actually came to the committee meeting considering this and went through their history. And, as you heard from the Honourable Herb Gray the other day, they have never exercised their arbitration powers.

The IJC is only as strong as the governments whose agents they are, and I think the reason they've never exercised their arbitration powers is that the governments have never asked them to do it. Perhaps they've never been comfortable with their doing it. I think this is part of the dilemma, and I think that

has to be understood. It's certainly something for the federal government to take under consideration in their opinion.

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**Mr. Lee Richardson:** Mr. Chairman, for clarity, could the witness just respond. Is that because they doubt their authority?

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**The Chair:** Everything is through the chair.

[Translation]

↓ ↑

**Mr. Christian Simard:** I raise a point of order. I have not finished.

[English]

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**The Chair:** Mr. Richardson just wanted a clarification. I wouldn't take that off your time. You'll allow some degree of flexibility. Mr. Simard, you're back in, but perhaps you can integrate the response of Mr. Richardson.

Mr. Simard, you have three minutes.

[Translation]

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**Mr. Christian Simard:** I disagree with that, Mr. Chairman. There is a certain coherence in the questions I ask. He can ask his question when his turn comes.

[English]

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**The Chair:** Absolutely. The continuity is very important. I understand that.

Mr. Shrybman.

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**Mr. Steven Shrybman:** I'll just respond briefly to your question. In terms of the Boundary Waters Treaty you suggested that both the United States and Canada would have to jointly refer a matter to the IJC for consideration. That's not true under article IX. Either country can do that.

Under article III, which is the diversion provision, for a diversion to occur there are two conditions that must be met. One of them is that it's approved by either national government. The other is that it is approved by the IJC. So you don't need a referral to the IJC in order to invoke the approval authority under article III.

The other point I would make is that the trade agreements are fundamentally corrosive of provincial authority--I think that's clear--and ignore the constitutional division of power between the federal and provincial governments. We have a great strengthening of the law for commercial and corporate objectives and a weakening of law for other purposes.

The strengthening of the law happens in the context of NAFTA and the WTO. The weakening of international law is happening right now with respect to this compact, which has the blessing of the U.S. federal government and which basically ignores the IJC, its approval authority, and the authority of Canada's federal government.

This is a shared water resource. It seems to me that there is a strong case for the Government of Canada to take some ownership and play a role here.

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**The Chair:** You have one minute, Mr. Simard.

[*Translation*]

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**Mr. Christian Simard:** It is certainly an extremely important issue, i.e. whether it should or should not be considered a basic product affected by the trade agreements. This is a big problem.

As for the boundary treaty, there is a little confusion in my mind. You say that the agreement must be improved, because it is important and it must be reinforced. At the same time, you also say, Elizabeth, that it is important to have both federal governments, because this provides more guarantee for conservation.

I don't know if the American federal government offers more guarantee for conservation than the compact, because the American Midwest is insatiably thirsty. As for the American compromise, I don't know if the American federal state is stronger in terms of conservation than the states bordering the Great Lakes. I might add Vermont, because it borders the basin, with Lake Champlain, as one expert said. It would be important to add Vermont to this, because they are more conservation-oriented than Illinois. These contradictions should also be played with the Americans.

However, I still have a big problem understanding your position. You are in favour of a Canadian federal government involvement, through the International Joint Commission, and the reinforcement of the 2001 agreement. I see a contradiction in this.

🕒 ↓ ↑ (1010)

[*English*]



**Ms. Elizabeth May:** There are a couple of fundamentals here. One is that nothing that's done from this point forward should undermine the IJC or the Boundary Waters Treaty. We all agree on that. Some of us at this table believe the current drafts do that, and others do not.

I also believe nothing in this agreement should undermine the current Water Resources Development Act of the U.S. Congress. This law says there should be no diversions of water out of the Great Lakes Basin without the unanimous consent of all Great Lakes governors.

You are quite right to point to the thirst in the southwest. This is one of those things driving the concern of Great Lakes governors. It's driving the concern, and our colleagues in U.S. environmental groups are also of different views about how to handle this compact, how to handle this annex, how to best protect the Great Lakes.

One of the reasons that I hear from people who are concerned that we should move forward with this approach is that, as population moves from the Great Lakes states as the industrial belt there has been in decline, the population shifting to the southwest has also involved congressional districts' reapportionment, so that their chances of getting a good law through Congress in the future will not be as good as what they have now.

Certainly we don't want to take anything to the U.S. Congress that relates to an international matter, because if it's a treaty, it requires 75% approval in the U.S. Senate, whereas what we have now with the Boundary Waters Treaty from 1909 was actually negotiated between the United States and Britain on our behalf--but that's another long story.

What you end up having is the threat of potential water users in the U.S. southwest wanting water. That is why I think this approach that has been proposed in draft form is particularly dangerous, because it opens the door to saying, "We can accept diversions if they meet these conditions".

My concern is that as we go down that road, if the conditions become onerous or if they appear, like return flow, to be geographically discriminatory, they will be abandoned down the road because the horse will be out the gate in terms of saying we allow diversions. Once that is accepted in jurisdictions throughout the basin, it will be very hard to keep conditions in place that make those diversions difficult, particularly in the face of trade loss.

The current U.S. President, in the election campaign, campaigned in the Great Lakes states that were against diversions. Everyone says they are against diversions.

Our view is that between the Boundary Waters Treaty, which says neither government should allow anything that affects the level or flow of the Great Lakes, and what's already in place at the federal level in Canada and the federal level in the U.S., what we first need to do is to sort out exactly what needs to be done to ensure that the existing instruments are not undermined and to strengthen them.



**The Chair:** Thank you, Ms. May. I am going to have to leave it at that. Perhaps in our questioning we will come back to some of these points.

Mr. Scarpaleggia.



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**Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.):** As a matter of fact, that's very informative, and thank you all for being here. Your explanations have been excellent, and it's a real education for me.

To continue on this line of questioning from Mr. Simard, let me ask a naive question in order to get an answer that could possibly help me crystallize my understanding of this issue.

The IJC basically makes binding decisions on diversion projects. Is that correct?

🕒 ↓ ↑ (1015)

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**Ms. Elizabeth May:** If referred to it under article III....

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**Mr. Francis Scarpaleggia:** They have to be referred by one government or the other. Is that it?

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**Mr. Steven Shrybman:** Well, article III doesn't say that. It says simply that for a diversion to occur, it has to be approved by either the United States or Canada, "with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission."

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**Mr. Francis Scarpaleggia:** So, ultimately, any diversion project would have to be approved by the IJC?

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**Mr. Steven Shrybman:** If it's going to affect the level and flow of water on the other side of the boundary...which, of course, is the sixty-four thousand dollar question.

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**Mr. Francis Scarpaleggia:** Could you repeat the last part?

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**Mr. Steven Shrybman:** That's the sixty-four thousand dollar question: will it or won't it?

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**Mr. Francis Scarpaleggia:** That will lead me to my second question.

So the IJC has--

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**The Chair:** Mr. Scarpaleggia, Ms. Miller also wanted to respond.

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**Mr. Francis Scarpaleggia:** I'm sorry, Ms. Miller.

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**The Chair:** I'm sorry to interrupt you, but perhaps it might be helpful. It's on the same thought.

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**Mr. Francis Scarpaleggia:** Absolutely.

↓ ↑

**Mrs. Sarah Miller:** As regards affecting the levels and flows, I referred you to the Great Lakes Commission report primarily because they looked at all the science and basically came to the conclusion that no single diversion will ever actually be able to be detected as affecting the levels and flows of the Great Lakes. We have a problem.

If it were from a tributary, yes, we could tell that there are impacts, but it's very, very unlikely. What they have acknowledged is that it's the cumulation. It's all the many small withdrawals with the bigger withdrawals, but any single one withdrawal will never really have that kind of measurable impact.

To my knowledge, I don't think the IJC has ever approved or disapproved any of the diversions that have gone ahead, precisely because the impacts weren't measurable.

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**Mr. Francis Scarpaleggia:** That's an excellent point.

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**Mr. Derek Stack:** If I could just add, we need to temper the legal authority with the political will of the IJC to step in.

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**Mr. Francis Scarpaleggia:** Could you expand on that?

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**Mr. Derek Stack:** I was here when Commissioner Gray testified, and I was not at all heartened that the IJC would take a strong role in the absence of the political will, a consensual political will.

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**Mr. Francis Scarpaleggia:** My next question flows from your answer, Ms. Miller. I do not know if it was you or Ms. May who mentioned that we need to do an inventory of water uses and conservation measures, in other words, that we need to do a lot more science.

Could you tell me where you think that science should be done? Someone mentioned a science commission attached to the IJC, but would you see a role for the Canadian federal government in doing more water science?

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**Ms. Elizabeth May:** If I may, Mr. Chair, that was in my brief.

It is a commitment that governments already made in 1986 in the Great Lakes Charter to conduct a full inventory of water uses and conservation plans within the basin to know what's going on in terms of current uses and withdrawals. But we don't have that information. So that's a current obligation unfulfilled by both governments.

I think a lot of this should be done at the federal level in Canada. I note with some caution, because this is not a personal comment about individuals within the bureaucracy, but you have had some very impressive witnesses who used to be in Environment Canada. You will not find their equal there now. I refer to Dr. Jim Bruce and Ralph Pentland, scientists who understood their area really well. We have had a real reduction in capacity to do the science at the federal government level. Again, the people who appear before you from Environment Canada are very fine people and very dedicated civil servants; we just don't have the same capacity we once had.

↓ ↑

**Mr. Francis Scarpaleggia:** And you feel this work should be done within the federal government, as opposed to by arm's-length bodies, universities, and so on?

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**Ms. Elizabeth May:** It is a big piece of work, so I think it should be supervised and coordinated somewhere. Some of it will be done at the federal level and some of it could be done at universities. Certainly, as you have heard, the Province of Ontario and the Province of Quebec have very large roles to play. We need to know what we are doing with the Great Lakes on both sides of the border, per the commitments made by all parties to the Great Lakes Charter, and I think that needs to be done.

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**Mr. Francis Scarpaleggia:** Thank you.

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**The Chair:** Thank you, Mr. Scarpaleggia.

Ms. Miller, do you wish to comment?

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**Mrs. Sarah Miller:** Yes, just briefly. There have been data collected under the Great Lakes Charter, available from the Great Lakes Commission on discs. The problem with the data that Great Lakes United and CELA identified in their *Fate of the Great Lakes* report is that it is totally inconsistent. It can't be compared. It's apples and oranges, because the information that each of the Great Lakes jurisdictions is collecting on water is collected at different levels; some of them are only collecting it from certain sectors and not other sectors. We just don't have broad-based information and we certainly don't have information on groundwater.

So there is a desperate need for research, more than the universities and, probably, the provinces and the federal government could have the capacity to produce together, because we have such a lack of knowledge on the interaction of the surface waters and the groundwaters of the Great Lakes, and given climate change predictions and scenarios. We especially don't know how little is too little to cause cascades, deaths of species, loss of biodiversity, and the other huge impacts we are seeing in some of our lakes.

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**Mr. Derek Stack:** I don't think anyone would argue against the pursuit of knowledge, but both the Nature Conservancy and the Geological Survey commented in their interventions in the last couple of days in Chicago that, yes, we need more information, but we clearly have enough information to know that the threat is real and that the threat is today.

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**The Chair:** Mr. Wilfert, we have three minutes left in that line of questioning. If the committee is okay with that, we can just finish on that side with you.

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**Hon. Bryon Wilfert (Richmond Hill, Lib.):** Mr. Chairman, first of all to Mr. Watson, if I might, I have taken his question under advisement and I have indicated to the department that I think it is probably not going to change, but we want to make sure. Obviously, it's one of the issues we would raise with President Bush when he is in Ottawa. It's a valid point, and we will endeavour to get the answer.

Mr. Chairman, in my view, there's no question that the draft annex procedures in the compact will not adequately protect the waters of the ecosystems of the Great Lakes and the St. Lawrence. On these proposals, from what I've heard from witnesses, they would compromise the role of the IJC and the provisions of the Boundary Waters Treaty.

I would like to make abundantly clear again, to those witnesses who may have missed this, the resolve of the Government of Canada and the resolve of the Minister of the Environment. We are absolutely

opposed to any bulk water exports, period. You can check *Hansard* of a few weeks ago if you missed that. We also oppose diversions.

Let's make it very clear that the issue of the Great Lakes and the protection of the ecosystem of the Great Lakes is very high on this list of this particular minister and of the government. Let's also make it very clear that we're not interested in politics, we're interested in science. Decisions must be made based on science.

I think the State Department's response was very clear, as was that of the Attorney General of Michigan. There is concern that opening up direct discussions, with Canada versus the United States, would open up the whole issue of water across the United States.

What I have not heard effectively from anyone this morning—and I apologize if in fact you said it and I didn't hear it—is how the Government of Canada can best engage in this process, in the most effective way. For example, we know Ontario and Quebec will be engaging the government between now and the discussions in January 2005. What I want to know from you is what you think the most effective way is.

Obviously we are going to be making, again, a very clear statement on this issue. But we are not directly in these discussions. So, Mr. Chairman, the question is very simple: how best to engage.

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**The Chair:** Thank you.

Ms. Miller, would you like to start off? And then we'll hear from Ms. May—and if you could, do it within a couple of minutes now, please.

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**Mrs. Sarah Miller:** I'll try.

We have very particular federal–provincial work underway in the Great Lakes, but it's always very related to existing agreements, like the Great Lakes Water Quality Agreement and the Canada–Ontario agreement that comes out of that for furthering it. What we don't have is an ongoing working relationship between the provinces and the federal government, looking at all-encompassing issues in a way that I think is helpful.

We have so much on our plate now. We have invasive species. We have climate change coming. Certainly when our own federal water policy was conceived, climate change was really not widely accepted. And we keep being told that policy is going to be updated. We need some real working groups, and we came to Ottawa a couple of weeks ago to try to further that.

In the U.S. Congress, there are working groups with the states and the congressional representatives in Congress who work regularly on Great Lakes issues, and not in just a reactive way, but in a proactive and visionary way. I think it's time we set up these systems in Canada.

Ⓜ ↓ ↑ (1025)

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**The Chair:** I think I'm going to have to jump in at this point.

Mr. Comartin may want to follow up on that same line of questioning. You may want to integrate your responses, and maybe not.

Mr. Comartin.

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**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Why don't we let Ms. May just take a minute or two to respond, and then I'll go into the other points I want to raise.

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**The Chair:** That's very generous. Thank you, Mr. Comartin.

Ms. May.

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**Ms. Elizabeth May:** That is very kind of Mr. Comartin.

I don't want to cut into your questioning time. I would just address the honourable parliamentary secretary and make it clear, on the record, that we are well aware of Canada's commitment against bulk water exports, against diversions. We appreciate it. We appreciate the leadership of the Premier of Ontario on this issue. We appreciate what's being said by Canadian authorities to protect the Great Lakes.

Our concern is that what's being drafted undermines that. Again, our brief speaks directly to the role of the federal government in raising the issue bilaterally with the United States by ensuring that nothing in this annex agreement undermines the IJC and the Boundary Waters Treaty. But frankly, the threat lies south of the border, and we need to be very vigilant. The legal tools we now have are probably not adequate in the long term, but we shouldn't rush to an agreement that actually undermines the tools we now have.

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**The Chair:** Thank you very much.

Mr. Comartin, it's back to you.

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**Mr. Joe Comartin:** Thank you, Mr. Chair.

Thank you all for coming today. I'm sorry I had to step out, but I had to go to the House for a minute.

Mr. Stack and Ms. Miller, you've had the most intimate contact with the process of anybody we've

had come before us in the last few weeks. In terms of the recommendations you've made, in particular the first four or five, and maybe six, I wonder if you could give us some sense of what the response will be from the Great Lakes governors in the Great Lakes states to the proposals you're making. In terms of those comments, given that these protections—which I would agree with you are very important and would buttress and strengthen the annex very significantly—are not in the annex now and we have not seen these types of protections up to this point, what are the chances of our getting them from the Great Lakes states?

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**Mrs. Sarah Miller:** That's very hard to predict. It's been a very hard slog around that table. We're certainly not prepared to support agreements that don't include the kinds of level playing fields we have been struggling for between the provinces and the states.

One of our big concerns is that the language isn't a compact and the regional agreement is not consistent. In fact, the regional agreement contains all the environmental protections, but one little understood point is that in the implementation manuals there are actual, day-to-day practices that are going to have to change in the provinces and states to try to enshrine better, ongoing data collection to establish a baseline to establish conservation. It's very unclear. There's still a lot of greed around the table. Every single region still wants to prosper, to be able to attract industry.

On conservation, they've received 10,000 responses from the public. Overwhelmingly, the public has wanted conservation strengthened. Even in Wisconsin, where there's the demand from Waukesha for water, they had the strongest turnout in favour of conservation. I think the politicians are lagging behind the public in this regard. Whether or not the politicians will be willing.... We have minority legislatures in most of the states right now, we had an election in the middle of this process, and we're having a hard time getting legislation through. Michigan has legislation going through the House that would mean it would actually be, for the very first time, trying to generate water data. That legislation is being opposed.

So I couldn't really say, because every time we've seen a draft, it has been radically different from the next draft. There's still a lot of contention. There are strong states and there are weak states. There are states that have hardly participated. As you know from looking at a map of the region, there are states that have very little.... Pennsylvania has participated quite strongly, but it has 18 miles of shoreline. Indiana has hardly been involved. So it's very hard to predict.

🕒 ↓ ↑ (1030)

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**Mr. Derek Stack:** We could say fairly, though, that with the relative attention now being paid in Canada, particularly with respect to diversions, it has been repeated over and over again in two days. Some of the issues that are clearly more issues here than they are south of the border are now...I won't say front and foremost, but they're certainly ranking higher than they were on their list of things they need to do if these deals are going to pass. That was the framework for one of the data. What do we need to do to these deals so that they have a hope of surviving?

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**Mr. Joe Comartin:** Mr. Shrybman, do you have any comments on the proposals from Ms. May about the two structures here: one, that the IJC and the federal governments would be responsible, particularly around bulk export and diversion; and other issues like consumptive use, conservation, and other issues like those that would lie more with the states than the provinces? I would say this is the first I've heard of this.

Ms. May, I'm going to ask you for some elucidation, but Mr. Shrybman, do you have any comments, from a legal perspective and a constitutional and international law perspective, about whether that could function?

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**Mr. Steven Shrybman:** I can't give you a thoughtful opinion about it, but it seems to accord with my understanding of the jurisdictional line between the federal and provincial governments with respect to water—but by responding to you, I might also respond to the honourable parliamentary secretary's question.

We know the framework of trade law is corrosive of public policy and law related to conservation and environmental goals. We know the Boundary Waters Treaty is inadequate and incomplete. The answer to his question is that—and Elizabeth May offered it as well—there need to be some bilateral discussions with the United States. Is it going to be easy? No. Are we going to get anywhere by simply putting it off? No.

Hiding our heads in the sand and pretending as if some initiative by the states and the provinces can address either of those problems is just way off base. The solutions lie in bilateral negotiations, and I reject this glib political calculus that somehow, in the United States, the interests of water-thirsty states would prevail. I frankly don't know how the political pie would be cut on an issue like that.

There are some blue states out there as well. There are some red states in the basin. We certainly have allies in the Great Lakes Basin who don't want to see massive diversions to the southwest. You'd have to prove to me the notion that somehow Congress is going to favour that brief. I'm not willing to accept it, though I know it's a glib assessment of how things would play out.

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**Mr. Joe Comartin:** It's an urban myth rather than reality.

Ms. May, with regard to the splitting of jurisdictions—

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**Ms. Elizabeth May:** On most of what I've presented, I've been quite candid with committee members—and I realize the brief wasn't circulated in advance, for which I apologize; I have copies with me, but

[*Translation*]

it's not available in both official languages. It's my fault.



[English]

In our brief, most of what I've presented to you is the result of works of our two chapters in Ontario and Quebec, as well as national committee volunteers and members on our water privatization committee and concerned people throughout our organization. But this idea is mine alone.

I started by trying to come before your committee while thinking about what would be a useful way to proceed. A lot of people have worked very hard on the documents before us. Personally, I think they're dangerous, but there are elements in them that represent progress, particularly around consumption and consumptive uses. Those are legitimately areas the states and the provinces should be working on more, but the issue of diversions is really one, both under constitutional law in Canada and constitutional law in the United States, that is best dealt with.... If you want to shut that barn door and lock it down, you're better to do it at the federal level, where you state clearly and unequivocally....

We already have the Boundary Waters Treaty. Let me make it really clear that we don't want to reopen any negotiations around the 1909 Boundary Waters Treaty. We got that one, so let's hang on to it. But look to both jurisdictions to say we have a commitment. Both national governments claim they are four-square against diversions and bulk water exports. Fine. The weaknesses in the domestic legislative schemes appear to be on the U.S. side of the border, not the Canadian side of the border, so what do we do in Canada to make U.S. rhetoric match U.S. reality? I don't think it's these agreements.

By separating them out, I thought we could move ahead with the ones that weren't problematic and make sure we don't undermine the IJC, the Boundary Waters Treaty, and U.S. domestic law, to the extent that they have a good law in the Water Resources Development Act of 1986. That would best be done at the federal level.

🕒 ⏴ ⏵ (1035)

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**Mr. Joe Comartin:** Do I still have time?

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**The Chair:** You have one minute.

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**Mr. Joe Comartin:** I bet this is going to be impossible.

Mr. Shrybman, again, can you give us a quick scenario of what it would be like if a private investor came forward and made a claim? Is it possible to answer that in 45 seconds?

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**Mr. Steven Shrybman:** It would be a foreign investor in the United States. In this case, under NAFTA, it would file the complaint that somehow the regime discriminated against its interests, in the same way some investors have now filed against Mexico. That would go to an international arbitral tribunal that would decide all of the issues we've been debating, not the Parliament of Canada, not the

Congress in the United States, nor the executive there. The tribunal would decide whether the regime engaged water as a resource and created proprietary interests that then could be subject to trade.

The problem with the regime is that it leaves the decision with international tribunals. They operate behind closed doors. They have commercial mandates. There may be no judicial review if the place of arbitration is outside Canada, so Canadian courts would not have any role to play before, during, or after the dispute was resolved. That's the problem.

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**Mr. Joe Comartin:** I think we all recognize it's limited—and they recognize it, too—but would the criteria put out so far by the IJC be taken into account in that scenario?

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**Mr. Steven Shrybman:** It would certainly be brought to the attention of the tribunal. How the tribunal would take it into account, we don't know.

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**Mr. Joe Comartin:** Thank you, Mr. Chair.

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**The Chair:** Thank you, Mr. Comartin.

I'll go now in five-minute opportunities, beginning with Mr. McGuinty, and then Mr. Jean.

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**Mr. David McGuinty (Ottawa South, Lib.):** Thank you, Mr. Chair.

Thanks very much, folks, for showing up. I really appreciate the presentations and the debate. It's good to see many of you again.

When Raymond Chrétien, the Canadian ambassador to the United States, gave an exit speech at the end of his term in Washington, Mr. Chairman, one of the things he said was that his greatest surprise was the extent of his time dedicated to environmental issues. He said he spent over 40% of his time dealing with continental environmental issues—not necessarily just bilateral ones, but continental ones—and that these issues were not going to go away and probably had the longest shelf life of all.

I want to pick up on what the parliamentary secretary was saying. I think we've touched around it a little bit. I am a strong proponent of re-examining the overall system in place, Mr. Shrybman, as you keep suggesting, including the public law regime that governs this and the questions around whether or not the WTO is in fact corrosive. I think there are probably competing opinions with respect to that question.

Is it time for a continental initiative? President Bush is joining us in several weeks. Is it time for us to

stop the fiction around the fact that we live on the same continent, that we trade increasingly in the same continent? The last time I looked, our oceans were contiguous. We're going to have to deal with our oceans management strategy, for example, in a contiguous fashion with American and Mexican ocean policy. Concepts like conservation and the precautionary principle weren't even devised in 1907 and 1908, the time when that first treaty was being negotiated.

Question number one: Is there any evidence, south of the border and in Mexico, that a continental initiative of this kind would be well received?

Question number two to the panel: None of you have mentioned the economics of water. None of you have mentioned the expanded use of economic instruments to achieve environmental improvement. That's something we have, I think, not been overly aggressive in pursuing in Canada. Mind you, I like real baselines, I don't like fictitious ones. I'm looking for nation-states that have found better use of economic instruments.

Can you comment on, for example, the fact that the Province of Ontario is now seriously examining the question of water pricing and abstraction licensing? What impact would a rethinking of the economics around this issue have on the sustainable development of our water resources?

⌵ ⌶ (1040)

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**The Chair:** Ms. Ehrhardt, you were trying to catch my eye. Would you like to start there, and then we'll come down through the other side of the panel?

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**Ms. Sara Ehrhardt:** I'll just say my membership is very concerned about the way in which continental integration takes place. While we do understand that there are ways in which all of these jurisdictions have to work together, we want to make sure Canada and Canadians continue to have a sovereign voice on anything that takes place and that civil society continues to push our government to be the leaders we want them to be in environmental matters.

I also want to touch base on the economic use of water. That was brought up in the 1987 federal water policy, which, as I mentioned, has not been reviewed, has not been updated. That's something we've been pushing for, for quite some time.

At the Council of Canadians, we do have concerns around the use of economic instruments. We do want to hold commercial water takers to task. At the same time, we don't want to commodify water. We want to target those with swimming pools, we want to target water bottlers; we don't want to target the Canadian poor. I would just register that caution, but say we do think a comprehensive review of water policy across Canada is needed.

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**The Chair:** Ms. May.

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**Ms. Elizabeth May:** Thank you, Mr. McGuinty.

I would say I'm also very grateful, because the Canadian embassy in Washington just mentioned one of those environmental issues on their file and to which they're going to have to pay a lot more attention, and that's protecting the Arctic National Wildlife Refuge. I bet that was a big chunk of Ambassador Chrétien's time.

In terms of continental policy, yes, it would be an ideal time to do a ten-year review mark of NAFTA. There's an effort by civil society to draw the attention of a different parliamentary committee to the idea of reviewing where we are. Where have we seen positive results, and where have we seen negative results? Let's really try to get an assessment.

From an environmental point of view, I would flag the North American Commission for Environmental Cooperation, which has done some very useful things despite being a toothless organization subject to three environment ministers from three jurisdictions who can stop them at any time. I'm concerned about their current trend, whether they'll be protected, whether they'll continue to be independent, but some continental environmental monitoring is certainly appropriate.

While I share Ms. Ehrhardt's concerns about integration, I just want to speak briefly. We've talked about the federal water policy of 1987 and how it needs to be updated because it's so very old. I was in the Minister of the Environment's office at the time. I helped work on it and Mr. Pentland worked on it very closely. As I recall, it was very progressive. It talks about water pricing. It talks about the need to value the resource. It uses much the same arguments as we would use around energy use, if you're not paying the real cost. That's not to say you privatize it, that's not to say you commodify it, but just as with energy issues, we are not paying the real price for our water at the tap, yet we seem to be willing to spend more money than we spend on gasoline per litre to buy bottled water of unknown purity, placed in plastic bottles that leak endocrine-disrupting plastic substances. The way we treat water in this country boggles my mind.

That's separate from this annex agreement, but I do think it's worth looking at. We would favour the use of economic instruments.

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**The Chair:** Thank you.

Ms. May, I'm going to have to just clip it there and go to Mr. Jean. Perhaps we can come back to some of these themes.

Mr. Jean.

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**Mr. Brian Jean (Fort McMurray—Athabasca, CPC):** Thank you, Mr. Chairman.

Thank you, guests, for speaking today.

I would like to start by just indicating to Ms. May that she might want to rethink her political position on using right and left, because it usually changes whenever you turn your back. Instead, I would

suggest using colours. If you know your primary colours, there are only four, one of which is blue, and you can't get green without blue. I just wanted to establish that.

Finally, at the risk of astonishing my colleagues, I think we met once at a Sierra Club meeting in Calgary. As well, I'm a member from Fort McMurray.

I have some comments, and I also have three questions. I only have five minutes, so I'd like to spill them out quickly.

I agree with some comments made in relation to the issue of a commodity and water. I am a solicitor by trade and have studied international and environmental law in both Australia and the U.S., and to be honest, it frightens me greatly. I do not believe the status quo will stay, and I think the U.S. will be seeking more and more to establish water as a commodity, even in its natural state.

I would also like to point out that I don't believe we're going to be in bilateral issues with the U.S. Instead, it will be more of a trilateral situation with Mexico, with NAFTA, and I think that is another issue that needs to be addressed, as the rest do.

My final comment before my questions is to ask the members here and the guests who have come to rethink the issue of the federal governments, especially in the U.S., getting involved and being the be-all and end-all for any additional treaties that they would obviously have to be involved with. I would rather see Ontario, Quebec, and the interested states being the controlling mechanism for future annexing of water, simply because the federal government in the U.S. has to deal with the benefit of all states. That is again frightening because of the situation. Especially with migration of employees coming out of the States and in Canada and going to the rest of the provinces, I believe that again will be a federal jurisdiction issue in the future. We'll have to look at all the states and all the provinces, and I think that will be to the detriment of the provinces and states directly hit.

First, I'm going to ask all the questions. On inventory, I would like to have some more specifics in relation to why you would like to see an inventory. I know levels have gone up and down dramatically or significantly since the thirties. What benefit would there be to establishing those inventories?

Second, negative flow is happening in some areas because of diversions. What can be done about that at the current stage?

And third, on the withdrawals you have suggested in your case, Ms. May, do you believe that's actually enough to stop the flow and protect the Great Lakes?

   (1045)

**Ms. Elizabeth May:** Thank you, and it's good to see you again. I hope you'll take out a new Sierra Club membership.

I'll try to address your questions in order.

Because the Great Lakes Charter of 1986 required this inventory, I think we would be, without doubt, in better shape now in answering some very specific questions about the state of the lakes. The

Boundary Waters Treaty speaks to level and flow. Of course, in a water body this enormous, as you've heard, it's very difficult to figure out what any one impact is on that level and flow. One of the things that would aid us in this is a better inventory. As you've heard from Ms. Miller, the numbers and the data that come in are not in the form of a usable inventory and are not comparable between jurisdictions. Better information is needed, without doubt. Given that this is an existing obligation, we'd like to see it fulfilled.

In terms of existing and future impacts on water, this is part of our written brief that I didn't get a chance to speak to. Let me just stress that the Sierra Club of Canada is far more concerned with the impacts of climate change on the Great Lakes than any commercial scheme to take water. The impacts of climate change on the Great Lakes are likely to be enormous and very significant, and to affect users throughout the basin. That makes it all the more problematic to be looking at a scheme for allowing diversions of water in a way that does not take into account, at this point, the precautionary principle and the need to be aware of climate change impacts.

As we look into the future, the Great Lakes system will very likely be under severe stress, based on the modelling for climate change impacts. Where we're seeing reduced flow in certain of the major rivers within the basin, that's being tied to increased evaporation due to warmer temperatures in winter months. So it's a complex picture of what will happen to the Great Lakes 10, 20, 30, or 150 years from now. Since they are one of the great water bodies of the planet, we need to be very cautious in embracing any arrangement that would actually add to the stresses on the lakes. I'm not confident anything in the current set of agreements will protect us from diversions.

I agree with your point that the states near the Great Lakes and the provinces near the Great Lakes are the ones most interested in protecting that body of water. The reason I point to the federal government in the United States and the federal government of Canada is that this is the level of government most able to deal with it.

Let me back up. The reason this agreement is so very complex is that they're trying to create a scheme that will withstand a still hypothetical challenge based on the commerce clause of the U.S. Constitution. I think there are simpler ways to prevent the U.S. Constitution's commerce clause from being applied, by getting a statement at the federal level that could be used in a future court case rather than creating this enormously complex review scheme, regional engagement, all for the purpose of making sure the Water Resources Development Act of 1986 in the United States can hold up.

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**The Chair:** Thank you.

Ms. Ratansi, and then Mr. Simard.

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**Ms. Yasmin Ratansi (Don Valley East, Lib.):** Perhaps you have answered these questions. I thank you for coming here. It's a very complex issue, and I'm looking at all different papers.

If I look at the Boundary Waters Treaty, and then the compact and the two agreements—and I'm

looking at you because you're the lawyer here on the panel—I understand that the Boundary Waters Treaty is the overarching agreement and that no other agreements can violate it. Am I naive in my understanding? That's number one.

Number two, does the draft agreement between the governors and the provinces undermine the powers of the IJC?

Number three, Bill C-6, which was an amendment to the International Boundary Waters Treaty Act on May 24, 2001, was a very strong bill in terms of prohibition provisions, etc. How does it impact the whole discussion that is taking place?

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**Mr. Steven Shrybman:** Let me try to answer those three quickly.

As a matter of international law, the most recent agreement prevails. To the degree that NAFTA or the WTO agreements impact water and there's a conflict between those requirements and the requirements of the Boundary Waters Treaty, as a matter of law the agreement latest in time would prevail, so we have a problem in terms of a conflict between trade law and the treaty. That's point one.

Point two is that the compact and an agreement between the governors, or between the governors and the premiers, cannot impact the framework of international law. In fact, that law can't be impacted by anything that Congress or Parliament does either, other than to renegotiate those international agreements.

Point three is that as a matter of practice rather than law, Canada raised a serious concern about the annex. Its concern was that the role of the IJC was being marginalized by creating an independent parallel regime that didn't seem to have any regard to the IJC playing a role.

The linchpin in all of that may be this whole notion of flows on the other side of the boundary. We've heard environmentalists say they're hard to measure. In some cases, if there's a big enough diversion, as at Chicago and this one into Lake Superior, yes, you can, but often you won't be able to.

What approach did the Parliament of Canada take in passing Bill C-6 to strengthen the Boundary Waters Treaty? It said any diversion of water will be deemed to affect the flow on the other side of the boundary, making it very clear that, in Canada's view, that required review by the IJC. In other words, not only did Canada ban exports, it deferred to the authority of the IJC and declared itself on what impact diversions would have. None of that exists in the compact. That's one of the reasons for concern.

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**Ms. Yasmin Ratansi:** Thank you, Mr. Chair.

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**The Chair:** We will go to Mr. Simard.

[*Translation*]



**Mr. Christian Simard:** Thank you, Mr. Chairman.

The last point you raised on the predominance of the international agreements is very interesting. It is quite obvious that the agreement between the states and provinces cannot be considered a trade agreement. Consequently, it is a parallel agreement. Now, it remains that in this 2001 agreement project, there is nonetheless a reference to the Boundary Waters Treaty. What does not help us in the debate is that we do not have a clear position of the International Joint Commission. Their representatives have come here. How does the International Joint Commission react? We can read between the lines that there are very difficult debates between their legal advisors, and maybe two confronting positions.


In reality, the International Joint Commission has failed anyway. The Chicago diversion is something that actually happened despite an existing international agreement and structure. I sometimes believe that this international agreement is a false protection, a theoretical legal protection. This agreement was negotiated with a country that is much larger than ours, as many other agreements, and this other country always gets what it wants.

I still did not get an answer to my question.

How can we improve the 2001 agreement to ensure there is some balance between the signatory provinces and states? I have the feeling that reality will prevail, and no matter what legislation the federal government may introduce on this side of the Great Lakes, if the same legislation is not introduced on the other side, there will be no improvement to the treaty. It takes two to work out a treaty.

How can we ensure that, by improving these projects, the system will be protected? The true victims in all this are the Ontario lakes and the St. Lawrence. You know that in our region, an enormous lake could be lost, Lake Saint-Pierre, which is an extraordinary biological production plant for both the St. Lawrence itself and the Gulf of St. Lawrence. Lakes Erie and Huron are also seriously threatened. This is my concern.

Ms. Miller is also associated with the process. How, as part of a compact in the United States, can we have a certain veto or right of intervention.

   (1055)

[English]



**Mrs. Sarah Miller:** Your point on the Chicago diversion is well taken. Ontario's minister of natural resources, when he announced the release of the draft annex, strongly outlined his concern that probably the most logical place we're going to be seeing further diversions from the Great Lakes Basin will be in increases at Chicago. Right now, the Chicago diversion is set out by a U.S. Supreme Court decree. It's unlikely that Canada would get standing in the U.S. Supreme Court, but the Ontario government has been trying to argue at the table that any further and new increases of that diversion should be subject to this annex. That is a very, very important point because they certainly diverge on the U.S. side.



We don't have very good luck in courts on water. As you know, the recent Manitoba-North Dakota decision went against Manitoba, even though we did get standing in the courts.

These are very serious issues. As you pointed out, Quebec and Ontario are at the receiving end of the system, and most of the impacts are going to be hugely exaggerated for us as we lose more and more water in the system. That's why, if we come up with an annex we feel we can live with, I would really like to see both Quebec and Ontario adopt it in their own legislation so it is binding. The states are only binding themselves to each other in the compact, but we're binding ourselves to our own domestic legislation so there is that enduring strength. But I wouldn't recommend it with the current drafts, unless they're changed.

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**The Chair:** Ms. May.

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**Ms. Elizabeth May:** Thank you for your question, Mr. Simard, because I also wanted to mention that in our written brief we specifically raise the threat to the Great Lakes ecosystem from possible increases at the Chicago diversion, because it can take place without significant new works being established. We've heard that there may be a request already on the table from Illinois to do just that, and that jurisdictions on the U.S. side of the border are keeping this one quiet until they get through the discussion of this annex.

We've also heard that at least some reviewers have interpreted the agreements in the Great Lakes Charter annex as exempting increases to the Chicago diversion from most of the provisions of the agreement. So I think it needs to be clarified that any agreement going forward—this, a more robust version of this, or any negotiations—need to be very clear that all increases to existing diversions must be treated the same as any new diversions.

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**The Chair:** Okay, thank you very much.

Members of the committee, we've reached the point where we have to bring this to a close.

On behalf of the committee, I would like to thank you. By the depth and the deliberative nature of the questioning, I think you can see the committee takes this issue very seriously. We will be working toward a report that we will be putting back to the House, and the input that you've made this morning will be very helpful as we do the right thing with respect to this issue. So thank you very much for being before the committee.

① ↑ (1100)

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**Ms. Elizabeth May:** Thank you, Mr. Chairman.



**The Chair:** Members of the committee, we'll adjourn. Thank you very much for your attention.

NOVEMBER 23, 2004

BRIEFING: MR. TIM WILLIAMS  
COMMITTEE RESEARCHER

EVIDENCE

**Tuesday, November 23, 2004**

*[Recorded by Electronic Apparatus]*

⌚ ↓ (0905)

*[English]*

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**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):** Good morning.

⌚ ↓ ↑ (0910)

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**Hon. Denis Paradis (Brome—Missisquoi, Lib.):** Good morning.

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**The Chair:** Bonjour, monsieur.

Members of the committee, the steering committee met this morning and we dealt with a few issues. I will leave those until the end of the meeting today to bring members up to date on what we discussed. We do have on the agenda the Great Lakes Charter Annex 2001 implementing agreements.

What we will be doing is pro forma to the steering committee's direction. Since members just received this last night, we apologize for that. It was in translation, and we do understand that a document of this nature, obviously, should be with the committee days before. This did not happen, but the procedure we're going to follow is that we will be briefed by our researcher with respect to his take on what the witnesses said and so on, and we'll get into a dialogue with our research on that. Then we will have a more in-depth discussion on Thursday on the Great Lakes Charter Annex 2001.

That's the agenda for today.

We also have the first report from the steering committee. Perhaps I could have a motion, Mr. Bigras, with respect to the steering committee report, the first report. I think we only need a motion to adopt the report.

**A voice:** I so move.

**The Chair:** Thank you.

(Motion agreed to)

**The Chair:** I would like to start by having our researcher provide an overview of the charter annex

agreement, and then we can question our research.

Prior to doing that, I would like to introduce to members an old friend of mine who was an alderman in the city of Toronto for over 25 years. He is also a specialist in energy and water. Tony O'Donohue, welcome to Ottawa. It's nice to have you here. Tony is also writing his second book, so I have to be very good to him and make sure he deals with me fairly in whatever chapter I may be in.

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**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Could we make some input into his comments about you?

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**Mr. Bob Mills (Red Deer, CPC):** We can talk to him after.

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**The Chair:** You can have some input, but do it clandestinely.

Anyway, welcome, Tony.

Tim, would you give us an overview? Then we'll enter into a discussion or dialogue on this.

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**Mr. Tim Williams (Committee Researcher):** Sure. You have before you the first draft of the report regarding Annex 2001 to the Great Lakes Charter. In the way I wrote it, as you see from the table of contents, it's basically in three sections.

The first is essentially a background on how management of the lakes, particularly in a bilateral sense between the United States and Canada, is currently occurring. There's a discussion about the Boundary Waters Treaty. I introduced the Great Lakes Water Quality Agreement—very briefly, because it's discussed afterwards in terms of water quality. I also specifically talk about bulk water removals management in Canada and in the United States before moving on to a section—relatively brief, given the complexity of the implementing agreements—on the actual annex itself.

Throughout this discussion what I've tried to do is distinguish between the important conclusions the committee heard from witnesses.... In those cases I've just highlighted them in the text. I want to distinguish between those important overall conclusions and actual recommendations, because the recommendations are made strictly to the federal government.

In the second part I moved into the Government of Canada's response. As we heard from witnesses, the Government of Canada responded to the formation of Annex 2001 after it was first released back in December 2001. They responded relatively quickly, in February of 2002, to Annex 2001. We heard also that they are creating a response as we speak for release to the council of governors very soon, as far as we know--they said, I think, at the end of November.

The second part concerns the basic response of the federal government. The three recommendations I

have made there are worded “that the federal government should include x” in their response. I'll get to the conclusions later; I'm just talking about how I've treated these things.

There are only three recommendations that I actually put into the draft regarding the content of the federal government's response to the Council of Great Lakes Governors. As I said, I've also highlighted portions of the text where the committee has heard some pretty forceful testimony with respect to the substance of the actual annex, because of course we can't really start getting into what the governors should do and what the provinces should do. The recommendations are strictly directed at the federal government.

The third part is a further response, away from Canada's response to the council of governors—the actual letter they're preparing now. The testimony included a fair number of recommendations regarding what else the federal government could do to try to protect the ecological integrity of the lakes and manage the lakes.

I'm not sure whether you want to go straight to the recommendations and look at them. They're fairly short; there are only five of them that I put into the draft. Or I can go through the sections one by one that include those recommendations.

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**The Chair:** Is there any preference on that? Maybe it would be better to clump the recommendation with the content. I think that would be the best idea.

There seems to be agreement on that.

⌚ ↓ ↑ (0915)

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**Mr. Tim Williams:** That's no problem.

In the introduction, on page 1, I set the tone a little bit with a quote from the Right Honourable Herb Gray, who was in front of the committee. The tone is one of caution. We heard, I think, that the process isn't exactly going to be finished overnight, so the suggestion is to take the time to get it right. The introduction is fairly self-explanatory, just saying that the Great Lakes are a precious resource and we really have to manage them properly.

“The Issue” is the second section, on page 3 in the English version. Basically I have outlined the issue. We heard in testimony that there's growing demand for withdrawals from outside the Great Lakes Basin, largely because of the topography of the land. Particularly along the west coast of Lake Michigan, the basin ends within 10 kilometres of the lakeshore. If you start withdrawing water to suburbs of large metropolises, that water ends up out of the basin. That, I think, is one of the things that is going to be driving demand for withdrawals from the basin.

As to management, because of this growing demand and because of potential climate change, management of the Great Lakes water basin is certainly going to become more difficult.

Then I started, just as a backgrounder, explaining what the Boundary Waters Treaty is, with a brief

outline of some of the relevant articles of the treaty, such as article 3, which is the one that outlines the establishment of the International Joint Commission and the fact that obstructions and diversions that are going to affect the natural flow and levels of boundary waters on either side of the line should be done with the approval of the IJC.

Article 8 basically refers to article 3, but another important part we heard in the testimony, I think, was that the Boundary Waters Treaty basically gives both sides of the border equal access to the use of boundary waters.

Article 9 I refer to because this is the one that gives the right to either of the parties to make a referral to the IJC. I stressed “either” because I think, as we heard in testimony, it is actually either Canada or the United States that can make referrals to the IJC on differences between the two countries. It's just never happened. I emphasized that we actually do have the right to do it; either side has the right to do it unilaterally.

In paragraph 16 I make a reference to article 10. When you make a referral to the IJC under article 9, their recommendations are not binding, but under article 10 they are in fact binding. It's just that, once again, this one has never been used, because to make a reference under article 10 you have to have approval of the United States Senate and the Canadian cabinet.

Then I outline some of the positive aspects of the Boundary Waters Treaty—the fact that Canada has equal access and has equal membership on the IJC despite the fact that we have a much lower population.

As to weaknesses, I point out that the way boundary waters are defined under the Boundary Waters Treaty they do not include groundwater or tributary waters. In addition, it's old. It was done in 1909, and environmental concerns just weren't on the top of people's minds at that particular time, so the treaty does not explicitly mention them.

   (0920)

In the next section I describe very briefly the Great Lakes Water Quality Agreement. The only reason I did that is because we heard some reasonably strong testimony that is referred to later on about making sure water that is returned to the lakes from withdrawals meets Great Lakes water quality guidelines. That's why I put in a couple of brief paragraphs about what the Great Lakes Water Quality Agreement is. It also involves the IJC. The IJC works quite heavily now with respect to that agreement.

In the next section I outline what the Canadian and U.S. governments have done—as far as what we heard in testimony goes, I'm not an expert in U.S. government policy by any means—about bulk water removals and diversions, particularly after 1998 and the NOVA Group application to the Government of Ontario.

Canada basically had a three-pronged approach. They wanted to make a joint referral to the IJC with the United States on water uses; make changes, amendments, to the International Boundary Waters Treaty Act; and they also attempted to get provincial and federal cooperation through an accord on bulk water. The first two basically have been accomplished. The IJC released its report in February 2000, and the recommendations from that report I attached as an appendix because I think they're important and certainly set the tone for minimum criteria for boundary water use.

I described some of the changes to the International Boundary Waters Treaty Act—basically removals

of boundary water in bulk, what it means, and the fact that they've been highly controlled at the federal and provincial levels, but I'm just talking about the International Boundary Waters Treaty Act here. I also noted a part of the International Boundary Waters Treaty Act that describes the basic premise behind why the Canadian government made the changes they did. They made the changes based on the statement on page 10 in the English version:

... removing water from boundary waters and taking it outside the water basin in which the boundary waters are located is deemed, given the cumulative effect of removals of boundary waters outside their water basins, to affect the natural level or flow of the boundary waters on the other side of the international boundary.

That is a direct reference to article 3 of the International Boundary Waters Treaty. It shows how the Government of Canada is interpreting the International Boundary Waters Treaty, particularly that because of the potential for cumulative effects, all removals were deemed to have an effect on levels and flows.

Then I mentioned the accord. Briefly, not all provinces signed on to the accord. In Ontario and Quebec, legislation has already been passed to ban water removal from the basin, or from the territories of Quebec in the case of the legislation from Quebec.

In the United States the main piece of legislation they have is the Water Resources Development Act, and I've cited a couple of the sections relevant to this study. I've once again put into italics parts of it that I thought were particularly relevant. In section 3, for instance:

... any new diversions of Great Lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lake states and Canadian provinces;

That's almost in a preamble section of their act.

The section that is particularly important in the actual operative sections is part two. This is on page 12 of the English version, which I've highlighted. Part two is what has asked the Great Lake states, in cooperation with Ontario and Quebec, to come up with these agreements that we're actually discussing right now. It's also fairly important to note that they suggest—it says “encourage”—“a common conservation standard embodying the principles of water conservation and resource improvement”.

A lot of the testimony we heard, and I talk about it a bit later, is on this problem with respect to resource improvement versus ecological integrity. In my interpretation of this, the Great Lakes states were pretty much instructed to use resource improvement as a standard.

Ⓜ ⌵ ⌶ (0925)

Part 3 of this is also very important because this is kind of the status quo of bulk water removals out of the basin in the United States, and that is that as it stands, it requires unanimous approval from all eight Great Lakes state governors to approve water removals.

Then I discuss some relatively complex legal arguments as to whether or not the status quo in the United States is... it sounds like it holds water, as it were. It sounds like there is basically a veto power there—and there is a veto power. But the Canadian Environmental Law Association in particular suggested that some people...at least, there are some legal opinions that the Water Resources Development Act wouldn't stand up to something called the dormant commerce clause within the United States Constitution. And it starts getting pretty complicated. I didn't really get into it in a lot of detail.



Basically, there are questions about this dormant commerce clause and its effect on water removals. There are different legal opinions with respect to it. But it's one of the main reasons, for instance, that the Canadian Environmental Law Association is in favour of the annex implementing agreements—not as they stand, but as they would like to see them changed. It's because they feel this act will not hold water against the Constitution of the United States. That's why I got into this dormant commerce clause a bit, but not a lot.

In the next section, on page 14, I get into the background of the actual annex itself, what the Great Lakes Charter is, and then quite quickly into the implementing agreements, because that's what the report is really about. So on page 14 I just describe quite briefly at the bottom the two agreements: the Great Lakes Basin Sustainable Water Resources Agreement, which is the non-binding international one that includes Ontario and Quebec; and the Great Lakes Basin Water Resource Compact, which is strictly among the governors of the Great Lakes states, although under certain circumstances the provinces would have to be consulted.

Turning to paragraph 33, basically at the core of what we're talking about is this set of standards that proposals for water diversions and new and increased consumption have to meet before getting a permit under these agreements.

The other thing that's kind of important to mention in this particular section—and maybe I didn't make it quite explicit enough—is that we heard testimony, at least from Foreign Affairs Canada, and I think from the people who were around the table, the Canadian Environmental Law Association and Great Lakes United, that these agreements were released under a little bit of pressure because they were coming up to a three-year deadline. So they do seem to be fairly rough. There's a lot of room for change, which I mention right at the beginning of the conclusion, I think. That's how I start the conclusion.

But paragraph 33 outlines the basic parts of the standards, that permits would have to meet these criteria before being permitted.

Paragraphs 34 and 35 basically still describe these implementing agreements. They're very complicated, as you probably all have already recognized. Not only is there a set of standards, but there's also a set of exclusions to the standards, in particular, large reviews will not be done; a regional review will not be done on any diversion that's a million gallons per day. That's American, which is about 4 million litres per day or greater, averaged over a 120-day period.

Ⓜ Ⓜ Ⓜ (0930)

Consumptive uses have to be greater than 5 million gallons or 19 million litres per day over a 120-day period. If there's a combination of withdrawals, diversions, and consumptive use, then there's another exclusion. Basically, they have to add up to 5 million gallons a day or 20 million litres per day.

Paragraph 36 is the first one that I've actually highlighted. Basically, I've said:

From the standpoint of the Committee the essential question is whether or not the Standards and the thresholds for triggering them provide sufficiently tight control over licensing withdrawals to protect the ecological integrity of the waters of the Great Lakes.

I don't think we've heard from anybody who said that was true, so I concluded with a sentence that said:

The Committee heard from no witnesses that felt that the Agreements in their current form offer sufficient protection to

the Great Lakes Basin.

I should outline paragraph 37 next. Basically, there seemed to be two groups of people in front of us. There were groups that really had a big problem with the agreements, almost no matter what happened to them. It wasn't completely clear from some of them whether or not they would have accepted the agreements with some major changes.

There are a number of other groups we didn't hear from, but the Canadian Environmental Law Association and Great Lakes United really believed strongly in the process itself. They believed strongly in implementing agreements as a good thing, partly because they felt that the management framework or regulatory framework in a lot of the United States—in the actual states, not in the federal government—was weak, and this would provide a better framework than the status quo.

Under paragraph 38 I've said:

It's the Committee's belief that the two opinions are not so far apart as to be inconsistent.

In other words, I've tried to find some common ground. I don't think we heard from anyone that the agreements as they stand are sufficient. They really do need to be changed and tightened up. They need to be improved. Some of this testimony should be reflected in the federal government's response to the Council of Great Lakes Governors.




Basically, that is a segue phrase into the next section, which is the input of the committee into the Government of Canada's response. I start by talking about the initial government response to the actual annex. Remember, the annex was produced in 2001. We're now talking about the implementing agreements for this annex, which came out in July of 2004.

I outlined what the Canadian government response was to the annex initially, back in February of 2002. Basically, they were worried that the standards under Annex 2001 could be too permissive and would compromise the ecological integrity of the Great Lakes. There were lots of unanswered legal and jurisdictional questions, particularly regarding a conflict between the annex and the Boundary Waters Treaty, and also a general unknown on how the annex was going to be applied.

We heard from Environment Canada and Foreign Affairs Canada at the very beginning. From reading the testimony, I had the impression that the ministers of both Environment Canada and Foreign Affairs Canada were going to look for the committee's input in the government response.

Basically, in paragraph 40 I've outlined a mild criticism of the Canadian government. In their initial response to the annex they responded within about two months. So far, with respect to the implementing agreements, it has taken them quite a bit longer, so I said that perhaps they could have operated more quickly. Nonetheless, the committee was also happy to hear that at least the government officials seemed to be open to hearing the parliamentary perspective of this committee, incorporating that or at least looking at it, with respect to their response to the Council of Great Lakes Governors.

After that, I've started on the particular aspects of the standards we heard about.

   (0935)

Under these, I start getting into the recommendations, but the recommendations don't actually come until the very end. Most of the conclusions I've put in that are important I've highlighted, just with

respect to the content of the standards themselves, without ever coming to any recommendation that the provinces or the governors should do anything. This is mostly highlights for input into the Canadian response.

Under thresholds for triggering the standards, basically I compare those with what the Canadian government has, with what the IJC has recommended, and with some of the wording from the Water Resources Development Act in the United States. If you remember, under the suggestion of the Right Honourable Herb Gray, the research staff—meaning me—came up with a comparison of the standards with the recommendations out of the IJC report from the year 2000. This is why I've included those recommendations, all of them, as an appendix to the report, because the IJC recommendations are very important.

In a number of cases, it seems fairly clear. We heard also from witnesses, particularly from Elizabeth May of the Sierra Club, that in their opinion as well, the standards do not meet up with the recommendations of the IJC from their year 2000 report, in various aspects.

In particular, eventually the standards will apply to any withdrawals that are greater than 100,000 gallons, or approximately 400,000 litres, averaged per day over a 100-day period. There are a number of problems with this. The IJC's recommendation was not to permit any removal unless it could be demonstrated that the removal did not endanger the ecological integrity of the basin. The standards don't mention ecological integrity at all. There is some mention of integrity particularly in the international agreement, which is far more detailed than the compact. Certainly there's no mention of any kind of analysis of ecological integrity of withdrawals, and this is particularly problematic when it comes to cumulative impacts, which was pointed out. It's very, very difficult to measure. I'll get into the uncertainty a little bit later.

Under the International Boundary Waters Treaty Act, their position was basically that any removal is deemed to affect the natural level or flow of the boundary waters. In addition, in the Great Lakes Charter—which the annex is actually annexed to—they do measurements of withdrawals based on an average over 30 days, not over 120 days. The standards seem to be more permissive than the Canadian government position, more lenient than the IJC, and in fact more lenient than the actual charter they're based under. So under paragraph 46, I basically said that the thresholds must be made more stringent. This is just the committee's belief, the committee's conclusion. It's not a recommendation to anybody in particular; it's just a conclusion that the committee might want to consider based on my lead-up to that.

Regarding part 2, on page 21, "Return of Flow Requirements", this is a fairly important part of the standards. There are exemptions to this, but basically they say that all water that is removed from the Great Lakes should be returned to them, minus—what do they call it?—an allowance for consumptive use, but the withdrawal from a Great Lake has to be returned to the watershed of that Great Lake, anywhere in the watershed of that Great Lake, with preference to tributary streams from where the water was withdrawn.

Ⓜ ⏪ ⏩ (0940)

But there are exemptions from this, and this is an important exemption. This return of flow to the Great Lakes is excluded for places that are more than 12 miles outside the basin. There's also a volume threshold that excludes this return flow, which is approximately a million litres per day, averaged over a 120-day period.

This is part of the reason some of the witnesses, particularly, I think, Mr. Shrybman, were saying that

while these standards are basically applied across the board to within and outside of basin water uses, in practice they won't be, because this particular exclusion means it will be way easier to make withdrawals just outside of the basin than to make withdrawals a long distance out of the basin, because returning water from the southwest of the United States or wherever is going to be way more difficult than from the suburbs of Milwaukee.

The IJC, in its recommendations with respect to return of flow, has set a standard of no net loss to the area from which the water is taken. It goes on to recommend that a maximum of 5% be lost; that is, for every 100,000 litres or whatever that's removed, 95,000 litres must be returned to the Great Lakes.

The Canadian government's position, which it outlined in its response to the year 2000 report, was that... It's not as strict as Canada's approach—this is with respect to recommendation 1 of the IJC—but they kind of said they'd accept it anyway, because it takes into account the concerns of all governments in the Great Lakes Basin. So they accepted this 5% maximum loss.

I think it was Mr. Bruce who was really very forceful in his brief and in testimony that this “no net loss to the area” requirement is better than the standards, which say yes, water has to be returned, but it just has to be returned anywhere within the basin. It leaves open-ended how much has to be returned as consumptive allowance.

In paragraph 49 I've basically supported this “no net loss to the area” requirement. This is all for the committee's consideration. I also mentioned that there was a fair amount of voicing of the opinion that this 5% loss should really be a maximum, that in most cases return flow should be greater than 95%.

The next section, which is page 23, starting at paragraph 50, is on the return-of-flow quality. This is a little trickier, because the compact itself and the standards within the compact and the international agreement don't really talk about the quality of the water that has to be returned. But the international agreement, as I said, is much more detailed. It includes a section that says the return flow should meet all applicable water quality standards, but it's very unclear whether or not this is going to apply in... it's not actually mentioned in the standards; it's mentioned in a guideline section of the international agreement.

The compact does not have a guideline section and therefore does not talk about anything with respect to the water quality of the water returned to the Great Lakes. I've just said—and this, again, I think, came from Mr. Bruce—that there should be some mention in the standard that water returned to the lakes should meet the water quality guidelines set under the Great Lakes Water Quality Agreement, which is, again, why I referred to those earlier on.

Also, nowhere in the standards is invasive species mentioned. The IJC was very clear that there should be management in place to prevent invasive alien species. That should be in the standards as well.

 (0945)

Section 4 is “Resource Improvement vs. Ecological Integrity”. I've touched on this previously. The Water Resources Development Act seemed to encourage the governors of the Great Lakes states to work on a principle of resource improvement, but a lot of the testimony we heard, from what I remember, was basically saying that this resource improvement versus ecological integrity was a bit like comparing apples and oranges, that resource improvement is not a particularly good management tool and that ecological integrity should really form the basis of standards. So that's what I've concluded under

paragraph 54.

Under section 5, “Uncertainty”, this is where I’ve suggested the first recommendation. Basically, we heard a lot of testimony about how little we know about the Great Lakes. There’s a lot of uncertainty about the quantity, quality, and movement of the basin’s groundwater, exactly how to measure cumulative effects, and possible overriding effects of climate change on levels and flows. Because of this, we heard from a few witnesses, at least, that suggested that the standards for permitting water withdrawals should be based on a precautionary principle. So in recommendation 1—as I said, and I really want to emphasize that this is strictly a recommendation to the federal government about what to put in its response; this is not a recommendation to provincial governments or to governors—it recommends that in its response to the Council of Great Lakes Governors, the Canadian government urge the governors and premiers to base the criteria and the standard on the principle of precaution.

Section 6, page 26, is probably the thing we heard the most about, the possibility of the standards and their implementation conflicting with the Boundary Waters Treaty, both in respect to Canada’s... The agreements themselves apparently are inconsistent with Canada’s interpretation of influencing flows and levels as described in the International Boundary Waters Treaty Act. They seem to be inconsistent with various of the IJC’s recommendations and in fact seem to be somewhat conflicting with the federal law in the United States, at least the preambular section talking about adversely affecting the use of the resource.

Then I basically mention what the Canadian position seems to be now from the Department of Foreign Affairs. In the House, our Minister of Foreign Affairs stated, I think it was in Question Period:

... the proposed Annex does not affect Canadian and U.S. obligations under the Boundary Waters Treaty. It does not affect levels and flows of the Great Lakes.

I’ve outlined a little section here about why the committee might want to conclude that it’s concerned about that conclusion, particularly with respect to the International Boundary Waters Act, which deems any removal to affect levels and flows. So it just seemed that what the minister said in response to a question was somewhat in conflict with Canada’s position as outlined in its own act, particularly with respect to the possibility of cumulative impacts from smaller withdrawals.

Now, the international agreement, which is the one that includes Ontario and Quebec, has a section in it which clearly states that:

Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any person any right, claim or remedy under any international Agreement or treaty.

So it basically does have a non-derogation clause in it.

The compact in the United States does not include this. This is the one that simply has the governors. So paragraph 63 is where I mention—and we heard this from the Department of Foreign Affairs, and it was translated and distributed to the committee—that the U.S. State Department has asked for a similar kind of non-derogation clause to be included in the compact. And I mention that both of these—the fact that there is this kind of non-derogation clause in the international agreement and that the U.S. State Department has asked for one in the compact—are reassuring, at least to some extent, to the committee.

Ⓜ Ⓜ Ⓜ (0950)

However, that leads into recommendation 2. Basically, in recommendation 2 we would urge, if the

committee is in agreement that:

... the Canadian government urge the Governors and the Premiers to include specific language in the Agreements stating clearly that in the final analysis of proposals for water removal, the Boundary Waters Treaty will prevail.

There still remain some problems, though, particularly regarding the practicality of this kind of thing, because we heard from a number of witnesses that if in fact there is a conflict, the Canadian government has very little recourse in terms of how it can have an effect on such approvals in the United States.

The main recommendation is recommendation 3. Recommendation 3 is outlining what should be in these agreements to avoid any possible conflict with the Boundary Waters Treaty. I came to the conclusion throughout the testimony, and I think there was some feeling within the committee as well, that basically the agreement should meet up with the IJC's recommendations, and if these agreements and the standards within them meet up with the IJC's recommendations, then it's very difficult to see how there can be a conflict with the International Boundary Waters Treaty Act, because it's the IJC that's in charge of implementing it.

Recommendation 3 is basically that in the response to the Council of Great Lakes Governors:

... the Agreements should adopt the language and the intent of the recommendations of the IJC as outlined in their year 2000 report... as minimum requirements for the approval of projects to remove water from the Great Lakes Basin.

That's the end of the middle section, which concerns how the committee might want to influence the federal government's response to the Council of Great Lakes Governors. Remember, the Council of Great Lakes Governors includes the premiers of both Ontario and Quebec.

The third section is basically a further response of the Canadian government: what the Canadian government can do to help out the situation in its own house. It's divided into three sections. One is about decreasing uncertainty. Basically that means putting some extra money into freshwater research.

Recommendation 4 on page 30 is:

The Committee recommends that, in its efforts to reallocate money between and within departments to priority areas, the government apportion significantly increased resources to freshwater research in Canada.

The next section I've titled "Unleashing the International Joint Commission". As I've mentioned, the IJC has a very good track record. Part of the reason it has a very good track record is that it's only joint references that have ever been made to the IJC. The Canadian and the U.S. governments come to an agreement to make a joint referral to the IJC, despite the fact that under article 9 they have the powers to make unilateral referrals.

The IJC has been asking for ages to have referrals on invasive species. We've heard from the Right Honourable Herb Gray that they've also been asking for money and a referral to look at water flows and levels in the upper Great Lakes. At least part of the reason they haven't received that is that Canada and the United States don't do individual referrals; they do joint referrals.

I've basically concluded that this kind of approach in some respect has leashed the IJC's power, despite the fact that they have a fair amount of credibility. So I've outlined under paragraph 71 that Canada should at least consider using its right of unilateral referral in the case of important scientific research or if the implementation of Annex 2001 is found to be at odds with the IJC's recommendations.

I've also introduced the same kind of concept with respect to article X. Realistically, article X is—let's face it—virtually impossible to trigger, because you need approval of the United States Senate. But the fact is it's there, and if the Canadian government comes to the conclusion, years down the road, that implementation of the annex is really in conflict with the Boundary Waters Treaty—there have been at least noises from the State Department and from the State of Michigan that say they're not particularly happy with the way the implementing agreements are—they could at least start opening it up. As I've said it, they could “consider opening diplomatic efforts toward invoking Article X”—that's how I've worded it—to test the waters, to at least look into article X.

Ⓜ ↓ ↑ (0955)

On paragraph 74, the Commissioner of the Environment and Sustainable Development in the year 2001 did an audit of Great Lakes and St. Lawrence water management by the federal government. One of the sections was referred to the International Joint Commission. I've quoted one of her recommendations, basically saying that the Canadian government wasn't supporting the IJC sufficiently.

So I've come to the conclusion... and this leads into recommendation 5:

The Committee recommends that the Canadian government more fully explore its referral options under the Boundary Waters Treaty and that it support the IJC

—and then I use the words of the commissioner—

by supplying it with more timely information, better following up on its recommendations, and ensuring that its resources are adequate.

Finally, on better coordination with the provinces, I've made no absolute recommendations under this section, or at least I haven't suggested any recommendations under this section. It just seemed a bit confusing in the testimony about just how much cooperation was happening between the federal government and the provinces with respect to these agreements. The Canadian government clearly expressed back in 2002, in fairly strong terms, that it was worried about Annex 2001. I've said, under paragraph 79, that because of the concerns they referred to in their letter to the Council of Great Lakes Governors, perhaps the federal government could have had a more active role in advising or at least communicating with the provinces with respect to these implementing agreements.

We also heard, on the last day of testimony, that there seems to be some mechanism, at least within the United States, of coordinating state and federal cooperation on particular issues. I've basically said, in paragraph 80, that some form of better communication and coordination must be established between the federal government and the provinces, particularly when the issue at hand is clearly under one or the other's jurisdiction.

For my conclusion, I think I've basically said let's be cautious. The draft implementing agreements are just that, draft implementing agreements, and they almost certainly will not survive as is. There will be changes made to them. I've outlined, under paragraph 82, that the committee sort of hopes that within this process of changing, the standards come up to meet more closely the recommendations of the International Joint Commission.

So in that brief half-hour or whatever, that's sort of an outline.

↓ ↑

**The Chair:** Thank you very much. I'm sure the committee is very appreciative of that overview and the work that has gone into that, Tim.

With the agreement of the committee, for the questioning of Tim I think we'll stay in the order we use for our usual questions and statements, if you will. I just want to emphasize that we will be coming on Thursday to deal with it page by page. We'll get into the real detail and discussion then.

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I wonder if I could have the committee's indulgence--I have to go and speak to a bill in the House--to make a point before I go.

↓ ↑

**The Chair:** Members, do I have consent to allow Mr. Comartin...

↓ ↑

**Mr. Bob Mills:** I have to leave at 10 o'clock as well. Be fast.

↓ ↑

**The Chair:** Shall we flip a coin on this?

↓ ↑

**Mr. Joe Comartin:** I will be very quick. It's a legal point, so Mr. Mills probably won't get it.

**Some hon. members:** Oh, oh!

↓ ↑

**The Chair:** We don't want to be that presumptuous, Mr. Comartin. Just quickly, then.

↓ ↑

**Mr. Joe Comartin:** Thank you, Mr. Chair, and thanks to the committee.

On the whole issue of invoking article X, you may have missed this, but there was a quick point made by the counsel from the IJC that there's a final usage we can make of international law. I think that may need to be addressed. If you go back and look at his testimony, it was a very quick comment, I would say less than a minute, but he did make that point.

If we can't invoke article X, then we can invoke international law and move to binding arbitration. There are provisions, both within that and just generally in international law, and I think he made that point. It was the only evidence we did get on the use of international law. In terms of the role we have to



play as a sovereign country, I think there is in fact some additional provision within international law. I think that's a point that needs to be made.

That's all I'll say at this point. I'll raise it some more on Thursday.

🕒 ⏴ ⏵ (1000)

⏴ ⏵

**The Chair:** Okay.

Yes, Tim.

⏴ ⏵

**Mr. Tim Williams:** I'd like to get some clarification on who that was. Was it Mr. Shrybman?

⏴ ⏵

**Mr. Joe Comartin:** No, it was the counsel for the IJC. He came with Mr. Gray and sat to his right. I forget his name; I've met him before, but he is their legal counsel.

⏴ ⏵

**The Chair:** Thank you for that, Mr. Comartin.

Back to you, Mr. Mills.

⏴ ⏵

**Mr. Bob Mills:** Tim, I just wonder what the details are of the Ontario government's position and their recent statement that it wasn't strong enough and that they were opposing it unless they got... Do you know exactly what they're looking for?

⏴ ⏵

**Mr. Tim Williams:** No. All I know is their press release.

My educated guess is that during the public comment period, which was extended into 90 days, they got an earful and have come to realize they really should back off and look for improvements. But I don't know exactly what the improvements are they're looking for.

⏴ ⏵

**Mr. Bob Mills:** Okay.

My other question would be, do we have any background information as to where the eight states and

governors are? Are they united? I met with the U.S. embassy people about this, and they indicated to me that there was as much disagreement between those eight governors as you could ever find. In fact, they went through what some of the states were thinking. Obviously, that should be a consideration we could play to in the negotiations.

Then, of course, there's the Quebec government, and I'm not exactly sure what they are saying at this point, if anything.

I think we should be aware of this, because it's the real world of where decisions are going to be made. Obviously, I think we should encourage the Canadian government to play into those areas when they make their response, so that we in fact have more influence than we might otherwise have. I don't know for sure how you do that, but I think it would be worthy of a little bit of mention at least.

↓ ↑

**Mr. Tim Williams:** Certainly the governor of the State of Michigan has already stated in pretty forceful language that they're not happy with the agreements as they stand. I've only mentioned that once towards the end.

I can certainly look at that on Thursday when we go paragraph by paragraph and I get specific instructions on what changes the committee would like. In the meantime, I can certainly try to think of some language and where it could go.

↓ ↑

**Mr. Bob Mills:** Yes, I think that's the main thing.

And, of course, I think the emphasis on ecological integrity is a very strong point for us. Obviously, that's what's most important. The lack of mention of that leaves it open to a great deal of interpretation of what you mean when you talk about the quality return of water. Do you throw chlorine into it? Is that what it means? That surely doesn't give much ecological integrity, so I would encourage you to really emphasize that point in your response. I think you've got it, Tim, but it should be really strong.

↓ ↑

**Mr. Tim Williams:** Certainly, the concept of ecological integrity is not mentioned in any of the recommendations. It's in the very first paragraph that I've highlighted—

↓ ↑

**Mr. Bob Mills:** Yes.

↓ ↑

**Mr. Tim Williams:** It says that is what the committee is concerned about, but it's not specifically in any of the recommendations—and certainly not in recommendation 3, which is really the core recommendation.

↓ ↑

**Mr. Bob Mills:** It just seemed to me that it really gets the point across, or what we're really emphasizing.

↓ ↑

**The Chair:** Mr. Bigras.

[*Translation*]

↓ ↑

**Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ):** Thank you, Mr. Chairman. I will be splitting my time with my colleague.

We'll be discussing this matter Thursday, but I would like to draw your attention to two elements of the recommendations found on pages 37 and 38.

I find the word “exhorte” in the French version to be perhaps a little too strong a word. It is used in recommendations 1, 2 and 3. I'd like to see something more nuanced. I'll leave that up to you. It would be a good idea to come up with a more appropriate verb for our recommendations to the governors and provincial premiers. I'd like to see something softer.

My second suggestion concerns recommendation 3 which urges “the Governors and Premiers to revise and strengthen the Agreements. So far, so good, up to that point. However, since we are talking about a portion of the most important recommendation in the report and since it affects the IJC's recommendations, I would like to cite something found on page 8 of the Commission's August 2004 report, as quoted by Mr. Gray:

Until this process is complete, it is not possible to say whether and to what extent Annex 2001 and measures taken under it will give effect to the recommendations in the Commission's 2000 report.

I think we need to go with what Mr. Gray said. Until the process is complete, it is impossible to say whether the measures being proposed here go against the IJC's recommendations. However, we do want the agreements to be consistent with these recommendations and to be revised and strengthened. I think this nuance would accurately reflect the IJC's position, while giving us some assurance that we are moving in the right direction.

That's what I wanted to say at this time.

⌚ ↓ ↑ (1005)

[*English*]

↓ ↑

**The Chair:** Tim, would you like to refer to Mr. Bigras' points with respect to complying or cross-referencing with the IJC recommendations vis-à-vis recommendation 3, and then the wording of

“urge...” We can look at that maybe and you can make some suggestions on that.

↓ ↑

**Mr. Tim Williams:** I hope I didn't miss anything, but under paragraph 65, the lead-up paragraph into recommendation 3, I finished *en anglais*:

The Committee further believes that until such Agreements are finalized, a moratorium should be put in place on...revised withdrawals.

I was unsure about whether or not to put that in a recommendation, that the committee recommends a moratorium should be put on withdrawals, because that would seem as if we were telling the Governments of Ontario and Quebec and the governors what to do. So I left it as “The Committee... believes” this is what should happen.

[Translation]

↓ ↑

**Mr. Bernard Bigras:** I do realize that this is stated in the previous paragraph but, as we all know, the crux of this report is the recommendations. It is the recommendations that are scrutinized. Therefore, I feel that Mr. Gray's interpretation of Annex 2001 in terms of compliance with the reports that he himself produced is important. Mr. Gray told the committee that what we were presented with was a draft and until such time as the process is complete, we won't know if Annex 2002 complies with the report that he produced. We could very well say: “Although we cannot conclude that Annex 2001 does not violate the provisions of the 2001 report, we believe that agreements should draw inspiration from the wording...”. Some people are of one view, while others another. Mr. Herb Gray is a very important player in this process. If he maintains that at this stage of the process, it's impossible to say whether or not his recommendations are being followed, then I think this needs to be mentioned.

🗨️ ↓ ↑ (1010)

[English]

↓ ↑

**The Chair:** May I suggest to Mr. Bigras and to the committee that we give our researcher an opportunity to digest those suggestions and then come back. That's the substantive part of the discussion we can have—whether it is possible, for example, in this one when he reviews the IJC's recommendation and Mr. Gray's recommendation, whether he can put the reference in there. We'll refer these suggestions to our researcher to bring back for Thursday and then we can discuss them.

Is that okay, Mr. Bigras?

[Translation]

↓ ↑

**Mr. Bernard Bigras:** Yes.

[English]

▼ ▲

**The Chair:** Okay. Thank you.

Christian.

[Translation]

▼ ▲

**Mr. Christian Simard (Beauport—Limoilou, BQ):** Recently at a gathering in Chicago, an overview was to be given of the public consultation process held this past summer and early autumn. Might it not have been a good idea to include in the report a summary or synopsis of the recommendations made by stakeholders on both sides of the border? I don't know if that would be too difficult to do. The parties met only recently and I don't know if it's possible to do a summary or synopsis. It would be an interesting initiative, from an information standpoint, since this was a very recent gathering.

I would now like to move on to article 48. The Canadian government has accepted the idea of a 5% loss. It has accepted this reluctantly, but accepted it nonetheless. My feeling is that the maximum loss of 5% mentioned in the report will become a minimum threshold. I think it's mere wishful thinking to say that any losses should clearly be below this threshold, but never over 5%. That's fundamental.

I'm uncomfortable with one thing. How can the government urge people to be virtuous if it accepts a permanent 5% loss, knowing full well that the Great Lakes Basin does not easily renew itself? Some witnesses have stated that given the prevailing winds, the water cycle isn't closed in the Great Lakes. Therefore, there's a fundamental problem and the government has accepted this. How then can it make credible recommendations to the Governors and to the States when it has agreed to absorb most of the loss itself?

It's merely a comment on my part, for the moment. We can discuss this further and see if an amendment is possible. It's quite simple really. We're reviewing Annex 2001, but the fact is that the government is urging people to be virtuous, when it itself is not.

[English]

▼ ▲

**The Chair:** Tim, do you have a sense of that?

▼ ▲

**Mr. Tim Williams:** Yes. Certainly under further recommendations to the federal government, the committee, if it so wishes, could easily make a recommendation that the Canadian government change its position on that 5% and either reduce it or not accept that recommendation, to leave it at 5% consumed.

▼ ▲

**The Chair:** I think we should leave that out there. Again, similar to what I said previously with respect to any issues that are raised now, we will come back and we will discuss those. If you wish to move that at that time, Mr. Simard, then we can have that.

If research has any further ideas between now and then on that issue, you could bring them forward at that time also.

Mr. Simard, you have a couple of minutes left. Then I'm coming to you, Cheryl.

[*Translation*]

↓ ↑

**Mr. Christian Simard:** I think this is a good report. I have no further comments at this time. Perhaps someone else has.

🕒 ↓ ↑ (1015)

[*English*]

↓ ↑

**The Chair:** Good.

Before Mr. Mills left he had only gone to 10:05, so I'm going to go back to Ms. Gallant and then I'm going to come across to the other side.

Ms. Gallant, you have five minutes.

↓ ↑

**Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC):** Thank you, Mr. Chairman.

I just have a brief question. Once all the recommendations we've made and the IJC have made are taken into consideration and Annex 2001 is in place, is there an entity that monitors or enforces the rules that are put into place? We're more or less assuming that the permit program is the be-all and end-all, whereas many parts along the shores of the Great Lakes are quite remote. In the United States, where they're parched for water, there is nothing to stop a tanker from putting its hose in along the beach, filling it up, and going south--no borders.

Is there something in place to somehow monitor what's going on even from the intake pipes going into the cities?

↓ ↑

**The Chair:** That's a very good question. From the witnesses we heard that that particular issue wasn't addressed. I mean, it would be a number of jurisdictions, not the least of which would be cities in terms of bylaws. It could be state jurisdiction in terms of large diversions.

Your question is, not only is it ongoing in terms of who monitors existing legislation, but in any recommendations we make, who monitors? In fact, whatever we agree on, is it the IJC on an ongoing basis who does the monitoring?

Tim, do you have anything to respond on that? It's not raised in the report.

↓ ↑

**Mr. Tim Williams:** Enforcement of current laws regarding withdrawals is something that really didn't come up in testimony. For what you're talking about, which is relatively smaller withdrawals as opposed to large diversions, the IJC requires permits and things like that, but I don't know how many... On the Canadian side, I'm not even sure who enforces. It's probably the coast guard, but I don't really know who enforces the Boundary Waters Treaty on the Great Lakes.

↓ ↑

**The Chair:** It's a good question. It could be conservation officials, coast guard, city officials. It's probably a whole new coordinated issue there. But we're really on the content of Annex 2001. That's something we should take under consideration, but there's no response to it at the moment.

Going across to the other side, Mr. Parliamentary Secretary.

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**Hon. Bryon Wilfert (Richmond Hill, Lib.):** Mr. Chairman, I just want to recognize the work the researcher has done and to congratulate him on the report.

Obviously, I'll have to go through it in some detail, but I would suggest at the appropriate time to have a motion that will ask for a written response from the Minister of Foreign Affairs and the Minister of the Environment. Traditionally, of course, as you know, it's 120 days, but I would also put in that motion that given the urgency, we seek to get a written response much earlier. We can't require it, but we can certainly urge, given the fact that the issues are going to be coming back by January, therefore a traditional 120-day response would be of not much value to the committee.

↓ ↑

**The Chair:** We want it as soon as possible.

Mr. Wilfert, you mentioned that you would be raising that. Once again, I think it's entirely appropriate that you give the committee the direction you will be taking on that. Once again, I will note it, and any motions that are required--

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**Hon. Bryon Wilfert:** Within the 24 hours, so I would think it would be made available for Thursday.

↓ ↑

**The Chair:** — will be made on Thursday.

My understanding is, and I'm going to get a procedural clarification here, that any motions made out of the report don't require 24 hours' notice. For example, that particular motion is required.

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**Hon. Bryon Wilfert:** I'm at the pleasure of the committee. I just want to emphasize that notwithstanding the 120 days, we seek as soon as possible written responses from both ministers in order for the committee to have it, considering that the discussions are going to resume in January.

🕒 ↓ ↑ (1020)

↓ ↑

**The Chair:** The chair certainly will take direction from the committee, but it would be the chair's opinion that since we're discussing this report, any relevant motions that are made on Thursday would not be deemed to have to have 24 hours' notice. I think that should be fairly—

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**Hon. Bryon Wilfert:** There's no problem with that. I'll move it at the appropriate time.

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**The Chair:** Okay, good. Thanks, Mr. Wilfert.

Any other questions?

Mr. McGuinty.

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**Mr. David McGuinty (Ottawa South, Lib.):** Thank you very much, Tim, for the great first draft; it's very difficult to pull together, I know, with such disparate testimony.

I have a couple of comments. Maybe you could expand on a few points in here. I'm just going to go through them, if you'll bear with me.

The first would be this. You mentioned earlier what the motivation might have been for Ontario to issue a press release last week. I don't know what its motivation was. I know that government has been seized with this issue for over a year and has been deeply concerned ever since the former Conservative government in Ontario in 1995-96 entered into these agreements. I also don't know what the motivation would be for the Province of Quebec, for example, in terms of what they're doing.

Might it be helpful for the committee to actually get a statement from both provinces as to what their thinking is, going forward, with respect to these agreements? I don't know, from a procedural point of view, whether we might have requested the presence of both provinces to enlighten us about what their



own thinking is in respect to jurisdictions and governments. I put that to you, Mr. Chairman, for consideration going forward. What is the motivation? Where are the Ontario and Quebec governments? Where are they now in terms of a written submission?

On page 24 of the English version, where you talk about the resource improvement versus ecological integrity difference, I have serious concerns with some of the wording here, particularly in paragraph 54. I don't know enough about the difference, and I'm not sure members of the committee know enough about the difference, between the concepts of resource improvement and ecological integrity.

I do know enough about ecological integrity to say it's very hard to define it, it's certainly very hard to measure it, and it's something to aspire to in most ecosystems. I'm not sure the committee can say it is rejecting almost out of hand the concept of resource improvement. I share some of the concerns Ralph Pentland raised, Mr. Chairman. I would like to see, if possible, at least a better definition of what resource improvement is and what ecological integrity purports to be. They are great words, and I've seen them used for decades now in different settings, but I'm not sure if I understand fundamentally the difference between the two. I just wanted to flag that with you.

In recommendation 1 on page 25, as it reads I think you're referring to the precautionary principle, which I would also urge, Mr. Chairman, be defined clearly. What do we mean if we're urging the Government of Canada to urge the governors and the premiers to base the criteria and the standard on the principle of precaution? What does that mean—what precisely does it mean? The precautionary principle is a quasi-legal concept that people are still having great difficulty defining, but there are some good standard definitions. We may want to weave them into this and expand somewhat on the notion. As it reads now, I think if I were on the receiving end of this recommendation, I just wouldn't know what to do with it.

Another point that jumped out at me was—I'm sorry, Mr. Chairman; I know you are going to go through them, but I just want to—

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**The Chair:** No, the clerk was just pointing out to me that when you're referring to it, you should refer to the paragraph and not the page number, because they are different in the French.

↓ ↑

**Mr. David McGuinty:** I'm sorry about that.

In recommendation 4 we talk about apportioning significantly increased resources to freshwater research in Canada. I'm wondering whether as a committee we could go a little further and actually specify where that significantly increased resourcing would in fact be apportioned to. Is it to the IJC? In another recommendation you talk about increasing the IJC's resources. Is it to Environment Canada? Where? I think this might be helpful for those who are in the business of allocating scarce resources.

The other thing I want to signal now and that maybe you can help me understand is this. Under paragraph 77, when you talk about better coordination with the provinces, you say, citing Ralph Pentland again:

One witness, however, suggested that perhaps the devolution of implementing powers to the provinces had gone too far.

What precisely are we talking about? What devolution of powers? I'm not sure what Mr. Pentland meant. Has there actually been any devolution of powers? Or have provinces decided to usurp powers? I don't understand this part. I'm not sure what Mr. Pentland was referring to, but I certainly would love to see more clarification.

Those are my first comments, Mr. Chairman. Thank you very much.

Thank you very much to our researcher.

⌚ ↘ ↗ (1025)

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**The Chair:** Thank you, Mr. McGuinty.

We've noted those, and what we'll do once again is take those under consideration and try to deal with those suggestions or your recommendations with respect to clarification and try to bring those back on Thursday.

Yes?

↘ ↗

**Ms. Yasmin Ratansi (Don Valley East, Lib.):** Along the same lines that David was mentioning, ecological integrity versus resource integrity, are those terms interchangeable?

First of all, thank you very much. It is a very comprehensive report. But as you read it, it jumps out at you what those two terms mean. Are they interchangeable, and how do they affect resource improvement leading to commodifying the water and the quality of the water? Perhaps you could explain what you mean by those three.

On point 19 you talk about the Great Lakes Water Quality Agreement and you say "...each country to restore and maintain the chemical, physical and biological integrity..." Is that the ecological integrity? Is that the resource integrity? What does that mean?

Those are my comments. Thanks.

↘ ↗

**The Chair:** Ms. Ratansi, I didn't catch the last part and I don't think the researchers did.

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**Ms. Yasmin Ratansi:** What I'm trying to say is there are so many terminologies. If we could have a clarification so that we're not interchanging ecological integrity, resource integrity, and water improvement, the biological, chemical...

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**The Chair:** That goes back to Mr. McGuinty's point too on biodiversity.

I appreciate that. We're noting these.

Tim.

↓ ↑

**Mr. Tim Williams:** I have a specific response to the precautionary principle. Definitions of precautionary principle are highly contentious. That would be up to the committee to debate, so I didn't go there. If the committee wishes to get into a discussion about which definition of the precautionary principle I should be referring to, then it's up to the committee to tell me which one they would like to use.

Second, would a glossary of terms help with respect to both of your comments?

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**Ms. Yasmin Ratansi:** Yes, I think so.

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**The Chair:** I think we can conclude that yes, that would help.

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**Mr. David McGuinty:** As long as the glossary, Mr. Chairman, if I may, spoke to the clear differences between resource improvement...

I have a sneaking suspicion that there is more that informs the notion of resource improvement than we've been led to believe or that we've had a chance to hear about. I have a sneaking suspicion that there's probably jurisprudence in the United States that helps to backfill what it means. I can't take at face value the notion that it was designed in order to commodify water. I don't know if this is true or not true. I'd certainly like to hear more about that notion. I'm not sure if a glossary would take us there.

I'm always a little concerned, Mr. Chairman, when recommendations are drafted in such a way as to dismiss something out of hand. Again, I'm not sure what the differences are, and nothing I heard here helped me understand it better. I think it's probably what our research staff is struggling with as well.

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**The Chair:** Okay, thank you.

Mr. Comartin, you didn't get your full time. Did you want to now...

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**Mr. Joe Comartin:** I'm at a bit of a disadvantage. I'm sorry. I apologize to the committee. The bill

was kicked out on Friday without me being told.

Mr. Mills was starting into the point about Ontario having expressed serious reservations, about not being prepared to go through with the agreement as presented. I think that fact should appear in the text of the report, as should the fact that both Great Lakes United and CELA have indicated similar reservations in not being prepared to support the agreement as is. I believe those facts should be in the agreement.

Mr. Chair, I was also going to raise the issue of the precautionary principle. I think Mr. McGuinty has raised some really good points with regard to the fact that it's been interpreted in a number of different ways, although it is beginning to have some meaning on an ongoing basis within some treaties and legislation generally. The only suggestion I can make with regard to how we deal with that is we may want to say that the definition we're looking at is that of the Royal Society here in Canada, which wrote a report in 2000, I believe it was. If you look at chapter 8 of that report, it has a very lengthy definition. That definition and expansion—because the chapter is about 8 to 10 pages long, expanding what they mean by precautionary principle—has been accepted in a number of international conferences at this point. I would like to see the term “precautionary principle” used, as opposed to the “principle of precaution” that you've used here, but use “precautionary principle” as defined by the Royal Society here in Canada.

⌂ ⌵ ⌶ (1030)

⌵ ⌶

**Mr. Tim Williams:** Can I have some clarification?

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**The Chair:** Yes, Tim.

We'll have Tim respond to that.

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**Mr. Tim Williams:** I just want a clarification. That's the Royal Society's report on genetically modified organisms that came out in 2000, I think it was?

⌵ ⌶

**Mr. Joe Comartin:** Yes, that's right. I have a copy of the chapter sitting on my desk.

⌵ ⌶

**Mr. Tim Williams:** I'm sure I do as well. I just wanted to make sure that's what you meant.

⌵ ⌶

**Mr. Joe Comartin:** Yes, that's the one I'm referring to.

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**The Chair:** I guess we're going to have to go back to Mr. McGuinty just to get a clarification on that.

↓ ↑

**Mr. David McGuinty:** I think if you approach the Department of Justice, Mr. Chairman, they would be able to give you a statement of how the precautionary principle has been applied in a Canadian context, how it is informing the preambular sections of so much of our legislation. They'll give you, I think, a little bit of a precedent, a code of how it has been interpreted, and it might help us in terms of coming up with the more generic, more acceptable version. The Department of Justice has done this work.

↓ ↑

**The Chair:** Those are two good suggestions. I think we would want to fit whatever the spirit and intent is of the report, our own definition, if necessary, that could be gleaned from those suggestions.

So I think the point is well taken at this point. Perhaps Tim could have a look at that and bring it back for Thursday.

Mr. Comartin, did you wish to ask any other questions?

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**Mr. Joe Comartin:** No. As Mr. Wilfert suggested, I think a number of us will be moving some motions. In my case, I want to strength the wording in a couple of areas, but I'll wait until Thursday.

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**The Chair:** Okay. Thank you.

Mr. Carrie.

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**Mr. Colin Carrie (Oshawa, CPC):** I had a couple of comments, but actually they were brought up by other members, especially the definition of resource improvement. I think that needs to be more clearly outlined for us. I have a comment about the lack of research.

You brought up a good point, Tim. There appears to be a lack of research, and perhaps we should word it a little more strongly. You brought up the point about groundwater, and I know in the U.S. midwest it seemed to be fairly much gone before it was made an issue, and it's something we should look into a little more strongly.

You mentioned the foreign species that we're seeing now in the Great Lakes. That's the one point I'd like to make as far as wording things a little more strongly is concerned. We need to research things better.

Thank you.



**The Chair:** Okay. Thank you very much.

Any other questions? Any further input?

Tim, again, thank you for your work on that, and we'll look forward to Thursday.



We have Mr. Bigras' motion.

Do you want to table that for the next meeting?

[*Translation*]



**Mr. Bernard Bigras:** Given the time, Mr. Chairman, no doubt it would be preferable to table this motion at our next meeting.

  (1035)

[*English*]



**The Chair:** Okay, good enough.

Thank you very much.

The meeting is adjourned.

NOVEMBER 24, 2004

COMMITTEE FINALIZING  
RECOMMENDATIONS.



CANADA

## Standing Committee on Environment and Sustainable Development

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NUMBER 009



1st SESSION



38th PARLIAMENT

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## EVIDENCE

**Thursday, November 25, 2004***[Recorded by Electronic Apparatus]*

⌚ ↓ (0915)

*[English]*

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**The Chair (Mr. Alan Tonks (York South—Weston, Lib.)):** Good morning, members of the committee. Bonjour.

Ladies and gentlemen, I wonder if we could convene now. Thank you.

At the last meeting we had a general discussion with our research staff with respect to the report. Today we are going to look at the suggestions that were made at the last meeting. Tim has taken those suggestions, for the most part, and he's going to explain how he has integrated them into the report.

I would like to remind the committee that we had indicated we are going to report to the House tomorrow. I am looking for the expeditious and deliberative considerations of the committee so that we can meet our commitment. I thank you in advance for that.

I think we'll ask research to take us through the report, in terms, I guess, of focusing on the changes that have been made from the last draft we had before us.

Is that okay? Thank you.

Tim.

↓ ↑

**Mr. Tim Williams (Committee Researcher):** There were a few changes that were recommended. I didn't really hear any dissent around the table about those recommendations, so I tried to take into account almost all of them. I'll just run through quickly, and hopefully we can do this expeditiously, as the chair has said.

Paragraph 7 is in response to Mr. Mills' request that a little more emphasis be put on the fact that there is some dissent out there among the governors and the provinces and from the United States government, so this is a process that's still unfolding, and therefore this is a good time to jump in to put the committee's point of view forward. That's paragraph 7.

After that, there wasn't much—

↓ ↑

**The Chair:** Excuse me, Tim, before you go any further, the members have only the second draft; they may not have the first one. Can you tell us just how you've changed that recommendation to reflect the direction?

Just before we go on, Mr. Comartin has a point.

↓ ↑

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** I'm sorry, I don't have a second draft; I just have the first.

↓ ↑

**The Chair:** They should have been passed out.

↓ ↑

**The Clerk of the Committee (Mr. Eugene Morawski):** Does it say “Version 3”?

↓ ↑

**The Chair:** Where does it say that, Eugene?

↓ ↑

**The Clerk:** It's at the top right-hand corner of page 1.

↓ ↑

**The Chair:** Oh, yes, it's after the table of contents, just up in the top right-hand corner. Version 3 is the one we are going to be dealing with.

What I've asked Tim to do, as he's going through this version 3 draft, is point out what the difference is, following the intent of the questions and direction that was given at our last meeting, just to show us and illustrate what the difference is. He has tried to incorporate that.

We're on paragraph 7 on page 3. I understand that the French version may be paginated a little differently, but we're on paragraph 7.

Are we all together now? Thank you.

Mr. Comartin, do you have a point just on the process?

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**Mr. Joe Comartin:** It's about paragraph 7. It wasn't the Governor of Michigan; it was the Attorney General of Michigan. I understand that just at the political level that reflects perhaps some difference. Although we're not quite clear whether the governor has changed her position, clearly the attorney

general has expressed reserve. The governor has not, publicly.

↓ ↑

**The Chair:** Thank you, Mr. Comartin.

Are there any other comments with respect to paragraph 7?

Then we'll move on.

Just as an explanation—this is not to get your attention from time to time, or because there's anything more “illuminating” about the agenda or the paragraphs—they are trying to fix the lights, because there is a problem with the dimmer. We can't get them any brighter presently than they are right now, so I think we'll try to proceed, just bearing in mind that they are working on the electric lights.

🕒 ↓ ↑ (0920)

↓ ↑

**Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC):** Mr. Chair, can you explain the difference between versions 2 and 3?

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**The Chair:** We're explaining the differences in those paragraphs that are affected by the recommendations that were made out of our last meeting.

↓ ↑

**Mrs. Cheryl Gallant:** Okay.

↓ ↑

**The Chair:** Tim is going through them, saying, in paragraph 7, this is what it said last time, this is the direction I was given, and this is the way it has been changed: how do you feel about that? That's basically how we're proceeding.

Maybe, Tim, since we've been distracted a bit, you can go over paragraph 7 changes again, and then we'll proceed further.

↓ ↑

**Mr. Tim Williams:** Okay.

Paragraph 7 was basically in response to Mr. Mills' request that a bit more emphasis be placed on the fact that there is dissent among the parties to the agreements—specifically Ontario and perhaps Michigan—as well as some level of discomfort from the U.S. State Department with regard to putting in a non-derogation clause. Basically it's a new paragraph, although it's essentially copied from the first

paragraph of the conclusion of version 2. The conclusion now starts with a very similar paragraph to this, just modified slightly.

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**The Chair:** Is that okay?

Thank you.

↓ ↑

**Mr. Tim Williams:** We then go to paragraph 48, "Return of Flow Requirements". This has been modified slightly because there was a request for a new recommendation to the federal government basically to change its position with regard to the 5% return. There is now a new section, which I'll get to a little later on. If you remember, this is split into three parts: an introductory section, a section on input into the federal government's response to the governors and provincial premiers, and also some further requests to the federal government. Since this is a request for the government to change its position on the 5% return, that section has now been moved to the third part. There is now a new recommendation, and we'll get to that in a second.

In paragraph 50, there is now a mention, "The Committee heard compelling evidence". It's the committee support for the no net loss area requirement. The Ontario government's press release also states that:

For the purposes of the Annex agreements, Ontarians, and the McGuinty government, clearly want a "no diversions" agreement, or the position of "no net loss" as proposed by the International Joint Commission.

So I have added a phrase at the end of paragraph 50 that recognizes that the Ontario government now wants a no diversions agreement or a position of no net loss.

Paragraph 53 is the beginning of the section on resource improvement and ecological integrity. There was a fair amount of discussion regarding the definitions here as to what is resource improvement and what is ecological integrity. Version 2 basically categorically rejected the concept of a resource improvement, and there was some discussion that that wasn't a very good idea, that perhaps a more nuanced version would be better. This section 4, paragraphs 53 to 58, has been changed dramatically. It's probably one of the larger changes.

For instance, under paragraph 54 we heard evidence that this resource improvement perhaps would put a price on water. There was some recommendation that perhaps the committee wasn't actually convinced that this in fact was the case. So I've added a sentence:




While the committee is not convinced this will be the case, there are other problems with the concept of "resource improvement" that suggest that it should be applied with care.

That basically leads into the definition of improvement to the waters and water-dependent natural resources of the Great Lakes Basin.

Under paragraph 55 I've put in how that was defined under the original annex, Annex 2001. There's a subparagraph to paragraph 55 that defines how improvements were defined under the annex.

Paragraph 56 just notes that in fact the implementing agreements changed that definition slightly. They add the words “environmentally sound and economically feasible water” in front of “conservation”. If we look at the subparagraph, again, it would read “resulting from associated environmentally sound and economically feasible water conservation measures”, instead of just “associated conservation measures”. I think that's a fairly important point to note, and paragraph 56 does note that.

Paragraph 57 gets a little more complicated. This section is inevitably somewhat complicated. There's a difference between the compact and the international agreement in that the international agreement contains a section of guidelines on how the standards are supposed to be applied.

   (0925)

That is not true for the compact. The compact does not have those guidelines.

Paragraph 57 notes that there is some discussion within the international agreement about what will constitute an improvement--and I've noted here that they note under hydrologic conditions, water quality, and habitat. In other words, there are improvements that could be made that might be related, but they could be completely unrelated. A withdrawal that damages habitat could be balanced off by some kind of improvement somewhere else in the basin, in water quality or hydrologic conditions, for instance.

So paragraph 58, then, has also been changed to discuss a little bit more the committee's opinion with respect to improvement of the resources versus ecological integrity.

Now, I didn't get into what ecological integrity is in a really deep sense within the text, because I thought it would be distracting. I put it in a footnote, why ecological integrity is basically pretty complex and very hard to measure. Realistically, the IJC treats ecological integrity a little bit circularly, which is easy to do with this concept. But it does definitely bring in the concept of looking at the basin as a unified whole, looking at all the aspects at once throughout the basin, not just habitat management or water quality or hydrologic conditions--looking at it as a whole.

So I've changed the last part, which has been highlighted, as follows:

It is possible that a coordinated set of “resource improvements” could lead to ecological integrity. Without specific directions stating this clearly in the Agreements, however, the Committee is very concerned that piecemeal and unrelated improvements could lead to a deterioration of the overall integrity of the Lakes.

So it's a somewhat more nuanced version of version 2, and the committee is free to change it as much as it likes.

Moving to section 5, paragraph 6--

   (0930)

**The Chair:** I'm sorry.

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I'm sorry, Mr. Chair. If we have concerns, do you want us to express them at this point or let Tim finish the whole thing?

↓ ↑

**The Chair:** I thought we should get the full flavour, because some of the changes are reflected, as Tim has pointed out, later on. One example is the new recommendation.

I thought we would get all of the changes, and then we can go back to them and have a full discussion on them.

↓ ↑

**Mr. Joe Comartin:** Thank you.

↓ ↑

**The Chair:** If that's okay with the committee, then, I'll come back for questions.

Tim.

↓ ↑

**Mr. Tim Williams:** Paragraph 60 is a new paragraph. I think it came from the Conservative Party. It basically gives a little bit more emphasis about what happens in the lack of knowledge. Basically, damage happens in the lack of knowledge, and therefore we should try to improve our knowledge.

Paragraph 61 is where there was some discussion. I did not actually use the term "precautionary principle". This has now been changed and brought in specifically. There was a request to bring in a definition. I've put in the definition from the Rio Declaration. Obviously, the committee members are free to discuss which definition they would like.

Recommendation 1--page 30 in the English version--has also been changed just to reflect the fact that we are talking about the "precautionary principle" instead of "principle of precaution", as it was in version 2.

The lead-up paragraph to recommendation 3 is paragraph 70. There was, I think, a request from two members of the committee that reference be made to the IJC's recommendation of their interim report from August 1999. Basically, they stated that before they came out with their final recommendations in the year 2000, they requested a moratorium be put on withdrawals. That is now specifically referenced after recommendation 3, paragraph 71.

Paragraph 72, then, specifically refers to the IJC's conclusions in their August 2004 report, which looked back at their recommendations and stated that:

Finally, the Commission recommends that the outcome of the Annex 2001 process should include a standard and management regime consistent with the recommendations in our 2000 report. Until this process is complete, it is not

possible to say whether and to what extent Annex 2001 and measures taken under it will give effect to the recommendations in the Commission's 2000 Report.

Paragraph 73 is a new paragraph that's highlighted, that is essentially the same concept as in version 2. The last sentence leads into recommendation 3, but now is more of a stand-alone thought in that it says:

In following the precedent of the IJC's interim recommendation in 1999

---which was for a moratorium, pending their final version in 2000--

the Committee believes that until such Agreements are finalized




--"such" meaning agreements that meet the IJC's 2009 recommendations--

a moratorium should be put in place on approval of new and revised withdrawals.

Section 74 comes from a request from a member of the Bloc, Monsieur Simard, to have a new recommendation. This section leads into recommendation 4. Basically, it moves part of what was in version 2 in the "Return Flow" section and makes it a new section that leads into a recommendation:

...that the Canadian government remove its support for the 5% maximum use threshold and urge the IJC to revisit this provision of its year 2000 recommendations.

I think there was a fair amount of thought around the table that this 5% return should be really looked at as a maximum and not some kind of a standard to be met. That's where I also moved the quote from the government's response to the year 2000 report, giving its support reluctantly from the words to that recommendation of the IJC.

   (0935)

Recommendation 5 and paragraph 78 have been changed. This is a request from Mr. McGuinty to give a little bit more direction to where we want the funds to go. There was some evidence given by witnesses that suggested that federal capacity should be increased, so I've basically said, in recommendation 5, that funds be apportioned in a coordinated manner to government departments.

I know this is still fairly vague, but we really didn't hear from any witnesses about which departments of the government should be given money. There's Fisheries and Oceans Canada, the Ministry of Natural Resources, Environment Canada, all sorts of departments that are involved, and Health Canada-- basically the five MNR departments. We heard no testimony, really, about which department should be getting money, so I've left that fairly general.

The last correction was clearly in response to some of the recommendations. In paragraph 87 there was some question as to the powers of the provinces versus the powers of the federal government and how that has changed over the years in terms of implementing the Boundary Waters Treaty.

I have included the citation from Mr. Pentland clarifying exactly what he meant by the provinces basically gaining more and more capacity, getting better and better at it. Finally, he says, "it may be that over the four decades or so we've gone too far", meaning that the federal government should perhaps be a bit more involved.

Those are the major changes that I've added to try to respond to the recommendations made about version 2 at the last meeting.

↓ ↑

**The Chair:** Thank you very much, Tim, for capturing the spirit. That's not an easy thing to do from the fairly rapid discussion at the last meeting, and members did not have the draft before them in advance. So we appreciate the work and consideration that has gone into that.

Now what I would suggest is that we more slowly go back to some of the issues that were raised, particularly with respect to the changes that have been suggested by research. Perhaps I could do this and just guide the chair, but my suggestion would be that we go to the changes themselves and focus on them, and then deal with the report again in its general context.

The first changes--and Tim, you're going to have to keep an eye on this so that I don't miss any--were on paragraph 7. Are there any questions or issues related to paragraph 7? Okay, let's leave that.

Then Tim went on quite a bit to the sections on the return of flow requirements. That's paragraph 48.

Mr. Simard, did you have your hand up with respect to this particular one or in general?

[Translation]

↓ ↑

**Mr. Christian Simard (Beauport—Limoilou, BQ):** I wanted to comment on paragraph 75 and the recommendation, but I think you want us to discuss it later. Can I make this comment now?

[English]

↓ ↑

**The Chair:** My suggestion would be that we leave it until we come to that part of it. I'll flag that and we'll deal with it then. I'd just like try to keep it in the order that we have here. Okay?

On paragraph 48, then, is there any discussion or anything on that?

Then, on paragraph 50, the provision of no net loss that was raised by one of the members, is there any discussion?

We'll go on to paragraph 53 and then straight through quite an exhaustive revision up to paragraph 58. So that's paragraphs 53 to 58.

Mr. Comartin.

Ⓜ ↓ ↑ (0940)

↓ ↑



**Mr. Joe Comartin:** Yes. I want to echo your comments to Tim, Mr. Chair, and the work he's done on this, given the shortage of time and the amount of material he had to work with.

We've received a fairly impressive result.

Having said that, I want to oppose paragraph 54 because I do not agree with the conclusion in the final sentence, in the sense that the resource improvement test should be applied with care. At this point I don't think it should be applied at all.

I can suggest that either we change that, and I think we're going to have to change the wording from my perspective.... We may be able to deal with it in paragraph 58 as well. Perhaps we use some wording along these lines, and I can read this sentence, "While the Committee is not convinced that this will be the case...." And I think that was generally the response from the committee, that Mr. Pentland's assessment, and to some degree, if you look at what Mr. Shrybman said, it was the same thing...that it could turn into commodifying water. That was really overall what they were concerned about. I think there was a mixed reaction from the committee on it. I tend to side with them, but I don't think the committee as a whole did.

On the other hand, I don't think we're prepared at this time as a committee to say this test should be used at all, until there is further research that would justify the use of that test in the sense that it would show we would not end up with commodifying water.

The qualification that needs to go into that final sentence--and this would be my submission--is that it should not be applied at this time until there is further research that shows it does not end up in this trade-off that would compromise the ecological integrity. I'm sorry, I'm throwing a lot of words in there, but that's the concept I'm trying to get across.

At some point we may very well be able to use that. I'm open-minded enough, I think, to accept that possibility, but we're not at that stage now.

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**The Chair:** Mr. Comartin, within the context of how paragraph 54 is written now, I understand the intent, but how are you injecting that phraseology?

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**Mr. Joe Comartin:** In the final sentence, I would say that "it should not be applied at all at this time"--

↓ ↑

**The Chair:** You used some other words, though.

↓ ↑

**Mr. Joe Comartin:** --"until there is further scientific"--I don't know if "research" is the right word, or "evidence" may be a better word--"that would show that this test would not lead to the commodification of water."

↓ ↑

**The Chair:** Okay. We'll let our clerks craft that a little, but I think we understand the point.

Mr. Simard.

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**Mr. Joe Comartin:** Mr. Chair, I'm being asked a question from Mr. Wilfert. Perhaps I could respond to that.

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**The Chair:** Sorry, I didn't--

↓ ↑

**Hon. Bryon Wilfert (Richmond Hill, Lib.):** I have a point of clarification on whether he's talking about the sale. Or is it a broader term?

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**Mr. Joe Comartin:** It would be a broader term, Mr. Chair. It's not just the issue of saying to the southwest, "Okay, we're going to sell you water at so much a litre or a gallon"; it's this economic trade-off that can occur, and that's part of the commodification of water. We would say that we're going to move this amount of water out here if you do this over here. Perhaps we're going to give Milwaukee so many millions of gallons a day in exchange for them building a sewage treatment plant or a water treatment plant.

The difficulty with this in that circumstance is it may not do anything for the ecological integrity of the water in the basin, so you're in effect saying that those millions of gallons are worth this treatment plant. So it is a broader concept than just saying we're going to sell water for so much a litre.

⊕ ↓ ↑ (0945)

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**The Chair:** And of course that's picked up in paragraph 58.

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**Hon. Bryon Wilfert:** So the movement of water in one area could be bartered, in a sense, for improvements in another.

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**Mr. Joe Comartin:** Exactly.

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**Hon. Bryon Wilfert:** I would agree with that.

↓ ↑

**The Chair:** Mr. Simard.

[*Translation*]

↓ ↑

**Mr. Christian Simard:** As it is presently drafted, paragraph 54 is contradictory. It says: “The Committee, however, heard very articulate and forceful evidence...“. This seems to indicate that the committee agrees on the evidence, but later, it is said that the committee is not convinced. This is somewhat contradictory. I agree with Mr. Comartin that the notion of care is important in this paragraph. We know that interpretations regarding what will become or not a commercial item are sometimes based on work such as that of a parliamentary committee.

Consequently, this report must be drafted very carefully. To begin with, however, I do not believe that the fact of saying we will make some improvements will automatically make it commercial.

All environmental impact studies are carried out with what is called mitigation measures. These are compensation measures. When Hydro-Québec builds a dam and says that, to compensate, it will develop thousands of hectares of wetland, this does not put a price on the wetland. We must be careful, of course, but mitigation or compensation measures are not automatically equivalent to commercial value: a number of gallons divided by the cost of development equals a number of dollars per litre or gallon. It's not automatic.

What is more of a concern is that up to 5% will be withdrawn, and in exchange, minor improvements will be made here and there, but they will never compensate for a 5% diversion or excessive pumping.

It's like buying peace by giving little things to little groups. We did that a lot here and it worked, but we must be careful in drafting.

[*English*]

↓ ↑

**The Chair:** Thank you, Mr. Simard.

Tim has just indicated that he would like to reflect on the points raised.

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**Mr. Tim Williams:** Basically, I missed “articulate and forceful”.

To match the final statement, which I wanted to make reflect a bit more where the committee was

going, perhaps “heard very articulate and forceful evidence” should be taken out and replaced by “heard evidence”.

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**The Chair:** That suggestion is also pursuant to what Mr. Simard indicated in terms of the continuity here.

I guess what we'll do is take all the suggestions and then put them in the form of amendments. In order to remain focused, I think we should do these one at a time and maybe do them as we're having a full and wholesome discussion of each one.

So there's the suggestion, “heard evidence”. Articulate, it may have been, but whatever, I'm just going to put some brackets around those for now.

I'm going to go to Mr. Watson and then to Mr. McGuinty.

↓ ↑

**Mr. Jeff Watson (Essex, CPC):** Thank you, Mr. Chair.

I'm not sure I'd disagree with the evidence being articulate and forceful; it's the conclusion I seem to disagree with--whether or not the committee is not convinced that this will be the case. I'm more open to the fact that it just might be the case.

So it's the conclusion I disagree with, not the type of evidence. The evidence was persuasive, in my opinion. I'm not sure how we arrived at the statement that there's consensus on the conclusion of that statement. I'm registering the fact that I disagree with it. That's more the problem I have with it.

Thank you, Mr. Chair.

🕒 ↓ ↑ (0950)

↓ ↑

**The Chair:** Just as a clarification, with respect to differing points of view, there isn't anything in here that suggests we have a consensus yet. This is what we're endeavouring to find out. We'll only know that at such point as we put a vote.

Mr. McGuinty.

[*Translation*]

↓ ↑

**Mr. David McGuinty (Ottawa South, Lib.):** Thank you, Mr. Chairman.

I totally agree with what Mr. Simard said a few minutes ago. It is very difficult to demonstrate clearly

that there is a causal link between these two things.

[English]

In other words, to pick up where Mr. Comartin left off, we did hear very articulate and forceful evidence that there was such a cause and effect and I'm always leery of such assertions because asserting such a thing doesn't make it so.

I think what Mr. Comartin is saying is that there might be a need here to be careful by applying a precautionary principle. That's really what we're saying here, that there is no clear cause and effect, that by applying the resource improvement standard it will lead to the commodification of water. I don't know how we could state that as a committee, given what we've heard, but we should proceed with caution in the absence of fullness of knowledge and scientific data. But I am worried if we say clearly to our minister or to Parliament, all parliamentarians, to the Department of the Environment, that there is a clear cause and effect between applying a resource improvement standard with the commodification of water. That is not so. Nothing I heard led me to come to that conclusion, and I think we should simply redraft the paragraph to say that we recommend proceeding with caution.

↓ ↑

**The Chair:** Okay.

Are there any other comments?

Mr. Comartin and Mr. Richardson.

↓ ↑

**Mr. Joe Comartin:** Again, to have some direction, I don't think proceeding with caution is really where the committee is at. I don't think the committee, at this time, would want it applied because we do have reservations.

I take Mr. McGuinty's points. As I said earlier, I think there is some division here as to what the consequences would be. But the way it's worded now, and I think even the wording he is suggesting, to proceed with caution, at least to me suggests we would apply this principle. I don't think the committee, at this point, is of a mind to apply the principle. We want to be more comfortable that in fact it won't lead to the commodification of water in any form.

I think that's the subtle difference we need to be able to communicate.

↓ ↑

**The Chair:** Mr. Richardson.

↓ ↑

**Mr. Lee Richardson (Calgary Centre, CPC):** My sense of it would be that perhaps the changing of one word might accommodate what I felt was the consensus, if there was any in the committee in this regard, and that would simply be to change the third last word in the paragraph to "approached" as

opposed to “applied”. So it would read “...there are other problems with the concept of “resource improvement” that suggest it should be approached with care”. It gives a slight nuance to the change.

↓ ↑

**The Chair:** Are there any comments with respect to the suggestion Mr. Richardson is putting on the table?

I take it, though, Mr. Comartin, that yours was quite an exhaustive addition on the end of it. Do I take it that the points made by Mr. McGuinty and yourself would be accommodated by what Mr. Richardson has suggested?

↓ ↑

**Mr. Joe Comartin:** Please give me a moment, Mr. Chair.

I think it would be because I just don't want it applied. I think “approached” would leave open the possibility of the research that needs to be done to reassure us.

↓ ↑

**The Chair:** Mr. McGuinty, I think that's a step in the right direction.

Thank you for that suggestion, Mr. Richardson.

What about the other section, “very articulate and forceful”? Some of us may take different inferences with respect to the presentations. I think Tim's suggestion, taking out “and forceful” actually and keeping “very articulate evidence” is, I think, non-judgmental in terms of content. It's more a reflection that people articulated to an extent their particular point of view.

Is there any opposition to leaving “heard very articulate evidence” that applied and then taking Mr. Richardson's suggestion to take “applied” out and amending it to read “approached”?

Mr. Wilfert.

⊕ ↓ ↑ (0955)

↓ ↑

**Hon. Bryon Wilfert:** Well, that's wordsmithing it. Why don't we just say we heard evidence? Does that mean there's other evidence that isn't as articulate and forceful, Mr. Chair?

↓ ↑

**The Chair:** All right. I never was much at semantics. I'm taking it that the committee is in agreement.

Okay, just taking that out, so paragraph 54 would be amended by deleting “applied” and putting in the word “approached”.

May I put a vote on that? Do I have a consensus that there's agreement on that as amended?

**Some hon. members:** Agreed.

**The Chair:** Okay.

Mr. Comartin, does that now satisfy your concerns vis-à-vis paragraph 58?

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**Mr. Joe Comartin:** Yes, it does.

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**The Chair:** Is there anybody else? Okay, we can leave that then.

The chair would like to proceed to 60:

The Committee is very concerned to learn that in the absence of such knowledge to back up decision making, serious damage has occurred, for instance, to groundwater resources in the United States.

Tim raised the point about the lack of knowledge, I guess, with respect to that. Are there any problems with 60?

Then once again we have “the Precautionary Principle be that of the Rio Declaration”, and then Tim took us through 61, with the precautionary principle being entrenched in recommendation number 1. Any discussion on that? Okay.

Then I think we will go along to number 70, leading into recommendation number 3. This was with respect to the 1999 report of the IJC, and Tim has tried to capture the issue raised with respect to a moratorium and has crafted recommendation 3.

Then we go on to 72 and 73. Number 73 is the key paragraph, a new paragraph reflecting the IJC's recommendation to actually have elements of their position included.

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I have two points.

I would actually like 73 to be turned into a recommendation. I don't think it's beyond the scope of what we heard to press the governments on both sides of the border to continue what in effect has been a moratorium.

Again, tying into that, if we're going to make a recommendation, we'd have to change the wording to add to it, until there is clear scientific evidence that would allow that to occur without ecological damage.

But I would like to turn that into a recommendation. If necessary, I'll move a motion to that effect, Mr. Chair.

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**The Chair:** Is there any discussion with respect to...?

Mr. Richardson.

↓ ↑

**Mr. Lee Richardson:** I will second that motion.

↓ ↑

**The Chair:** It looks like we have a consensus.

Tim, do you have any response or discussion?

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**Mr. Tim Williams:** I would just like some clarity as to whom to recommend that? To recommend to the government in their letter?

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**Mr. Joe Comartin:** Yes.

↓ ↑

**The Chair:** Then how would that—

↓ ↑

**Mr. Joe Comartin:** We're looking for Foreign Affairs to take that position in response to the charter. We'd be recommending to them that they do that.

🕒 ↓ ↑ (1000)

↓ ↑

**The Chair:** To be clear, how would we word that, Tim, in terms of giving the direction?

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**Mr. Tim Williams:** The clerk might...



↓ ↑

**The Chair:** I just want to get that clear so we know what that would be if we had a motion.

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**The Clerk:** Maybe we could draft something by the end of the meeting.

↓ ↑

**The Chair:** Let's just hold off on that and we'll come back to it. We're going to have our clerk and the researcher draft something.

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I'm looking perhaps for some direction from you or Tim. I would like to see an addition to either recommendation 2 or 3—I think it could go into either one of them—or an additional recommendation, that the International Joint Commission continue to be the final decision-making body, as far as any diversion is concerned. It would be an extension really of what.... I think it's what the State Department's position is in the U.S., when they say they want the Boundary Waters Treaty to be the controlling document here. I don't think this is subtle, but I think it's really important that we also acknowledge that it's the IJC that ultimately should make the decision as to diversion.

↓ ↑

**The Chair:** Okay.

↓ ↑

**Mr. Joe Comartin:** I would move it, if necessary, either as a change to recommendation 2 or recommendation 3. Depending on what Tim's response is, if it should be a separate recommendation, I would move it that way.

↓ ↑

**The Chair:** Okay. Before we ask Tim, is there a request for clarification? I saw some hands.

Was this the same point, Mr. Paradis?

[Translation]

↓ ↑

**Hon. Denis Paradis (Brome—Missisquoi, Lib.):** It's about paragraph 70.

[English]

↓ ↑

**The Chair:** It's different.

Mr. Bigras.

[Translation]

↓ ↑

**Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ):** It's also about paragraph 70 and recommendation 3. I remember mentioning that I wanted our report to include Mr. Gray's presentation, which referred to the International Joint Commission's August 2004 report. It was said that, in the current state of the process, it could not be concluded that the draft agreement did not support the application of the International Joint Commission's recommendations.

Since we are examining these aspects, I must say that I do not see in the report what Mr. Gray had highlighted. I may be wrong. Mr. Herb Gray, Chairman of the Canadian section of the International Joint Commission, appeared before the committee. He indicated quite clearly that the International Joint Commission could not conclude that this draft agreement violated or was not consistent with the International Joint Commission's recommendations. I wanted this to be in the report. I don't see it right now.

[English]

↓ ↑

**The Chair:** Tim.

↓ ↑

**Mr. Tim Williams:** That point was taken into account. It's not actually in the recommendation itself, but I could incorporate it. It would perhaps make it a little too long. The specific citation from the year 2004 review of the year 2000 recommendations is in paragraph 72. Subparagraph 72 now states exactly what the commission has said with respect to the Annex 2001 process.

Would you like me to read it?

[Translation]

↓ ↑

**Mr. Bernard Bigras:** I can say it. Maybe I'm not expressing myself correctly, but I believe I did hear Herb Gray say that. I even asked him the question. I could find it in the minutes, which are not very far.

Herb Gray clearly said, with reference to the August 2004 report, that the International Joint

Commission could not conclude that this draft agreement between the governors and the two provinces violated or was not consistent with the recommendations made by his organization. So I feel that, since it is the purpose of our study, it's important to say it. That's all I'm saying.

⌚ ↕ ⬆ ⬇ (1005)

[English]

↕ ⬆

**The Chair:** Okay. Tim's point is that he thinks it is captured in paragraph 72.

Tim, although it would make recommendation 3 longer, could you firm that up in recommendation 3? Would it be possible? I know it would make it longer, but would it be possible to reword it or add to it?

↕ ⬆

**Mr. Tim Williams:** Yes, as I understand it, basically, the IJC is waiting for the final annex implementing agreements to come to any conclusion, but they have recommended in no uncertain terms that the agreements meet their year 2000 recommendations. They haven't determined yet, either way, whether or not that's true and that is reflected within paragraph 72.

Certainly, within recommendation 3, to a certain extent, we are supporting their point of view that the annex implementing agreements should meet their year 2000 recommendations. I can put in "as the IJC has also recommended", or I can move the whole section, paragraphs 71 to 73, in front of the recommendation and then add some more words within that recommendation.

↕ ⬆

**The Chair:** If I may, I think that seems to me to be more in keeping with the flow, that it would be a foreword to the recommendation. So where we have come from, we would take the explanation in recommendation 1 and move it in front of recommendation 3. Then there would be a few words at the end, as the IJC has indicated in the foreword to this recommendation--something like that.

We'll come back to this. The chair will not put a vote on this until we've had a crafting of both Mr. Comartin's suggestion on paragraph 73 and the suggestion with respect to the wording for recommendation 3 and the movement of that clause. This is just a reordering, if you will.

So, we'll come back to that.

On this, Mr. Paradis.

[Translation]

↕ ⬆

**Hon. Denis Paradis:** In recommendation 2, there are terms that look like the terms of recommendations 1 and 3.

[English]

It says "...the Canadian government urge the Governors and the Premiers to include...."

[Translation]

This phrase is used throughout the recommendations.

By and large, the witnesses told us that, when there is an agreement between eight governors and two provinces, we are mathematically inferior to the eight governors because there are only two provinces. As we heard a few times, I would rather see a federalism with more participation and cooperation than a federalism with levels. Currently, there is an agreement between eight governors and two premiers. When we look at that, we have to wonder where we were when all this was negotiated.

I believe that the environment is an area in which all levels of government should be involved. This cooperation should exist during the discussions. Otherwise, some will come back and say they don't like the agreement that was concluded, that it should give more consideration to this and that. I agree with the overall recommendations here, but I would like it to be added that greater participation is expected on the part of both the American federal government and governors and the Canadian government and provinces. We seem to be absent from these negotiations and talks. So, we could say that there should somehow be more dialogue and cooperation between the provinces and the Canadian government.

It's even more important on our side, because if there were water diversions, Canada is not the one who will claim the water coming out of the basin; it will be the United States. On our side, the integration or co-participation of everyone is even more important than on the American side.

   (1010)

[English]

**The Chair:** Thank you, Mr. Paradis.

Mr. Simard.

[Translation]

**Mr. Christian Simard:** We asked Mr. Gray himself a question on that very subject. He very clearly said that the Boundary Waters Treaty, a treaty concluded by both federal governments, could exist, but that in fact, over the years, it had been difficult to prevent actual diversions because the existing regulations were those of the states and provinces. We are examining a moral recommendation for the overall issue, but if we are to confuse jurisdictions or talk of cooperation between government levels, we will not clarify the situation.

There are eight states, which can have a compact, and two provinces, there is a reading of the overall issue, and there are the comments of the Committee on Environment. The government also made

recommendations. The Canadian government has jurisdiction on the Boundary Waters Treaty, but not on state regulations. It cannot replace state or provincial regulations. If you really want to create confusion... In writing this, we will clarify nothing.

I asked not only Mr. Gray, but also a few experts if we should get involved in these agreements. Everybody said no. They said the agreements were necessary, because the Boundary Waters Treaty and the IJC, with its arbitration powers, have reached their limits. Beyond broad principles, they said, don't touch the Great Lakes. In fact, we did touch them. We touched them, because the federal governments of the United States and Canada don't regulate water pumping. This is the responsibility of municipal, provincial or state governments. Everyone to his trade and all will go well.

[*English*]

↓ ↑

**The Chair:** Thank you.

Mr. Bigras.

[*Translation*]

↓ ↑

**Mr. Bernard Bigras:** The question was asked to witnesses, and some of them felt that it could be preferable that interprovincial agreements be concluded on these issues.

I'm not sure that adding a new player is the right thing to do. Some even said, regarding the federal guarantees, that regardless of the agreements signed by the provinces and American states, there would always be this double safety net.

I think this should be taken into consideration. Let's not forget that the provinces and states have a right of veto under the agreement. Consequently, I think we have a sure protection, and the addition of a third player now is not necessary.

[*English*]

↓ ↑

**The Chair:** Thank you, Mr. Bigras.

Mr. Scarpaleggia.

[*Translation*]

↓ ↑

**Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.):** Mr. Chairman, I believe my colleague meant to say that there should be more collaboration and consultation between levels of government so that the federal government will not have to use its right of veto and make statements against the provinces.

[English]

↓ ↑

**The Chair:** Okay.

Mr. Wilfert, and then I'll come back to you, Mr. Paradis.

↓ ↑

**Hon. Bryon Wilfert:** Mr. Chairman, I think Mr. Paradis has an excellent point, because if the federal government in fact has no role to play, I'm not sure why we spent all this time on this. One would presume we are here to.... And the Ontario government indicated they would be consulting with the federal government as the negotiations resume in January. It's not to replace anybody; it is to provide whatever assistance would be useful in this situation.

On the one hand, we're asking for the Government of Canada to play a more...and I kept asking that question: what role specifically do you think the Government of Canada can play?

I don't think we can have it both ways. Either we are going to say that Ottawa in fact can be involved in providing whatever assistance the provinces may be looking for.... But I think the fact that on the one hand, the federal government...complaints that we haven't articulated a clear enough position, for some. But on the other hand, I don't think saying the federal government might have a role to play would not be viewed as a good idea holds--no pun intended--any water.

I think either we are saying we are going to play a role.... How that role is defined, obviously, is working with our provincial partners.

⊙ ↓ ↑ (1015)

↓ ↑

**The Chair:** Okay.

Mr. Paradis, then Mr. Watson.

[Translation]

↓ ↑

**Hon. Denis Paradis:** Mr. Chairman, I would like to emphasize that encroachment into jurisdictions is out of the question: we are talking of cooperation here.

We are examining agreements concluded between governors, provinces and so on, and here we get a communiqué in which the government of Ontario says, among other things, that they are not satisfied with the agreements.

Will Canada ever reach an agreement without Ontario, Quebec and Ottawa being divided and going it

on their own? Can we imagine, to improve the situation, that Canada can present a united front, so to speak, and adopt a global vision?

I propose that, in a federal context, we work together rather than contemplate dropping the agreements. I in no way wish to encroach into jurisdictions; I only want the Canadian government to be present and cooperate with the provinces. In environmental matters, nothing is clean-cut. It's practically impossible to tell where certain things start or finish.

A little earlier, our friends opposite said that it was better to have the federal safety net. I'm not looking for a safety net; I want everybody to participate. We practically all have the same objective, i.e. to stop draining the lakes and pouring toxic products into them. Can the various levels of governments collaborate more to achieve this?

I absolutely do not want to substitute for a municipality for pumping or for a province for other things. All I want is for the levels of government to work together. I would like to see mentioned, somewhere in this document, that it is desirable that much more work be accomplished jointly by the various levels of government.

[English]

↓ ↑

**The Chair:** Just before we go any further, the chair has made a bit of an error here, in terms of precedents that I've tried to follow in the past. When members have a suggestion that they'd like to put as an amendment, or whatever they're speaking to, could we just have the wording changes?

Mr. Paradis, I understand the spirit you're articulating. You want it more collaborative and cooperative. Is there something in the recommendations that we're discussing? We're on recommendation 3, paragraph 70. Was there some wording in paragraph 73 that you had in mind, just so we know what we're talking to?

Then I'll come to you, Mr. Watson.

[Translation]

↓ ↑

**Hon. Denis Paradis:** What I'm saying is that recommendation 3 is worded the same way as recommendation 2 and others:

[English]

...“the Canadian government urge the Governors and the Premiers” to revise that, to do something.

[Translation]

I suggest, Mr. Chairman, that before each of these recommendations, including the third one, the following words be added: “Whereas it would be desirable that our governments, in the future, work more together.”

[English]

I suggest "whereas it would be advisable that our governments

[Translation]

cooperate more . »

[English]

↓ ↑

**The Chair:** That's helpful.

I'm going to ask Tim to work on that for a moment, just so we know what we're talking to, that's all. So it would be an introduction that would use words to the extent that in order to achieve the recommendations' results, something would occur.

I'm going to go to Mr. Watson and then I'll come to Mr. Bigras.

↓ ↑

**Mr. Jeff Watson:** All right. Perhaps we can crystallize this in a very succinct way. Here on the committee I sense we're all cooperating and collaborating toward a productive end, a good report, and yet within that we're all urging our positions. I don't think the two are mutually exclusive in any sense. I think the government has a forceful position in this discussion, and I think to urge that position within the context of cooperation...the two are not mutually exclusive, in my opinion.

I see no problem with continuing to say we have a forceful interest in this, and the government should urge this. It does nothing to damage the spirit of cooperation. At the end of the day, this will be settled in a cooperative manner, but we all have forceful positions to take, and I think there's nothing wrong with that language.

↓ ↑

**The Chair:** Mr. Bigras, and then Mr. Comartin.

🕒 ↓ ↑ (1020)

[Translation]

↓ ↑

**Mr. Bernard Bigras:** While Tim is wording the recommendation, I would like one point to be clarified: there is the agreement and there is the International Joint Commission. I would not want to see a third player included in the agreement, in this case the federal government. That's not what we are recommending. We are already asking that the agreement respect the recommendations of the International Joint Commission, where the Canadian government already has a great deal of power, with



the American federal government.

We ask the governors that the reference be the International Joint Commission report. The Canadian government already agrees with the American government on this commission. I believe it is possible for the provinces and American states to conclude agreements. In my opinion, we are already defining a limit by asking that the reference be the International Joint Commission report.

I don't know what Mr. Paradis has a problem with. Inevitably, the standards applied will be those of the International Joint Commission. However, the Canadian government is very well represented there. I am convinced they agree with me on this point.

[*English*]

↓ ↑

**The Chair:** Tim is just pointing out to me that after paragraph 6 there is a paragraph 86 on better coordination with provinces. That's paragraph 86 after paragraph 6. It's on page 39 of the English. I'm not sure what page it is on in the French, but it's paragraph 86.

Mr. Comartin, and Mr. McGuinty.

↓ ↑

**Mr. Joe Comartin:** I originally had my hand up for two purposes: one, to ask what you've just recommended, which is to get some specific wording.

[*Translation*]

For the moment, I have a problem: I don't know exactly what wording Mr. Paradis wants. I would like to see the text before making a decision.

[*English*]

On the second point, I don't know if we've gone off track, but I do want to get my recommendation in about the IJC having the final decision-making power, and I don't know if that's been lost in this.

Tim's nodding his head, so I'm fine.

Thank you.

↓ ↑

**The Chair:** No, it hasn't been lost.

We're definitely coming back to that, and I am also going to try to have some wording with respect to this, Tim. Perhaps you could just work on that for a moment.

Mr. McGuinty.

↓ ↑

**Mr. David McGuinty:** Thank you, Mr. Chairman.

I think the import of what my colleague was trying to say a moment ago was this. As rightly stated, Tim, in paragraph 86, "...the *BWT* is an 'empire treaty', and as such the federal government has the authority to implement it." I think my colleague was trying to indicate that not only does the federal government have the authority to implement it, but the federal authority also has the responsibility to implement it. I think what he was trying to indicate was that the committee here would send a clear message to the Government of Canada that it ought to be paying closer attention to what's going on.

I think that's what he's trying to indicate here. I don't think we're trying to step on jurisdictions.

The fact that we are a party and a signatory to the treaty that creates the International Joint Commission is one thing. It's handled over there; it's taken care of over there at the International Joint Commission. Well, clearly what we're trying to say here is that perhaps it's not. I think my colleague was indicating--and I would support this, and I hope other committee members would support this--that a clear message be sent that we ought to be paying closer attention, that this be on the radar screen of the Government of Canada in a more fulsome way.

↓ ↑

**The Chair:** Thank you.

Mr. Simard.

[*Translation*]

↓ ↑

**Mr. Christian Simard:** I don't think it's necessary. It is sometimes preferable not to add anything. It's not necessary to write it, because it could mean this: do we want to sign? Does the Canadian government want to sign the agreement?

Evidence of what I'm saying is that there are currently discussions, and the IJC is carefully considering the issue. We have seen that they are examining how these recommendations can be reflected in the agreement. The Canadian government has a great deal of influence on the IJC. In fact, the recommendations do not only encourage or invite the others. One of the fundamental recommendations is aimed at the Canadian government, who accepted that the amount of water diverted could be up to 5%. I think this is the most important issue to address for the agreement to be signed.

Since a recommendation is aimed at the Canadian government, it is definitely involved.

🕒 ↓ ↑ (1025)

[*English*]

↓ ↑

**The Chair:** Thank you, Mr. Simard.

Mr. McGuinty.

↓ ↑

**Mr. David McGuinty:** Just in response, if it is so self-evident that the Government of Canada has a role to play and is engaged in this process, why has it gotten to this point?

I think the point is that it's not self-evident. The point is that the Government of Canada should be more fulsomely engaged, and I think we should send a message as a committee. I think it's great leverage and it's important for the committee to say, "Get engaged".

↓ ↑

**The Chair:** Thank you.

Mr. Bigras.

[*Translation*]

↓ ↑

**Mr. Bernard Bigras:** Mr. Chairman, we are at this point because the provinces and states have the right to sign agreements. Quebec and Ontario have the right to sign agreements with American neighbouring states, and this is why we are discussing it. If this right did not exist, we wouldn't be talking about it, but the provinces have that right. We therefore state that the provinces and states can indeed sign agreements. It's been done in other areas.

The federal government also has a predominant role to play, and this is referenced by mentioning the treaty and the IJC. Let's recognize, nevertheless, that the provinces and states have the right to agree and play a role. This seems fundamental to me. There can be these safeguards the government wants, and I can very well understand, but let's allow the provinces to agree with the states on certain issues if they wish to do so.

↓ ↑

**Hon. Denis Paradis:** Mr. Chairman, the research officer did well to draw our attention on paragraph 86 and the following. I apologize for starting this debate a little early, as we have not yet reached this paragraph. However, I must say that paragraph 90 answers more or less the questions I raised. This paragraph indicates that the committee feels that the federal government should have been kept informed of the details, that it should have played a more active role in developing these agreements, etc. I believe that paragraph 90 truly answers the questions I raised, and I would like it to be more prominent in this report. That would solve the problem.

[*English*]

↓ ↑

**The Chair:** Great minds think alike. I'm not sure this is a good example of it, Mr. Paradis, but we were just discussing it.

For the committee's consideration, why don't we leave this, since the spirit of what Mr. Paradis has talked about is captured--at least there is an attempt to capture--in paragraph 90?

Could we look at paragraph 90? The suggestion is that paragraph 90 be made into a recommendation. I'm suggesting we look at that as a possible way to deal with this. Again, in discussing it with Tim, he's saying that an attempt has been made in paragraph 90 to capture the concerns that have been raised. Is there any way that gives us some sort of an outlet here?

Mr. Bigras.

[*Translation*]

↓ ↑

**Mr. Bernard Bigras:** Mr. Chairman, if paragraph 90 becomes in fact a recommendation, I will have to sign a dissenting report. I say it right now, because the provinces and states have the right to carry on negotiations. Consequently, if it becomes a full recommendation, I tell you right now that I will sign a dissenting report.

[*English*]

↓ ↑

**The Chair:** We were just trying to reach some sort of an accommodation, but your comment is fair.

Mr. McGuinty.

↓ ↑

**Mr. David McGuinty:** Mr. Chairman, I share Mr. Bigras' concern about the rights of the provinces to enter into agreements. We are here because two provinces are attempting to contract out of the authority of the federal government. This is why we're here discussing this issue, because two provinces are acting in contravention of an international treaty, which is why we keep referring back to the reports of the International Joint Commission and heralding their recommendations. I don't see anything in strengthening the notion that the Government of Canada ought to be paying closer attention to this issue that would in any way undermine the right of the Province of Ontario or British Columbia, or, for that matter, the Province of Prince Edward Island, to enter into agreements of such kinds. This is what I'm having difficulty with.

My understanding is that we are here to deal precisely with a situation where two provinces have entered into an agreement or a potential agreement with eight states that happens to contract out of an existing international treaty. The last time I looked, the Government of Canada signs international treaties.

🕒 ↓ ↑ (1030)

↓ ↑

**The Chair:** Okay.

Mr. Bigras, and then I would like to try to bring this to some conclusion.

Mr. Bigras or other members always have the right to a dissenting report. But at some point, we have to get to a vote so that we can allow members to do whatever they feel is appropriate.

Mr. Bigras.

[*Translation*]

↓ ↑

**Mr. Bernard Bigras:** From the start, we have had representatives, if I'm not mistaken, from the Department of Foreign Affairs. According to the information I have, there are discussions between officials from Ottawa, Quebec and Ontario regarding the current negotiations. There is an exchange of information.

Consequently, I could question the truthfulness of the sentence indicating the committee feels that the federal government should at least have been informed of the negotiation details. I'm not doing it, but it should not be a recommendation, because we had representatives from the Department of Foreign Affairs. I would like the Parliamentary Secretary, who is present, to clarify. Could he tell us whether there currently are discussions with the provinces regarding the negotiations on this agreement project? Are there discussions between officials from Quebec, Ottawa and Ontario? He must be informed.

[*English*]

↓ ↑

**The Chair:** Mr. Wilfert, and then Mr. Comartin.

↓ ↑

**Hon. Bryon Wilfert:** Mr. Chairman, we never had representatives from the provinces here, which I thought was a weakness. I would point out to you that in that paragraph 90 we're talking about an "advisory role". It's surely an advisory role, and I don't know who would have a problem with the word "advisory". We are consulting with the provinces, so to make the obvious statement that we are consulting and providing advice.... You may provide me with advice and I may accept it or reject it. We are providing advice to the Government of Quebec and the Government of Ontario, whether they accept it or not.

All this paragraph is saying is the obvious. I would suggest as a recommendation, on the one hand, that we want the government to become more visible and more active. Maybe Mr. Bigras has a problem with the word "active", but I don't know. The word "advisory" is what we're doing; we are advising.

So there shouldn't be a difficulty with that.

↓ ↑

**The Chair:** Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I must admit, I'm tending to side with Mr. Bigras on this one.

Through you, Mr. Chair, to Mr. McGuinty, I think he's being a bit harsh on the provinces. I think what happened here, and I'm speaking more from the Ontario viewpoint because I'm not entirely sure of what happened from the province of Quebec's viewpoint, my perception is, from meeting with some of the officials from the Province of Ontario, that they ended up here rather than intending to end up here. If you go back into the middle 1980s when this process started, the intent was to clean up the Great Lakes, a straight remedial type of approach. Conservation was also a significant principle that somehow got sidetracked in the negotiations, I think under some significant pressure from the U.S. states. That would be the best assessment I could give you of the negotiation.

I don't think either of the provinces, Ontario or Quebec, intended at the beginning to end up where they did. I think they ended up where they did because of pressure from the U.S. states and the demand and pressure they have to try to divert water. When you go back and look at the initial process, the initial process was about remedial work, cleaning up the Great Lakes, getting the toxins out, doing preventative work. That's what the discussion was about through the late 1980s and early 1990s--the late 1980s anyway. So I think he's being a bit harsh on it.

I'm becoming somewhat frustrated by this discussion, so if we could move on, Mr. Chair, once we see the wording we may have to take a vote on it.

🕒 ↓ ↑ (1035)

↓ ↑

**The Chair:** I think Mr. Richardson got us out of one. Let's see if he's up to the challenge on this.

Mr. Richardson.

↓ ↑

**Mr. Lee Richardson:** I think perhaps the author has already gotten us out of this. I have some sympathy for what Mr. Bigras is saying here, but to agree with Mr. Comartin, I think the draft, perhaps in paragraphs 86, 87, and the preceding paragraphs to 90, really has captured what we heard as a committee. Yes, it is a sensitive issue and one that I think was handled rather well by witnesses. We've heard both sides of the story.

But before we press too much further on this, I refer Mr. Bigras back to paragraphs 86 and 87. I think they did capture the nuance of it. We understand there is jurisdictional concern here, and perhaps the federal government dropped the ball along the way. But I think we have pretty much thrashed this out. I think everybody understands where we all stand now. My own conviction is that it's captured well enough in it to proceed as it is, but if a vote is required after we see a new draft, I'm prepared to go along with that too.

↓ ↑

**The Chair:** Okay. We were talking about paragraph 90. Tim, at least in a step toward trying to find an accommodation, did you have any suggestion in terms of the position of paragraph 90? Then, Mr. Simard, I'll go to you to respond to that.

↓ ↑

**Mr. Tim Williams:** I have two suggestions. One is a comment more than a suggestion. In version 3, unfortunately all of the sections that were highlighted have gone. Paragraph 90 in version 2 was highlighted and it remains highlighted. The other option is that if the idea is to move the concepts in paragraph 90 into a slightly more evident place within the report, as opposed to at the end...paragraphs 40 and 41 describe the government's response to Annex 2001. Back in early 2002, I think it was, they made their response. Perhaps paragraph 90 could be moved to between paragraph 40 and paragraph 41. It gives it a more prominent place under the Government of Canada's response...or a version of paragraph 90. We could repeat it for extra emphasis.

[Translation]

↓ ↑

**Hon. Denis Paradis:** Mr. Chairman, I think we could agree and, as suggested by the Parliamentary Secretary, highlight paragraph 90. This could meet our requirements. I'm told it was the case in the second version.

↓ ↑

**Mr. Bernard Bigras:** What do you mean by "highlight"? Do you want to have it in boldface? I don't see why this one should be in boldface rather than any other.

↓ ↑

**Hon. Denis Paradis:** That's the way it was in the second version, I'm told.

[English]

↓ ↑

**The Chair:** Tim is going to show you how that would work, Mr. Bigras and Mr. Simard.

Members of the committee, as I understand it, the suggestion would be to take paragraph 90 and work it into the context of paragraphs 40 and 41 and still highlight it in the later part of the report.

Mr. Simard.

[Translation]

↓ ↑

**Mr. Christian Simard:** This form raises a problem, according to me. In French, the text is not highlighted. I think everything is important in a report. I do not understand why certain paragraphs should be highlighted and others not. We can move paragraphs, but highlighting them is not relevant. You know, it's like a letter in which three quarters of the text is in boldface. We can't tell what is important because everything is important.

I think this is a tempest in a teacup. It's as if Mr. Paradis did not have... We were not at paragraph 90. We discussed it too early, and it's precisely paragraph 90 that he is concerned about. We don't know who to hold responsible; we're still negotiating. Right now, we are talking of a draft, and we included in this draft that the Boundary Waters Treaty and the International Joint commission should be respected. Consequently, nobody violated the powers of the federal government. It's not you who said this, it's Mr. McGuinty. He said earlier that we were at this point because we ignored it. It's indicated in paragraph 90. Moving it, highlighting it in boldface, or making it into a recommendation, all this is no use, according to me. It's fine the way it is, and we have been discussing for nothing for half an hour.

   (1040)

[*English*]

**The Chair:** The best I can come to in an attempt at finding some sort of consensus with all of the views that have been put forward is that in spite of the arguments that have been placed, we're dealing with paragraph 90 because it offers some escape valve with respect to the issue of the collaboration and so on.

It was in the body of the draft, so we're not talking about a new recommendation. It was in the body of the first draft, and in fact it has been consistent.

My suggestion would be that we take the concerns raised on highlighting and leave it as is in the report, but that we direct--I think Tim understands the spirit--Tim to attempt to take paragraph 90 and at least weave or craft it into the section dealing with the Government of Canada's response to the Council of Great Lakes Governors. With Tim's record of capturing the spirit, I think he'll be successful in finding a resolution from all of our perspectives.

The motion I would have is that it be referred to research, that paragraph 90 be included in the section entitled "Responding to the Council of Great Lakes Governors", and to redraft that to reflect the spirit of paragraph 90.

That would be my suggestion. Do I have consensus on that particular direction?

**Some hon. members:** Agreed.

**The Chair:** Okay. Thank you very much. I think we're going to be okay on that.

We still have to come back to Mr. Comartin, and then Mr. Bigras' suggestions with respect to paragraph 73. Are we ready to do that?

Mr. McGuinty.



↓ ↑

**Mr. David McGuinty:** Mr. Chairman, are we leaving the “Better Coordination with Provinces” paragraphs right now, paragraphs 86 through 90?

↓ ↑

**The Chair:** Yes, we are, and I'm now trying to finish 73, dealing with the issue of a moratorium, and so forth.

Mr. Comartin indicated he wanted something at the end of the paragraph.

↓ ↑

**Mr. Joe Comartin:** I wanted it to be a full recommendation.

↓ ↑

**The Chair:** He wants a new recommendation with respect to 73. Do we have a wording for that yet? We've been distracted a little bit, but I'd like to try to clear this up.

If you have a suggestion like that, you don't need to tell me; you can just tell the committee.

↓ ↑

**The Clerk:** The members of the committee can give the chair authority to draft these new amendments. We'll send them to the members, and if they're happy with them you can give the chair authority to print the report.

↓ ↑

**The Chair:** Do I have concurrence on that? Would that help things out?

↓ ↑

**The Clerk:** It gives the chair the authority, after the members have agreed to the amendments, to table the report.

↓ ↑

**The Chair:** I would come back to the members who raised it, in this case Mr. Comartin and Mr. Bigras. That would help very much. I think you can appreciate that we're starting to get down to crafting, as opposed to substance here, if I may say.

⌚ ↓ ↑ (1045)

↓ ↑

**The Clerk:** I'll put an appropriate motion in the minutes saying that the committee agreed to let the chair make certain revisions for approval by the members.

↓ ↑

**The Chair:** Do I have consensus on that?

**Some hon. members:** Agreed.

↓ ↑

**Mr. Joe Comartin:** If we're going to move on to another point, I have one other that I want to raise.

↓ ↑

**The Chair:** That will take us, if I'm correct, to paragraph 92...back to 75, Mr. Simard? Okay, we'll go back to 75.

Mr. Simard.

[*Translation*]

↓ ↑

**Mr. Christian Simard:** I agree with that. I want to make sure the recommendation does not contain any misinterpretations. It reads as follows:

The Committee therefore recommends that the Canadian government remove its support for the 5% maximum use threshold...

I would add here: "which it considers too high"

...and urge the IJC to revisit this provision of its year 2000 recommendations.

Otherwise, it could be interpreted as meaning the maximum could be more than 5%. Of course, if we read the previous paragraph, it's clear that we don't want to go over this threshold, but the recommendations are often read individually.

[*English*]

↓ ↑

**The Chair:** Could you just write that down, Mr. Simard? Then we'll try to incorporate it.

[*Translation*]

↓ ↑

**Mr. Christian Simard:** Yes, immediately after the words “5% maximum use threshold.”

[English]

↓ ↑

**The Chair:** I can just move on and come back to that.

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I have a point about recommendation 5.

↓ ↑

**The Chair:** We haven't got there yet, but we're going there.

↓ ↑

**Mr. Joe Comartin:** As usual, I'm way ahead.

I would just indicate that I do support the point Mr. Simard had. I didn't catch that, and I think it's very valid.

↓ ↑

**The Chair:** Okay, if Mr. Simard can provide that, we can go on with recommendation 5 that deals with the appropriation issues raised by Mr. McGuinty.

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** Our researcher has pointed out accurately that we didn't get any evidence that would justify us suggesting some direction as to where additional research should be done and by whom. My own experience tells me it really is Environment that we should be looking at. I don't know if there's any way the committee would feel comfortable making that kind of recommendation.

If you look at the departments, it would potentially be Fisheries and Oceans, Natural Resources, and Agriculture, but the most logical one would be Environment. I'm not going to press this issue unless the committee is comfortable with it, but I certainly prefer that we make a specific reference to Environment and perhaps say they would be the lead department on research.

↓ ↑

**The Chair:** Mr. McGuinty, this was your point. Would you like to elaborate on it?

↓ ↑

**Mr. David McGuinty:** Thank you, Mr. Chairman.

I would like to build on what Mr. Comartin put forward. I guess the logical home would be Environment Canada. But to several witnesses who said there isn't enough money, there isn't enough research going on, there have been serious cuts, our water capacity has been eroded inside the Department of the Environment, the question I put in response to that is, well, do we know what the left hand and the right hand are actually doing?

I would put to the committee that one of the things we might want to consider in this recommendation is to call upon the Government of Canada to launch an interdepartmental examination of what capacity we have in water at AgCan, at NRCan, at DFO, at Environment Canada, and to take stock of what our capacity is now, and then of course to act on how much of that capacity we have or don't have. Is Environment Canada the logical place for it to be a part? I don't know ultimately, because I'm not sure where the greatest weakness is. I know we're having great difficulty on our oceans management strategy, given our weaker capacity at DFO on the science front.

So I would say perhaps we ought to consider, Mr. Chairman, calling upon the Government of Canada to pursue an interdepartmental examination of our capacity when it comes to water at large, and then to perhaps even report back to this committee, if that can be asked for.

⌚ ↓ ↑ (1050)

↓ ↑

**The Chair:** Okay.

Mr. Simard.

[*Translation*]

↓ ↑

**Mr. Christian Simard:** I totally agree with Mr. McGuinty. This wording suggests that it's not just a vain wish. It goes and it will never come back. The Commissioner of the Environment and Sustainable Development, Ms. Johanne G  linas, always says that we should try to strengthen the recommendations. I agree, and she may even be asked to come back to the committee, i.e. to provide her with information on this situation.

By now, we have seen the whole problem. We don't even know what the 5% figure really is. We don't know and we pump water without knowing anything about the consequences. It's dramatic. Lack of knowledge is central to the problem. Is the Canadian government able to deal with this lack of knowledge? Right now, the answer is no.

The Canadian government and the departments involved are asked to report to the committee within one year regarding the status of the research in the Great Lakes and the resources they will devote to it. I believe this would be a strong move. This is nothing. I totally agree with Mr. McGuinty.

[English]

↓ ↑

**The Chair:** All right. Thank you very much, Mr. Simard.

I take it, then, that there is a consensus of integrating into paragraph 5, since it already has been pointed out by Mr. McGuinty that it was vague to begin with--and I think Tim had indicated that. We agree to firm it up by a mechanism with respect to an interjurisdictional committee that would look at existing resources with respect to water quality, and to report back to this committee with respect to what those resources are and how they should be allocated in order to meet the objectives of the report. That's the essence of it, and I'll get some wording to that effect.

Mr. McGuinty, and then Mr. Comartin.

↓ ↑

**Mr. David McGuinty:** I think you might have misspoken slightly, Mr. Chair, in speaking about "interjurisdictional" as opposed to "interdepartmental". However, I would assume that most Canadians would expect us, in today's climate, to seek to cooperate on an interjurisdictional basis as well. I'm sure the capacity of the Quebec government and the capacity of the Ontario government is quite pronounced in this area. It would be something else to find out what the provinces are actually doing and what their capacity is.

Increasingly with the devolution of responsibilities to cities, we know that even cities are playing a more active role in water management and water quality issues. So I think it behooves us not to rule out the possibility of interjurisdictional cooperation, because it is a question of scarcity of resources and science and so on, and it would be interesting to see if we could start cooperating more fully.

↓ ↑

**The Chair:** Thank you, Mr. McGuinty.

Tim has some wording on this. He's been working feverishly with his red pen, which is not a partisan comment by any stretch.

↓ ↑

**Mr. Tim Williams:** I have plenty of blue and orange pens.

↓ ↑

**The Chair:** Would you give us what you have so far, Tim? Then we can bring it back to the committee.

↓ ↑

**Mr. Tim Williams:** Yes. There are two points actually. With respect to the recommendation,

basically I have added an additional sentence at the beginning that says something to the effect of:

The Committee recommends that the government pursue an interdepartmental analysis of its scientific capacity, and after it has done so, report back to the Committee. Further to this, the Committee recommends that after its analysis the government apportion in a coordinated manner significantly increased resources to freshwater research.

↓ ↑

**The Chair:** We didn't mention anything about the point of the environment committee having greater involvement, or how that would be resolved. I think that's the interdepartmental issue as to how that happens.

Do you have any suggestions on that, Mr. Wilfert?

↓ ↑

**Hon. Bryon Wilfert:** Not only scientific, but also policy...in terms of what policies are in fact being pursued within an interdepartmental approach.

↓ ↑

**The Chair:** Right.

Listen, I think the intent is obvious, and I think we all agree with the intent of knowing, first of all, exactly how much is being spent. Then there's the aspect of whether it should be through specific ministries.

But if all of this is going to come back, I don't think we have to be as accurate with respect to saying how that's going to happen. We'll get a report back. I think it's the mechanism that's important. If we just let Tim work on that wording, I can bring that back to you and see if you're satisfied with that. But it's not a substantive difference in terms of the intent of the report.

Mr. Comartin.

🕒 ↑ (1055)

↓ ↑

**Mr. Joe Comartin:** I'm okay with what was put there.

↓ ↑

**The Chair:** All right. We'll work on that wording.

What does that leave us now? I think that's about it.

Mr. Comartin, and then I'm open to whomever.

↓ ↑

**Mr. Joe Comartin:** I just have a small point but a factual one.

Tim, in paragraph 9 you've used the figure of 40 million people, but the Munk Centre report has it at 45 million. I can't remember how I checked this, but I believe 45 million is the correct figure. Given that's a substantial difference.... I don't know if there's somebody who can double-check it, but I think 45 million is the right figure.

↓ ↑

**The Chair:** We're agreeable to having that edited. We'll take your word for that one, Mr. Comartin. We'll take the Munk Centre's word for it, too.

Any other comments?

Then the report will be amended, pursuant to the authority you've given the chair to work out the wording within the intent and spirit put on the table, and it will be reported back.

Mr. Comartin and Mr. Bigras—and we're going to come to Mr. Bigras' motion:

↓ ↑

**Mr. Joe Comartin:** Just in terms of time—I guess I'm asking Tim more than anybody—and in getting the changes made and circulating them, are we still going to be able to get this to the House by next week?

↓ ↑

**Mr. Tim Williams:** We'll be okay.

↓ ↑

**The Chair:** There's a consensus among the two advisers that we can do that, as these are not major changes.

Mr. Bigras, your motion.

[*Translation*]

↓ ↑

**Mr. Bernard Bigras:** Mr. Chairman, I am happy to table and present the motion. The clerk sent an invitation to the Minister of Finance. In the past, the minister always refused the invitations to participate in the committee's work. The report of the Commissioner of the Environment and Sustainable Development of Canada should not be omitted. The Department of Finance is the only one who refused to respond to the requests of the Commissioner of the Environment and Sustainable Development of Canada. If we decide to adopt a motion requesting the Minister of Finance to appear before the

committee before it adjourns, I think this would give more weight to the invitations we already made.

[English]

↓ ↑

**The Chair:** Any other speakers?

Mr. Comartin.

↓ ↑

**Mr. Joe Comartin:** I understand that Kyoto generally is coming before the industry committee starting next week. I don't know if the Minister of Finance is one of the people who's going to be requested to be there. I point this out really as a factual thing; I'm in support that he come before this committee, as is Mr. Cullen.

We may want to double-check that.

↓ ↑

**The Chair:** The clerk has indicated to me that it is true.... He's going to find out.

But in the meantime, we still have Mr. Bigras' motion.

Mr. Wilfert.

↓ ↑

**Hon. Bryon Wilfert:** Just so I'm clear on this, we're extending an invitation to the Minister of Finance to appear before the committee, obviously subject to whatever his.... But we are inviting him.

↓ ↑

**The Chair:** Exactly.

(Motion agreed to)

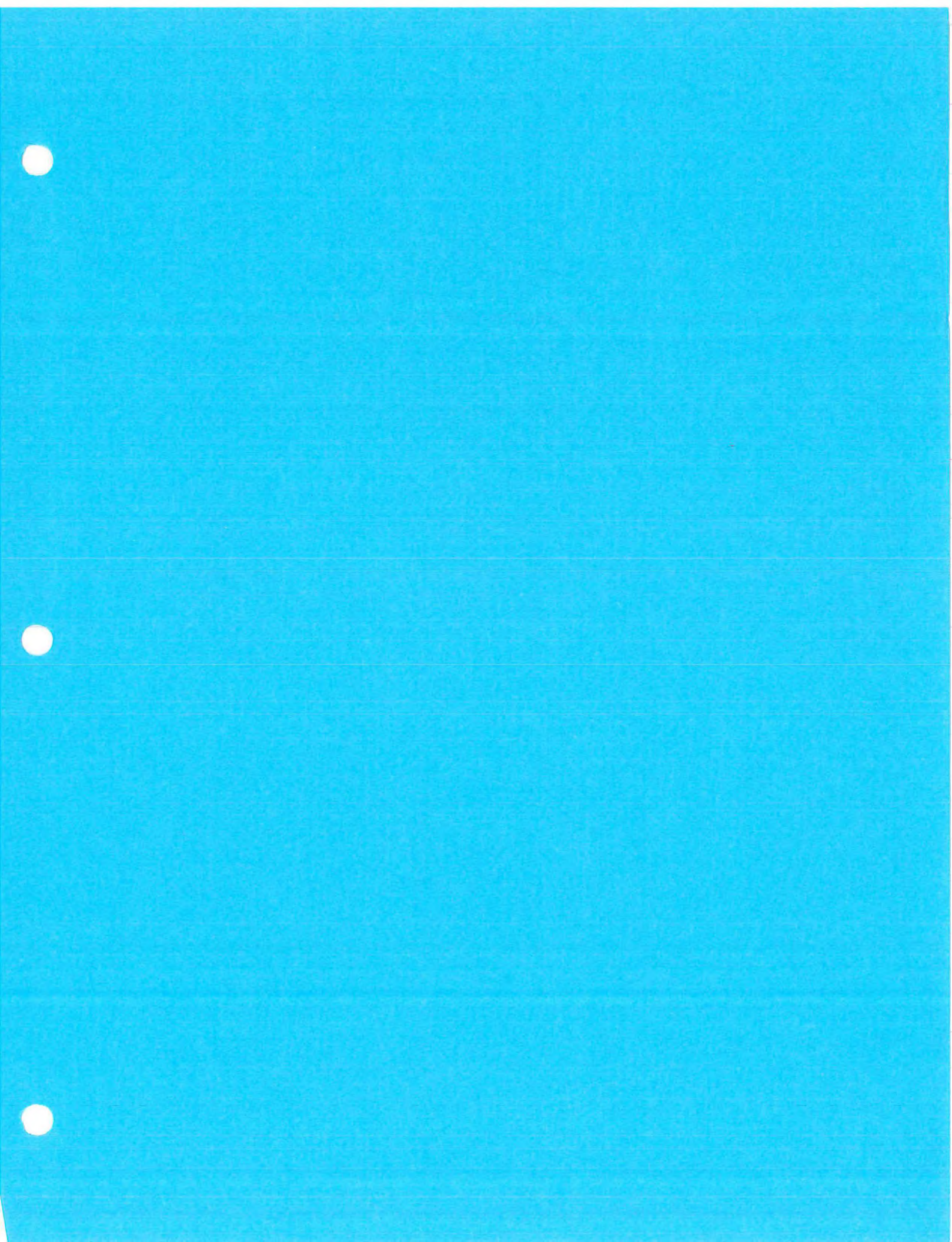
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**The Chair:** Thank you very much.

Thank you, members of the committee, for your attention.

The committee is adjourned.





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CELA / GLA



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT



*An international coalition promoting and  
coordinating basin-wide initiatives to protect and  
restore the Great Lakes and St. Lawrence River*

## **Statement to the Standing Committee on the Environment and Sustainable Development from the Canadian Environmental Law Association and Great Lakes United on the Great Lakes Charter Annex**

### **Summary**

The Canadian Environmental Law Association and Great Lakes United support the efforts of the Provinces and States to entrench long overdue Great Lakes water protection in a legally binding environmental protection framework. However, our support for the two draft Annex agreements released for comment in July 2004 will be contingent on the changes we have requested to these drafts to strengthen them so that they will be more equitable, effective, enduring and fair.

We are grateful for the invitation to appear before you today. We hope to address questions that have been raised about these agreements in your previous committee hearings and outline our belief that a strengthened Annex in combination with measures taken by the Federal Government of Canada will stop leaks, wastage and future diversions from the Great Lakes. Strong federal, provincial, and state action are all essential to full protection of the entire Great Lakes - St. Lawrence River ecosystem. This can be done without causing conflicts with existing agreements, treaties or laws and without encroaching on the sovereignty of any jurisdiction.

### **Background**

The Canadian Environmental Law Association (CELA) is a public interest legal clinic that provides legal advice and representation to the public and has a mandate that extends to environmental law and policy reform. CELA has been involved in Great Lakes water management and protection for over 30 years. CELA has published popular reports and made many submissions to governments on water protection and sustainability as part of broader law reform campaigns to strengthen Great Lakes and Ontario regulation.

Great Lakes United (GLU), founded in 1982, is an international coalition dedicated to preserving and restoring the Great Lakes-St. Lawrence River ecosystem. Great Lakes United is made up of member organizations representing environmentalists, conservationists, hunters and anglers, labor unions, community groups, and citizens of the United States, Canada, and First

Nations and Tribes. The Great Lakes United Sustainable Waters Taskforce has worked with member groups to develop policies and resolutions on local water conflicts and to improve water management regimes in the Great Lakes Basin.

Both organizations were involved in efforts to strengthen the Great Lakes Charter as early as 1984 and have been involved in opposing each of the seven harmful large U.S. withdrawal and diversion proposals originating from the US side of the Great Lakes after the signing of the Charter in 1985. We also actively opposed both significant Ontario withdrawal schemes since the Charter, the GRAND (Great Recycling and Northern Development) Canal proposal and a proposal to divert water from Georgian Bay to York Region. In 1998, CELA and Great Lakes United (GLU) received standing in the Ontario Court of Appeal. The Appeal was to consider the permit given by the Province of Ontario to the Nova Group to export bulk water in ships from the Canadian waters of Lake Superior to the Orient. As the result of negotiations with the Government of Ontario, that permit was withdrawn before it established a dangerous precedent.

In our 1997 publication "*The Fate of the Great Lakes ~ Sustaining or Draining the Sweetwater Sea?*" (<http://www.glu.org/english/information/publications/fate-report/pdfs/swtfrpt.pdf>) CELA and GLU chronicled the continuing problems with Great Lakes water management after the Great Lakes Charter. Some of the report's findings are, as follows:

- Decisions on water diversion proposals between 1985 and 1997 were purely political and did not protect the environment;
- Although the Provinces received notice of U.S. diversions over 5 million gallons (19 million liters), they did not have a direct role in decision-making on those diversions;
- The report accurately predicted that communities adjacent to, but outside, the boundaries of the Great Lakes Basin would be turning to the Great Lakes for their future water supplies;
- Little was done by the states and provinces after they signed the Great Lakes Charter to reduce water use and wastage within the Great Lakes Basin;
- The Great Lakes States may not have the powers to refuse a request from the thirsty U.S. southwest states; and
- Data gathering in the region on current water use is inconsistent and incompatible and has not led to reliable sound science on the cumulative and individual impacts of the waters already being taken from the Great Lakes.

Our report concluded that it would be unconscionable to continue with the status quo. This is why CELA and GLU have participated for the past three years on an Advisory Committee to the Governors' and Premiers' representatives negotiating the Annex drafts. This is also why we will continue to work to strengthen the two draft Annex 2001 agreements. We agree with the Ontario government that the status quo is no longer an option. Even though Ontario, Quebec and the Canadian Federal government have moved to prevent diversions from Canada, we have to remain involved to ensure that protection is put in place on the U.S. side of the Great Lakes.

## The Canadian Federal Government and the Annex

When many of these problems received attention after the Nova Group proposal, CELA and GLU concurred with the legal opinions of the Canadian Government that formed the basis of the Governments three- part strategy.

Central to the Federal government strategy was the conclusion that an outright ban of diversions could result in trade challenges by evoking Chapter XX of the then GATT. Entrenching both federal and provincial protections over their distinct areas of jurisdictional responsibility would be the wisest and best defence against harmful and opportunistic bids for our waters.

1. The International Joint Commission (IJC) was called upon to conduct a reference on the future challenges for the sustainability of the waters of the Great Lakes. The recommendations of the IJC were welcome ones. They provide a roadmap to protecting the Great Lakes from future uncertainties. Provisions of the Annex are addressing most of the IJC recommendations to the Provinces and States. CELA and GLU maintain that the wheels that the federal government set in motion will become mired and stuck if the two Canadian Provinces and eight U.S. States fail to implement these agreements. Huge areas of the Lakes will remain vulnerable to future diversion proposals.
2. The Government of Canada also passed the *Boundary Waters Treaty Act Amendments* giving the Minister of Foreign Affairs and Trade powers to veto future diversion proposals in **Canadian** Boundary waters. These powers however do **not** cover proposals coming from the U.S. side of the Lakes. Critics of the Annex have implied that the Agreements may be in conflict with the Boundary Waters Treaty of 1909. It is our belief that the Annex and the Treaty are compatible and that the Annex addresses weaknesses and limitations of the Treaty. The Federal government has jurisdiction over boundary waters, shipping, trade, fisheries and provision of waters to First Nations and to federal facilities. When the Boundary Waters Treaty of 1909 was passed, it included a hierarchy of uses. At that time little was understood about the environment and ecology of the Great Lakes. The Treaty is silent on the environment. The Annex is intended to address the Provincial responsibilities for the day to day allocation of water for drinking water and sewage treatment, agriculture, industrial use, manufacturing including food and beverage production and emergency response like fire fighting. The focus of the Annex on environmental criteria offers us long overdue legally-binding environmental protection tools. The Treaty provisions combined with the Annex protect all of the uses and all of the waters making up the Great Lakes ecosystem.

3. The final piece of the federal government strategy was to seek a Federal-Provincial Accord to prevent bulk water export. Not all provinces were willing to enter into such an accord. However, Ontario and Quebec acted to further protect the Great Lakes. Ontario passed a law that prohibited water transfers out of the major water basins in the Province. New source protection legislation with a watershed management focus is expected in late 2004 or early 2005. It will include strengthened Ontario water permitting regulations. Quebec has prohibited all water transfers out of the Province. Quebec has embarked on a package of ambitious water reforms for new programs, laws and regulations that will also shift focus to watershed management.

These combined actions make it highly unlikely that future Great Lake diversion proposals will originate from the Canadian side of the Lakes. However, it is still likely that a proposal for a large Canadian withdrawal for domestic use could be subject to an Annex review. However, further steps are necessary to increase protections on the U.S. side of the Lakes.

Protecting the ecological integrity of the Great Lakes St. Lawrence River ecosystem requires participation of all ten jurisdictions in future decision-making. Ontario and Quebec need to be at the table for this to happen.

### **U.S. Weaknesses Make the Region Vulnerable**

The current US Water Resources Development Act (WRDA) gives any one Governor the power to veto a diversion proposal. Though some maintain that this is adequate protection, we have learned that most experts have little confidence in WRDA standing up to a legal challenge as it may be contradictory to the commerce clause of the US constitution. This clause makes water an article of commerce and has been evoked by the U.S. federal government to compel states to share water beyond their boundaries. Nor does the WRDA cover all the waters of the Great Lakes Basin because it excludes groundwater, the source of several high profile debates over the siting of water bottling plants in the U.S. Similarly, outright bans of water export in the U.S. would likely also violate the commerce clause. This is why the states have chosen to legally bind themselves to each other in the Draft Great Lakes Water Resources Compact. It gives them strength in numbers, allows them to jointly administer their obligations to review proposals, collect data and implement conservation provisions. The Compact Agreement makes it less likely that the U.S. Federal Government will interfere with state decisions.

In Canada the Great Lakes are considered a national concern because they provide drinking water to a quarter of our population. In the U.S. the Great Lakes are viewed as a regional concern. The Great Lakes Region recently lost nine seats in Congress due to population shifts to the arid southwest. We should not underestimate the value to the States of the ability to bring international

support to their water management efforts in the region through the Great Lakes Sustainable Water Resources Agreement.

Keeping in mind that the status quo is not a favourable option, CELA and GLU support further efforts to strengthen the two Annex agreements, the legally-binding Great Lakes Water Resources Compact (the U.S. Compact) and the non-binding Great Lakes Sustainable Water Resources Agreement (the Regional Agreement). A summary of our main recommendations can be found on pages 7 and 8 of this submission. After years of discussion, we agree that this is the best way to preserve the sovereignty of all jurisdictions while overcoming constitutional barriers to governments binding themselves in laws across borders. We will urge Ontario and Quebec to bind themselves to the Great Lakes Basin Sustainable Water Resources Agreement by incorporating its important provisions into their provincial water protection laws without weakening any of those laws.

The Annex Agreements are not only setting out to prevent harmful withdrawals from the Great Lakes. They are building a system to better understand and improve water management decision-making within the Basin as set out in Chapter 3 of the Great Lakes Basin Sustainable Water Resources Agreement. CELA and GLU support the components of these agreements that require for the first time that each of the ten jurisdictions initially report on all water allocations and management programs in order to establish a baseline. There are also criteria to prohibit harmful intra-basin diversions (from one Great Lake to another). Subsequent annual reports will be reviewed by all ten jurisdictions making up the Regional Commission for compliance with the agreements' environmental and conservation requirements. This will give Canadians a direct role in monitoring and commenting on any lack of progress in water protection in the U.S.

While Ontario and Quebec have already acted to strengthen their water allocation systems, many of the U.S. States have not acted since the Great Lakes Charter. They will have much more work to do to comply with requirements set out in these agreements. Indeed, Ontario is leading by example because they require that all withdrawals over 50,000 liters (13,800 U.S. gallons) are examined under their permit to take water regulations. The public is given advance notice of these permits on the Environmental Registry and they are able to comment on permit applications.

Many of the U.S. States do not have permitting systems but simply register water allocations. This means they have no way to impose terms and conditions on withdrawals. With the exception of Minnesota, no Great Lake state requires reviews of water withdrawals at the low quantity levels that Ontario does. We see these Agreements as a way to compel the States with weak water management regimes to strengthen their regulations over time and for the Provinces to have a role in seeing that progress is made. However, this does not mean that Ontario will be required to lower their standards.

The Great Lakes Basin Sustainable Water Resources Agreement explicitly states in Chapter 7, Article 701(1).

*"Nothing in this Agreement alters the legislative or other authority of Parliament or of the Provincial legislatures or of the Federal Government of Canada or of the Provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada."*

As well it does not mean that there will be conflicts with the Boundary Water Treaty Act of 1909. Chapter 7, Article 702, states that:

*"Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any person any right claim or remedy under any international Agreement or treaty."*

Article 200 sets out that the Annex standards are to be considered as minimum and that the Parties may implement measures that are more restrictive.

The requirements and standards in the Annex are stringent for applicants and will result in few, if any approvals, ever being granted. The fact that compliance is required with **all** of the Annex environmental standards as well as consensus of all ten jurisdictions will be a major deterrent to an applicant for Great Lakes water. The existence of these two Annex Agreements will let the world know that the Great Lakes are not for sale.

Without these Agreements, Quebec and Ontario will continue to be sidelined in decisions on diversions from the Great Lakes. If we continue to pass up chances to entrench protection and make our own use of the Great Lakes sustainable we can be assured of many more diversion proposals and challenges. It is very likely that our cumulative everyday use of the Great Lakes, rather than a single diversion, will be ultimately where the harm is done to the integrity of the ecosystem and all creatures and enterprises dependent on their waters. We will have failed others in an increasingly water short world if we do not do everything we can to sustain one fifth of the world's fresh water. Others already put us to shame with their conservation and water efficiency practices.

The only other alternative we have now to challenge a U.S. diversion would be to try our luck in the U.S. Courts something that has proven unsuccessful for us. The recent North Dakota decision on Devils Lake has demonstrated this. For years the Canadian Government has written diplomatic notes about the regulation of the Chicago Diversion, the most likely site for future increased diversions out of the Great Lakes. However the current volume of this diversion has been regulated by decree of the U.S. Supreme Court. The Annex Agreements can not change this. It is unlikely Canadians would be given standing in future U.S. Supreme Court matters. It would be preferable to have any increases in the Chicago Diversion subject to the terms of the Annex.



## **Recommendations to Strengthen the Annex Agreements**

In the spirit of taking an ecosystem approach, CELA and GLU have worked over the past three years with a coalition of 10 other environmental groups across the Great Lakes-St. Lawrence River Basin to submit hundreds of pages of commentary on questions arising from Annex negotiations. These detailed comments can be viewed at

[http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/484b\\_Annex\\_international.pdf](http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/484b_Annex_international.pdf)

[http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/484c\\_Annex\\_Compact.pdf](http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/484c_Annex_Compact.pdf).

These are consistent with the input we have submitted to date. We are very concerned that there are large industrial, resources and agricultural sectors involved in this process that would like to see any progress on entrenching further water protections in the Basin fail. These interests have benefited from unfettered access to cheap Great Lakes water and sometimes have returned their wastewater in a degraded and altered state.

We regret that much of the debate in Canada on the Annex seems to have caught many by surprise even though the Governors and Premiers announced the intent and scope of the Annex undertaking three years ago. Now that the Annex comment period has closed, the Council of Great Lakes Governors has received 10,000 submissions. In Canada, we may have lost a huge opportunity to take proactive steps toward sustainability because the debate here took on a different character not at all framed within the reality of existing diversions and future, predominantly U.S.-based proposals.

### **Key Recommendations**

In the time left to us we will try to summarize the most important changes we have requested to strengthen these two draft Agreements. They include:

- A consistent threshold of 1 million gallons a day should be used to measure diversions, and consumptive use;
- The measurement of cumulative impacts should be carried out by all jurisdictions at the smallest scale possible;
- Language between the Compact Agreement and the Regional Agreement should be made consistent so that all jurisdictions are committing to the same actions. It is particularly important that the Decision Making Standard and the Decision Making Standard Procedure Manual are included in the Compact Agreement;
- The ten-year implementation timeline is not acceptable. Five years or less is more realistic;

- Conservation goals and targets should be added to both agreements. Programs to achieve them should be referenced in the agreements;
- The 12-mile exemption from review under the Annex should be excluded;
- The jurisdiction of origin for a diversion or large withdrawal proposal **shall** consider the outcome of the Regional review;
- Return flow to the source watershed, as close as possible to the point of withdrawal, should be required;
- First Nations and Tribes must be appropriately consulted and included in the consensus building framework of the two agreements;
- Averaging periods to determine the quantities of all withdrawals should revert to 30 days as set out in the original Great Lakes Charter (from the 120 days proposed in the current drafts); and,
- Proposals for future increases of the Chicago Diversion should be subject to review under these Agreements.

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Submitted November 18, 2004

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From: <Shawn.Morton@international.gc.ca >  
To: <millers@lao.on.ca >  
Return-Path: Shawn.Morton@international.gc.ca

Have attached word version of Pentland and Bruce session.

The Committee has been working on their report and I understand that they intend to finalize it today. I am not sure of the timing, however, it may be tabled as early as Friday, although I think early next week is more likely. We should receive a copy when as soon as it is released I will send a copy onto you and Derek.

Also, did not get a chance to tell you, but I thought both you and Derek did a very good job in getting your points across to the committee. Very challenging given the make up of the panel. I was very surprised with Shrybman and how he held himself out as providing expert legal advice.

Shawn

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-----Original Message-----

From: Sarah Miller [mailto:millers@lao.on.ca]  
Sent: November 25, 2004 12:28 PM  
To: Morton, Shawn -NUE  
Subject: Hearings

Try as I may I cannot seem to locate where i can obtain Hansard of the Standing Committee Hearings. Might you be able to send me the proceedings from the day Ralph Pentland and Jim Bruce attended and the day Sierra CELA and COC were there. Thanks I appreciate it. How will we know how the Committee responds next week?

\*\*\*\*\*

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WRITTEN SUBMISSION  
COUNCIL OF CANADIANS



**Legal Opinion:  
Great Lakes Basin Sustainable Water Resources Compact and the  
Diversion of Great Lakes Waters  
October 2004**

Steven Shrybman  
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Barristers and Solicitors  
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**Commissioned by:  
The Council of Canadians  
National Water Campaign  
[www.canadians.org](http://www.canadians.org)  
1-800-387-7177**

## EXECUTIVE SUMMARY

You have asked for our opinion about recent proposals by the Governors and Premiers of the Great Lakes Basin states and provinces concerning the use and diversion of the waters of the Basin. Of particular concern is the potential for these proposals to facilitate diversions of Great Lakes waters.

On July 19, 2004 the Council of Great Lakes Governors, along with the governments of Ontario and Quebec, published two draft agreements:

- The Great Lakes Basin Sustainable Water Resources Agreement (the Agreement), “a good-faith agreement among the 10 Great Lakes States and Provinces” regarding management of waters in the Basin; and
- The Great Lakes Basin Water Resources Compact (the Compact), which is an agreement among the eight Great Lakes States to engage in joint decision making with respect to the use and diversion of water from the Great Lakes.

Because the Agreement between the states and provinces is not binding, and would require approval by the federal government to be constitutional, it is less problematic than the Compact. Accordingly, the focus of this analysis is on the Compact and its potential to facilitate diversions of waters from the Great Lakes Basin.

### *Approving the Diversion of Waters From the Great Lakes Basin*

The essential purpose of the Compact is to establish a regime for approving uses and diversions of Great Lakes waters. Under the scheme, certain proposals to divert Great Lakes waters would be assessed according to a standard of review that sets out several criteria, including requirements relating to the development of conservation plans and the assessment of cumulative impacts of such withdrawals on both the quantity and quality of Great Lakes waters. The process for granting such approvals would also be more transparent, and engender greater scope for public participation, than is currently the practice in most Great Lakes States.

However, while the Compact has some appealing features, these must be considered in the context of its overall purpose and design. When these are taken into account, it is clear that the Compact’s positive features are outweighed by its potential to facilitate the diversions of Great Lakes waters to an extent that would threaten the ecological integrity of the Great Lakes, and seriously challenge Canadian sovereignty with respect to these waters.

In simple terms, the Compact would establish a scheme for authorizing diversions of Great Lakes waters, but impose no explicit limit on:

- the quantity of water that may be diverted from the Basin;
- the duration or term for such diversions;
- the purposes for which such waters may be used; or
- the geographic region that might be served by such diverted waters.

In crafting this scheme the Governors have ignored the advice of the International Joint Commission (the IJC) and propose a “common standard” for approving withdrawals of waters from the Great Lakes that would not distinguish between in-basin and out-of-basin uses and users. In other words, the Compact would establish the same legal right of access to Great Lakes waters for consumers outside the Basin as is now claimed by those within it.

#### *A Challenge to Canadian Sovereignty*

Under the Compact neither Canada nor the Provinces are given any right to approve or veto the diversion of Great Lakes waters regardless of their duration, scale, or impact on the waters of this shared ecosystem. Moreover, to be binding, the Compact will require U.S. Congressional approval, but neither it, nor the companion Agreement negotiated with the Provinces, is to be reviewed by Parliament.

While the preamble mentions the *Boundary Waters Treaty*, the Compact neither specifically refers to, nor does it make accommodation for the Treaty’s requirement that diversions of waters *affecting the natural level or flow of boundary waters on the other side of the line* be approved by the IJC.<sup>1</sup>

Certainly, cooperation among the States and Provinces is vital if the ecological integrity of the Great Lakes is to be protected. But that cooperation must respect the constitutional and sovereign authority of both nations. Both the Compact and its companion Agreement fail these tests because they:

- i) ignore the constitutional authority of Canada’s federal government with respect to Great Lakes waters;
- ii) seek to establish an approvals regime for out-of-basin diversions that is extraneous to the *Boundary Waters Treaty* and which would marginalize the role of the IJC; and
- iii) fail to respect customary international law with respect to boundary waters.

In terms of bi-national relations, the Compact represents a unilateral approach for dealing with an international problem that reflects a pronounced and problematic trend by the U.S. to go it alone.

For these reasons the Compact presents a significant challenge to Canadian sovereignty with respect to water which also has implications that extend beyond the Basin. Touching

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<sup>1</sup> Article III of the *Boundary Waters Treaty between Canada and the United States*.

on these questions, in early 2002, Canada registered “serious concerns” about the *Great Lakes Charter Annex of 2001*<sup>2</sup> (which provides the template for the Compact), complaining that:

- i) under the Annex the standard proposed for water removals from the Great Lakes is too permissive and would open the door to long-distance, large scale removals out of the Basin; and that
- ii) the implementation of the Annex could conflict or “clash” with the *Boundary Waters Treaty* thereby undermining the role of the IJC and weakening the protections the Treaty affords.<sup>3</sup>

With the publication of the Compact and international Agreement, it is apparent that these concerns were well founded.

#### *A Very Slippery Slope*

The Compact would also facilitate rather than contain the diversion of Great Lakes waters by creating numerous opportunities for diversions to be approved only by the State from which the water is withdrawn. Under the current regime mandated by the U.S. *Water Resources Development Act*, a consensus among Great Lakes Governors is required before diversions can occur. But the Compact would establish several exceptions to this consensus regime, including exemptions for diversions of up to five million gallons a day, while imposing no constraint on multiple or serial applications to divert quantities of water below this threshold.

In addition to these problems, the Compact would also introduce an “improvement” standard that could, in effect, put a price on Great Lakes water. This would occur where *proposals for improvement*, which are required to be submitted with diversion applications, entail financial commitments to support improvement works such as habitat restoration, or even sewage treatment. While an approving jurisdiction would not be paid for water *per se*, by linking approvals to funding for improvement projects, the Compact could have the same effect.

By opening the door to out-of-basin diversions, the Compact is also likely to increase exposure to NAFTA-based claims by foreign investors seeking access to Great Lakes water, or wishing to maintain entitlements once these are acquired. Under NAFTA investment rules, governments are precluded from discriminating between domestic and foreign investors (e.g. foreign owned corporations operating in the United States) when they approve use and diversion proposals. The Compact proposes a common standard for

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<sup>2</sup> The *Great Lakes Charter Annex of 2001* was signed by the Governors and Premiers of the Great Lakes states and provinces on June 18, 2001.

<sup>3</sup> Government of Canada Response to the International Joint Commission report concerning *The Protection of the Waters of the Great Lakes*, February, 2002. *Comments from the Government of Canada on Annex 2001 to the Council of Great Lakes Governors*, February 28, 2001.



in-basin and out-of-basin water withdrawals in order to avert trade agreement based claims that the regime discriminates against the latter. However, the “common standard” proposed by the Compact is unlikely to be an effective or reliable safeguard against such claims. Moreover, unlike the rules of the World Trade Organization, conservation is not allowed as an exception to these come-one-come-all requirements. In addition, once water use or diversion rights are acquired under these investment disciplines, they would be exceedingly difficult and expensive to revoke.

These concerns are heightened by the considerable uncertainty that exists about the capacity of the Great Lakes to sustain current water uses, and looming new stresses such as those caused by climate change. In this context, it is particularly problematic therefore that the Compact makes no reference to the *precautionary principle*, notwithstanding its central importance under both international and Canadian law as a guiding principle for addressing risks before they become manifest as serious ecological problems.

#### *Strengthening International Agreement to Protect the Great Lakes*

It is also important that the Compact is far more permissive than the diversion control regimes established by Canada and the Provinces of Ontario and Quebec. All three Canadian jurisdictions have effectively banned water diversions from the Great Lakes, and have established much lower thresholds for review than those proposed by the Governors’ scheme. Equally important is the fact that these Canadian initiatives are framed within the context of the *Boundary Waters Treaty*, and not independently of it.

If the Compact is fundamentally flawed, as we believe it is, this does not mean that the status quo is sustainable. Apart from the question of whether current uses and diversions of Great Lakes water are sustainable, it is clear for reasons which we and others have explored elsewhere that present legal regimes, both domestic and international, are not sufficient to ensure the sustainable use of Great Lakes water or to protect Canadian sovereignty with respect to these waters. To achieve these goals, Canada and the United States would need to negotiate a new bilateral agreement concerning water.

In the context of the Great Lakes this would either mean amending the *Boundary Waters Treaty*, or negotiating a new and complementary international agreement concerning water. Whatever form it may take, such an international legal initiative should:

- encompass all waters in the Great Lakes Basin, including groundwater and tributaries to the five Great Lakes;
- strengthen bi-national control over use and diversion of Great Lakes waters;
- adopt ecological integrity and the precautionary principle as the cornerstones of the Treaty; and
- establish the priority of that agreement in the event of conflicts with NAFTA or other international trade agreements.

Until such safeguards are in place, it would be prudent to extend the moratorium on water diversion approvals advocated by the IJC in its 2000 Report.

**ASSESSMENT OF KEY ISSUES:**

Several of the concerns we have summarized are self-evident; others have been the subject of commentary elsewhere.<sup>4</sup> Consequently, the following assessment is not intended to be comprehensive but rather to focus on certain key issues that we believe warrant more detailed review.

**The Compact Would Substantially Increase the Likelihood of Long Range, High Volume Water Diversions from the Great Lakes**

By imposing no explicit limits on the volume of water that may be removed from the Basin, the duration of such withdrawals, or the geographical scope of the users supplied by such diversions, the Compact would open the door to large scale, long-distance removals of waters from the Basin. The question then is whether the standards and procedures for such approvals provide an effective and reliable safeguard against wholesale diversion and/or removal of Basin waters to both near and distant users. For the reasons noted below, the answer to this question is no.

The Approvals Scheme

Under the scheme proposed by the Governors, a *Standard of Review and Decision* (the "Standard") would be applied by individual jurisdictions to certain proposals to withdraw water from the Basin. In cases of large new or increased withdrawals, the approval of Great Lakes Basin Water Resources Council (the Council), which is comprised of the Governors of the eight Great Lakes States, would be required.

The rules for decision-making by the Council stipulate that *all* Governors must approve diversions above the threshold for review (s. 3.3), whereas the objections of three Governors are required to block proposals for consumptive uses (s. 3.4). While Quebec and Ontario are to be consulted, they are accorded no approval or veto authority. In other instances, a simple majority of the Council is sufficient for decision making (s. 2.4). In the case of diversions there are several criteria by which proposals will be judged.

The most important elements of the Standard are common to both diversion and consumptive use proposals and include the requirements that:

- i) there is no reasonable alternative water supply within the Basin or that the need for water withdrawal cannot be avoided by efficient use and conservation of existing water supplies;
- ii) the quantities proposed are considered reasonable for the intended purposes;

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<sup>4</sup> Pentland; *Great Lakes Compact – Water for Sale?* James Olson, *Annex 2001 and the Future of the Great Lakes: New Wine into Old Wine Skins*, Woodrow Wilson International Center for Scholars Sept. 2004.

- iii) water withdrawn shall be returned to the same watershed, subject to a consumptive use allowance;
- iv) there will be no significant adverse or cumulative effects, including the effect of setting a precedent on future cumulative impacts;
- v) the proposed withdrawal incorporates a conservation plan to minimize water use;
- vi) the proposal must include an improvement to the water or other water-related resources of the Great Lakes; and
- vii) there is compliance with all state and federal laws as well as interstate, interprovincial, and international agreements.

The Compact defines "Diversion" to mean: *a transfer of Water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another, by any means.* For present purposes, the key issue is out-of-basin transfers. "Consumptive Use" is defined to mean *that portion of Water Withdrawn or withheld from the Great Lakes Basin that is lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products or other processes.*

The following analysis examines these criteria in terms of their potential to either facilitate or constrain out-of-basin water diversions.

#### The Problems with Adopting a Common Standard for In-Basin and Out-of-Basin Water Uses and Diversions

The most important problem with the Compact is that it would impose no *de jure* or legal limit on the volumes of water which may be removed from the Basin, or geographical constraint on the location of communities or users which may be served by such diversions. As Canada has correctly noted, this approach opens the door to large-scale, long-distance removals of water from the Basin.<sup>5</sup>

The failure of the Compact to establish quantitative or geographical limits on water diversions from the Basin stems from the Governors' decision to adopt a common standard for regulating both in-basin and out-of-basin withdrawals. In our opinion, the "common standard" approach is fundamentally flawed for the following reasons.

To begin with, the IJC has made it clear that there is no ecological or policy rationale for adopting a standard that fails to distinguish between in-basin and out-of-basin uses.

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<sup>5</sup> See note 3.

Indeed the IJC has repeatedly expressed the view that it is reasonable for water use standards to treat in-basin and out-of-basin uses differently.<sup>6</sup>

This is crucial because the rationale for adopting a common standard for both in-basin and out-of-basin users is based on the argument that this approach is required to address certain constitutional and international trade concerns. This is the approach advocated by a team of legal advisers (Lochhead et al) retained to advise the Council of Great Lakes Governors.<sup>7</sup> According to their advice, there are two reasons for regarding the existing framework of law concerning water diversions from the Great Lakes as being inadequate. Both arise from speculative concerns about the vulnerability of the current water diversion approvals regime to legal challenge.

#### *The Dormant Commerce Clause*

As it now stands, under the *Water Resources Development Act* (the WRDA) of 1986<sup>8</sup> the consent of all eight Great Lakes Governors is required before water can be diverted from the Basin. The Lochhead opinion argues that this approach would not survive a challenge either on the grounds that it offends the dormant commerce clause of the U.S. constitution, or the prohibition against export controls under the General Agreement on Tariffs and Trade (the GATT) of the World Trade Organization.<sup>9</sup>

It is beyond the scope of this opinion to critique the advice offered by Mr. Lochhead et al. regarding constitutional constraints on the authority of Great Lakes States to regulate water diversions. However, we must note that this concern is entirely speculative and has been called into question by advisors to the IJC. As the Lochhead opinion puts it:

*Because the WRDA does not clearly and unambiguously indicate a Congressional intent and policy to allow Great Lakes Basin Governors to violate the commerce clause in vetoing a proposed out-of-basin water diversion, a veto under the WRDA as it now stands would probably not survive challenge under the dormant commerce clause.<sup>10</sup>*

However, as pointed out by the International Water Uses Review Task Force in a report prepared for the IJC, amendments to the WRDA have addressed this concern. Thus, under the WRDA 2000, the States are directed to develop and implement a mechanism

<sup>6</sup> See for example, the International Joint Commission; *Review of the Recommendations of the February 2000 Report*, August 2004, at p.3, and 12-13.

<sup>7</sup> Lochhead, Asarch et al, Report to the Council of the Great Lakes Governors: Governing Water Withdrawal of Water from the Great Lakes, May 1999.

<sup>8</sup> 42 U.S.C. 1962d-20.

<sup>9</sup> Note 7, pp. 21 – 29. At p. 21 these views are summarized under the heading; *A prohibition against the diversion of Great Lakes water out of the Great Lakes Basin under the authority granted to the Governors of the Great Lakes states by the 1986 Federal Water Resources Development Act would violate the United States Constitution and international trade agreements.*

<sup>10</sup> *Idem* p. 22.

for making decisions concerning the withdrawal and use of water from the Great Lakes Basin. As pointed out by the Task Force, this development reinforces:

*.... the conclusion, one that had been challenged by part of the legal community, that Congress in fact intended the WRDA legislation to operate as a waiver of the Dormant Commerce Clause. As such, decisions made by the governors under the WRDA should not violate the U.S. Constitution.<sup>11</sup>*

#### *International Trade and Investment Challenges*

The other justification for adopting a common conservation standard for regulating the diversion of Great Lakes waters put forward by the Lochhead opinion is that, to be consistent with GATT/WTO rules, any control of water withdrawals from the Great Lakes must not distinguish between in-basin and out-of-basin uses. In our view this argument is both erroneous and misleading.

To begin with, the Lochhead opinion summarily dismisses the relevance of NAFTA for issues relating to water diversion, focusing instead on the GATT/WTO. This emphasis is clearly misdirected. If trade rules are to be invoked to challenge regulatory controls relating to water diversions from the Great Lakes, it is far more likely that such a challenge would be brought by foreign investors under NAFTA investment rules, than by another country under the GATT/WTO.

It is extremely unlikely that a country outside North America would invoke dispute resolution under the WTO to challenge a constraint on water diversions because there is simply no realistic, let alone vested, economic interest to be served by such a complaint. The IJC and others have consistently assessed international bulk water exports as being both uneconomic and impractical. On the other hand, it is not at all unrealistic to anticipate NAFTA investment rules being invoked by foreign-owned corporations seeking access to Great Lakes waters to support their US operations outside the Basin.

In fact, NAFTA investment rules have already been invoked in two water diversion/export related disputes.<sup>12</sup> It is simply not plausible to suggest, as the Lochhead opinion has, that a trade challenge by a country outside North America is more likely than one much closer to home.<sup>13</sup>

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<sup>11</sup> The International Water Uses Review Task Force; *Protection of the Waters of the Great Lakes Three Year Review: Report Prepared for the International Joint Commission*. Nov. 8, 2002 at pp. 2-3.

<sup>12</sup> The first is claim by Sun Belt Water Inc. against Canada for damages arising from a decision by BC to deny it a water export permit. The claim, filed several years ago, has not proceeded. The second is a recent claim by a group of US-based water rights holders brought against Mexico, claiming that Mexico is improperly diverting water destined for the United States, and employing it for the benefit of its own agricultural industries. Significantly the claimants allege that Mexico is failing to live up to commitments in a 1944 water treaty between Mexico and the US. As a consequence, the claimants argue that Mexico has interfered with the claimants' NAFTA rights to national treatment and to be free of expropriation. See Luke Eric Peterson; *US water rights-holders sue Mexico under NAFTA*, Investment Law and Policy Weekly News Bulletin, September 8, 2004.

<sup>13</sup> Note 7, p.20.

However, having discounted NAFTA, the Lochhead opinion argues that a common standard approach is necessary for the US to invoke Article XX(g) of the GATT should it be challenged for improperly interfering with water exports.<sup>14</sup>

Article XX(g) of the GATT establishes, subject to certain qualifications, an exception to certain trade disciplines for measures:

*Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption.*

Putting aside the question of who would actually mount such a challenge, what the Lochhead opinion does not say is that Article XX(g) has never been successfully invoked by any country, including the U.S., which has attempted to rely on it at least twice. Moreover, the Article may not even apply to water unless it is considered a non-renewable resource.

However, the more important omission regarding Article XX(g) is the fact that this Article does not apply to investor-state claims under NAFTA. Thus if the regulatory regime being advocated is challenged by a Canadian or Mexican company operating in the US, it will be irrelevant that constraints on diversions are required for conservation purposes.

This nevertheless leaves the argument that a common standard for regulating both in-basin and out-of-basin water withdrawals is necessary, because imposing a stricter regime for diversions would be vulnerable to a claim that it is discriminatory and offends the National Treatment requirement of both NAFTA and WTO Agreements.<sup>15</sup> But, for reasons explained in the next section of this opinion, the common standard approach cannot be relied upon to withstand a challenge that the Compact offends, in effect, if not in form, the requirement for National Treatment.

It is also important to note that Canada, Ontario and Quebec have effectively banned diversions from the Great Lakes and claim that their approach is consistent with Canada's international trade obligations. While we remain skeptical about this claim, it is true that these legislative initiatives have not in fact been challenged.

In other words, the entire rationale for adopting an approach to managing water diversions from the Great Lakes, which would erase the distinction between in-basin and out-of-basin uses and open the door to large scale diversions, is based on the highly

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<sup>14</sup> *Idem* p. 44.

<sup>15</sup> National Treatment is foundation principle of both NAFTA and WTO regimes and applies to trade in goods, investment and services. Thus Article 1102(1) of NAFTA requires: *Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

speculative and questionable advice of a legal team assembled to advise the Great Lakes Governors.

In simple terms, adopting a conservation standard that would apply equally to in-basin and out-of basin uses will not remove the threat of successful trade agreement-based challenges and is not required for that purpose.

### The Question of Return Flow

The next question then is this: having opened the door to large volume, long-distance diversions, do the standards for reviewing such diversion proposals ameliorate the risks that such schemes will be approved under the Compact?

As noted, none of the criteria for approving diversions explicitly exclude an application to remove large volumes of Great Lakes water to remote regions. Indeed, all of the criteria by which such a proposal would be weighed are indifferent to the destination of the diverted Great Lakes water. This being said, one criterion may create a practical impediment to long distance diversions - in other words, a *de facto* as opposed to *de jure* constraint on such diversions.

This is the requirement that:

*All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector.*<sup>16</sup>

Presumably, it would be difficult for users located any distance from the Basin to meet this return flow requirement. However there are several reasons to doubt the effectiveness and reliability of this safeguard.

### *Vulnerability to Challenge*

To begin with, this criterion is vulnerable to challenge as representing *de facto* discrimination between communities within or proximate to the Great Lakes Basin and those farther removed. While it is on its face non-discriminatory, the implementation of the return flow requirement in a manner that in fact discriminates against out-of-basin users will be closely scrutinized in any legal challenge brought to the regime. When it comes to the requirement for non-discriminatory or National Treatment it is the effect of the measure, not its form, that matters. Thus, regulations that treat domestic and foreign

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<sup>16</sup> See for example Articles 8.2(3) and 9.2(3) - in addition to this broad requirement, these provisions also specify that Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water Withdrawn from a watershed of a stream that is a direct tributary to a Great Lake or a direct tributary to the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively, with a preference to the direct tributary stream watershed from which it was withdrawn ....

producers in precisely the same manner legally may nevertheless be found to discriminate against the latter.

For example, in the S.D.Myers case, a Canadian ban on PCB exports, which applied in precisely the same manner to every potential exporter, regardless of their nationality, was nevertheless found to offend the NAFTA requirement that foreign investors be accorded National Treatment.<sup>17</sup> Trade tribunals have consistently adopted a similar approach to assess the effect of government measures, regardless of their form.<sup>18</sup>

This means that if trade rules are invoked, an international tribunal will not hesitate to look behind the face of the Compact to ascertain its true intent and effect. It will also have no difficulty in finding commentary by state officials and others to support the notion that the true purpose of the return flow requirement is to discriminate in favour of near-basin users. Given the rulings of trade and investment tribunals to date, there is no reason to have any confidence that the return flow requirement would survive if challenged.

In other words, the return flow requirement, which is the only safeguard against the Compact becoming a device to facilitate long-range, high-volume diversions of Great Lakes waters, is entirely vulnerable to trade challenges, and more importantly to foreign investor claims.

#### *Vulnerability to Manipulation*

In addition to the real risk that it will prove ineffective as a safeguard against trade and investment challenges, the return flow requirement is uncertain and may prove unreliable for other reasons as well. Take the case of consumptive use - where water is fully incorporated into a product, there is simply no residue to return to the Great Lakes. For such consumptive uses it would be irrelevant whether the destined user was located within the Basin or a thousand miles from it.

How, when water may be destined to particular communities and many users, is the allowance for "consumptive use of the applicable water use sector" to be determined? Would a remote community be entitled to earmark Great Lakes water to particular water-use sectors where consumptive use is highest? If so, the return flow requirement would impose little if any constraint on long-distance, high-volume export.

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<sup>17</sup> Astonishingly, in S.D.Myers, Canada was found liable for interfering with PCB exports to the US even though importing PCB wastes to the US was illegal under the Toxic Substances Control Act. See decision of the Tribunal in S.D. Myers v. The Government of Canada at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp>.

<sup>18</sup> Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 100. Reports which have not yet been published in the WTO Dispute Settlement Reports (DSR). Also see, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998) (98-3899), AB-1998-4; and *United States- Import Prohibition of Certain Shrimp and Shrimp Products- Recourse to Article 21.5 of the DSU by Malaysia*, Report of the Appellate Body, WT/DS58/AB/RW (22 October 2001), AB-2001-4.



In other cases, the return flow requirements may be far less onerous than might be assumed. Take, for example, a proposal to divert large volumes of Great Lakes water to irrigate crops outside the Basin. The allowance for “Consumptive Use of the applicable water use sector” is likely to be 70%<sup>19</sup>. This ostensibly would require that 30% of the water withdrawn would need to be returned to the Basin. The question then is how will return flow be measured?

In the example of agricultural use, would credit be given for a portion of waters lost to evaporation and returned as rainfall to the Basin? Alternatively, would produce shipped to communities in the Basin be counted as water returned to the Basin? Where that produce is water-intensive to produce, would the water embodied in the product, for example, which may be many times its weight, be included in the calculation?

In fact, just such an approach to water regulation and management is being seriously considered by policy and law-makers around the world. As described at a “virtual water session” of the 3<sup>rd</sup> World Water Forum which was held in Kyoto, Japan:

“Virtual water is the amount of water that is embedded in food or other products needed for its production. Trade in virtual water allows water scarce countries to import high water consuming products while exporting low water consuming products and in this way making water available for other purposes.”<sup>20</sup>

It is not difficult to foresee such arguments being advanced by sophisticated applicants who will support their claims with reports from experts and consultants advocating the scientific merit of this and other ingenious approaches for calculating return flow.

Thus the entire defense of Great Lakes waters against proposals to export large volumes from the Basin to remote regions will rest on a single criterion of the Compact which lends itself to various interpretations, will be difficult to administer, and which ultimately may be challenged as being no more than a disguised restriction on commerce or trade. The return flow requirement cannot therefore be seen as providing a reliable or sufficient safeguard against large-scale, long-distance diversions of Great Lakes waters.

#### The Failure of the Compact to Adopt the Precautionary Principle

No principle is more fundamental to environmental protection and conservation than the precautionary principle, which is now a ubiquitous feature of international environmental agreements and domestic environmental legislation in Canada and many countries.

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<sup>19</sup> IJC protection Section 3 *Consumptive Use*, fn. 11

<sup>20</sup> World Water Council: *E-Conference Synthesis: Virtual Water Trade - Conscious Choices*.  
<http://www.worldwatercouncil.org/publications.shtml>.

In *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, the Supreme Court of Canada acknowledged the importance and prominence of the precautionary principle, citing authorities that argue that it has achieved the status of a principle of customary international law.<sup>21</sup> In a more recent decision, the Court offered similar support for the 'polluter pays' concept.<sup>22</sup>

Remarkably, the Compact declines to explicitly embrace either principle. Its failure to do so undermines any confidence that the Compact will be implemented in a manner that demonstrates prudent respect for the uncertain risks and pressures that now confront the Great Lakes.

### The Problem of High Thresholds and Multiple or Serial Applications

Putting these fundamental concerns aside for the moment, there is another way in which the Compact can be seen to be more of a conduit for diversions rather than a guard against them. This has to do with the numerous opportunities for diversion and use proposals to escape Council review. Reversing the status quo, which requires consensus among Great Lakes Governors before diversions can occur, the Compact would allow substantial diversions of Great Lakes waters with only the approval of the State from which the water is withdrawn.

To begin with, proposals to divert less than one million gallons per day<sup>23</sup> will not be subject to Council review. Moreover, there are no provisions that would prevent multiple or serial applications for approvals for diversions or consumptive uses that are destined for the same geographic region. These might be made by multiple users within the same jurisdiction, or by the same user sequentially. By keeping each application under the

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<sup>21</sup> [2001] 2 S.C.R. 114957. As noted by Madame Justice L'Heureux-Dubé notes at para. 32:

*Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., The Precautionary Principle and International Law (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in ibid., at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 J. Env. L. 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" (A.P. Pollution Control Board v. Nayudu, 1999 S.O.L. Case No. 53, at para. 27). See also Vellore Citizens Welfare Forum v. Union of India, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.*

<sup>22</sup> *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624.

<sup>23</sup> This and other thresholds are typically defined to mean averages over periods of 120 days.

generous thresholds established by the Compact, the accountability framework established by the requirement for Council Review may be entirely circumvented.

Also of concern is the fact that exemptions may be granted for diversions of less than 250,000 gallons per day where intended exclusively for public water supply within 12 miles of the Basin boundary. This is to be compared with the 50,000 liter per day threshold established by Ontario regulation.

Yet another problem arises from the Compact's lack of precision in defining diversions and consumptive uses. For example, it is unclear how certain removals will be addressed where they can be regarded as either consumptive uses, diversions or both. In some cases the consumptive use by an out-of-basin user may represent 100% of the water withdrawn. If regarded as an application for consumptive use, rather than diversion, the threshold for Council Review is fully five times higher.

Take, for example, an application to remove 3 million gallons of water a day from the Basin to irrigate crops outside the Basin. As noted, when water is used for irrigation over 70 percent is consumed. Thus 2.1 million of the gallons withdrawn may fall under the consumptive use category, leaving .9 million gallons per day to be regulated as a diversion for Basin waters. Both quantities would be less than the thresholds for Council review. When the potential for multiple end users to apply for such withdrawals is taken into account, it is not difficult to see the Compact as a mechanism to facilitate substantial removals of Great Lakes waters to services end-users outside the Basin with little regulatory oversight other than by the state granting the withdrawal permit.

Finally, a substantial gap in the regulatory framework proposed by the Compact appears to exist for consumptive uses where the quantity of water involved is less than 5 million gallons per day. Because such a proposal is under the threshold defined by s. 8.3, no Council Review is required for such a proposed use. However, it appears that at least for a ten year period from the effective date of the Compact, there may be no requirement for even the State involved to review such a proposal for compliance with the Standard for Review.<sup>24</sup>

Apart from the concerns we have expressed about large-scale diversion approvals, when taken together, the various gaps in the regulatory framework proposed by the Compact support the conclusion that it may operate more as sieve than a dam.

### **A Challenge to Canadian Sovereignty**

Certainly, cooperation among the States and Provinces is important, and indeed vital if the ecological integrity of the Great Lakes is to be protected. However, it is essential that

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<sup>24</sup> Under s. 3.2 (1) only those diversions and consumptive uses subject to review under Articles 8 and 9 are required to be submitted for review by the Great Lakes State in which the withdrawal would occur. Only s. 9.3 would appear to apply to an application for consumptive use of water that is less than 5 million per day, but such proposals are grandfathered for a period of ten-years.

this cooperation take place in a manner that respects the constitutional and sovereign authority of both nations.

By ignoring the roles and responsibilities of Canada's federal government, and by seeking to establish a unilateral regime for approving out-of-basin diversions that implicitly supplants the requirements of the *Boundary Waters Treaty*, the Compact represents a clear challenge to Canadian sovereignty<sup>25</sup> even though it doesn't proclaim the fact.

To begin with, the initiatives of the Governors and Premiers have little if any regard to the considerable constitutional authority of Canada's federal government concerning water, including the waters of the Great Lakes. To be binding, the Compact will, if ratified, be submitted for U.S. Congressional approval. But neither it, nor the companion Agreement negotiated with the Provinces, is to be reviewed by Parliament. It is apparent that preserving the sovereign authority of Canada's federal government was not a concern for either the Governors or the Premiers, and this no doubt explains the alacrity with which they have ignored Canada's role.

The Compact and international Agreement would establish a regime for approving Great Lakes waters that assigns no role to the Canadian federal government. While provincial governments are to be consulted, they will have no authority to prevent diversions of Great Lakes waters approved under the Compact, no matter how opposed they may be. Moreover, the Provinces do not have the constitutional authority to approve such diversions even were the Governors to accord the Premiers that role. While the Provinces have considerable constitutional authority concerning water, in several respects that authority is limited by those powers assigned to the federal government, including the right to legislate with respect to navigation and shipping, the environment,<sup>26</sup> fisheries, and works extending beyond provincial boundaries. The Supreme Court of Canada has also established that federal authority to legislate regarding "peace, order and good government" includes jurisdiction over issues of national concern that "cannot realistically be satisfied by cooperative provincial action" such as marine pollution.<sup>27</sup>

<sup>25</sup> In both national and international law, "sovereignty" is both a legal and a political concept. In international law, sovereignty refers to the formal equality at international law between states and to the principle that one state will not interfere in the sovereign affairs of another. The first aspect is codified in Article 2 of the UN Charter, which states: "The Organization is based on the principle of the sovereign equality of all its Members." But there is a political aspect to sovereignty as well, and this was recognized by the Supreme Court of Canada in the *Secession Reference* case in citing academic authority for the proposition that "No one doubts that legal consequences may flow from political facts, and that 'sovereignty is a political fact for which no purely legal authority can be constituted...'"

<sup>26</sup> In this aspect authority is shared with the provinces, but a clear federal role has been acknowledged, see *R. v. Hydro Quebec* [1997] 3 S.C.R. 213.

<sup>27</sup> See *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401. In this case a forest company had dumped wood waste in a cove that was within the territorial boundaries of British Columbia but which ultimately flowed into the Pacific. The lower courts had ruled that the section of the federal *Ocean Dumping Control Act* pertaining to dumping in waters within a province was *ultra vires* Parliament. The Supreme Court disagreed, holding that the measure was constitutionally valid because it came within the national powers doctrine of the peace, order and good government power. Marine pollution, because of the predominantly extra-provincial and international character and implications, was found by the Court to be a matter of

Most important for present purposes is the exclusive constitutional authority assigned to the federal government to enter into international treaties under s. 132 of the *Constitution Act*,<sup>28</sup> which Canada exercised in negotiating a *Boundary Waters Treaty* with the U. S. almost a century ago.

It is important in this regard to appreciate that in terms of bi-national relations, the Compact represents a unilateral approach for dealing with an international problem, and as such reflects a pronounced trend by the U.S. to favour such approaches. While the Agreement between the Governors and Premiers may be seen as adding an international dimension to this U.S. initiative, the non-binding nature of that Agreement belies any meaningful commitment by the U.S. to bi-nationalism. Once again the approach adopted by the Governors follows the template laid out by the Lochhead legal opinion that explicitly rejects the option of strengthening the *Boundary Waters Treaty* in favour of a Compact between the Governors, which requires the approval of Congress but not the assent of Canada or the Provinces.<sup>29</sup>

Moreover, not only does the Compact reflect a decision by U.S. governments to reject the notion of strengthening the *Boundary Waters Treaty*, but it may also be seen as representing a collateral attack on the integrity of this Treaty as it now exists.

#### The Compact Would Undermine the Boundary Waters Treaty and Marginalize the Role of the IJC

The *Boundary Waters Treaty* (1909) is arguably the foremost environmental agreement between Canada and the United States. The Treaty sets out the principles and mechanisms to address various matters concerning the use of boundary waters and establishes the International Joint Commission to oversee and implement the Treaty.

Among other responsibilities, Article III of the Treaty accords the IJC an explicit role in approving certain diversions of boundary waters:

*It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.*

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concern to Canada as a whole, and has a “singleness” and “indivisibility” that distinguished it from matters of mere provincial concern.

<sup>28</sup> S. 132: *The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.*

<sup>29</sup> Note 7, pp. 40-43.

In exercising this approval authority the IJC is directed by Article VIII of the Treaty to be governed by certain principles and rules, including the principle that both the United States and Canada are to have equal and similar rights to the use of waters defined as boundary waters. Article VIII also sets out an order of preference that is to be followed by the IJC in according any such approval.<sup>30</sup>

Notwithstanding the importance of these provisions, the Compact makes no explicit reference to this IJC approval power, nor is there any attempt to reconcile the standards and procedures for diversion approvals under the Compact with the principles, rules and preferences set out in the *Boundary Waters Treaty*.

For example, the Compact establishes no priority in favour of particular uses, makes no explicit reference to the water quality standards of the Treaty or the *Great Lakes Water Quality Agreement* and, in addressing the question of cumulative impacts, fails to acknowledge the equal use principle of the Treaty.

The potential for conflicts between these two regimes is apparent, and Canada raised this concern in commenting on the Annex, questioning whether such a regime would undermine compliance with the Treaty and weaken its protections.<sup>31</sup>

By establishing an entirely independent approvals regime, which is to be based on procedures and standards that are extraneous to those of the Treaty, the scheme of the Compact reduces the IJC to a secondary role, if it is to play any role at all.

In contrast to the approach adopted by the Compact, Canada's diversions control regime does acknowledge the IJC's role in approving such diversions. In fact Canada's approach to regulating water diversions is formally situated within the framework of the federal statute implementing the *Boundary Waters Treaty*.

Thus s. 13(2) of the *International Boundary Waters Treaty Act* provides:

..... removing water from boundary waters and taking it outside the water basin in which the boundary waters are located is deemed, given the cumulative effect of removals of boundary waters outside their water basins, to affect the natural level or flow of the boundary waters on the other side of the international boundary.

Recall that, "affecting the natural level or flow of boundary waters" on the other side of the international boundary is the trigger that invokes IJC approval authority. In other words, by deeming diversions of water from the Basin, regardless of their scale or purpose, as having this affect, the IBWTA acknowledges and sets the stage for the IJC to

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<sup>30</sup> These are to favour 1) uses for domestic and sanitary purposes; 2) Uses for navigation, including service of canals for purposes of navigation; and 3) uses for power and irrigation purposes.

<sup>31</sup> Note 3.

review such diversions. No similar proviso is contained in the Compact, which essentially ignores the *Treaty* and the IJC's approval role.

It might be said that the Canadian initiatives to regulate water diversions from the Great Lakes also represents a unilateral as opposed to bi-lateral approach to dealing with this problem. But this would be to miss the fundamental points that i) Canadian actions, including both federal and provincial regulatory measures, and an accord between both levels of government, were taken to effectively ban not permit water diversions, and ii) were clearly framed within the context of the *Boundary Waters Treaty*, not outside it.

Another way in which the Compact can be seen as marginalizing the role of the IJC arises from the Governors' decision to disregard key IJC recommendations concerning the regulation of withdrawals of Great Lakes water. As noted, a particularly important point of departure has to do with the failure of the Compact to distinguish between in-basin and out-of-basin users, but there are others as well. In its most recent commentary, the IJC repeats its advice that the Compact conform with its views,<sup>32</sup> but that certainly is not now the case.

Finally, the unilateralism inherent to the Compact is also at odds with principles of customary international law. These impose on both Canada and the United States an obligation to use international and boundary waters in manner that does not cause appreciable harm to the other.<sup>33</sup> By ignoring this principle, and by establishing a regime that essentially ignores the *Boundary Waters Treaty*, the Compact and its companion piece not only represent a challenge to Canadian sovereignty with respect to Great Lakes waters, but may set a dangerous precedent that may diminish Canada's capacity to deal with other water related challenges elsewhere in the country.

### **The Improvement Standard of the Compact May Lead to the Commodification of Great Lakes Waters**

Like other criteria, it is unclear how the *Improvement Standard* mandated by the Compact would be implemented. According to this criterion for approving water diversions:

*The Withdrawal proposal shall incorporate a proposal for an Improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin,*

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<sup>32</sup> International Joint Commission; *Protection of the Waters of the Great Lakes: Review of the Recommendations of the February 2000 Report*, Aug.31, 2004.

<sup>33</sup> The United Nations International Law Commission (ILC) has developed *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses* in an effort to codify substantive customary principles of international water law developed through case law and state practice. Part II of the Draft Articles addresses the "general principles" of the Convention and the rights and duties of watercourse states. Two principles of equitable and reasonable use in Article 5 and the obligation not to cause appreciable harm in Article 7 may be considered the twin cornerstones of the Law of the Non-Navigational Uses of International Watercourses. See the *Convention on the Law of the Non-navigational Uses of International Watercourses* which can be found at [www.un.org/law/ilc/texts/nnavfra.htm](http://www.un.org/law/ilc/texts/nnavfra.htm).

*demonstrating how measures will be implemented to improve the physical, chemical or biological integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and,*

However, it appears that this provision would allow a company or jurisdiction seeking an approval to divert water from the Great Lakes to offer to fund or pay for certain “improvements” to waters and related resources. Water-related resources are broadly defined, and the range of potential improvements would include everything from defraying the cost of upgrading a sewage treatment plant or other municipal infrastructure, to improving terrestrial species habitat.<sup>34</sup> While the approving jurisdiction would not be paid for water *per se*, by potentially linking the approvals process to funding for public infrastructure, the scheme is tantamount to the same thing – the ‘sale’ of water to the highest bidder.

### Conclusion

Finally, if the Compact is fundamentally flawed, this does not mean that the status quo is sustainable or even that the IJC’s recommendations concerning water diversions are sufficient to address the deficiencies of the current regime. Apart from the question of whether current uses and diversions of Great Lakes water are sustainable, it is very clear that present legal regimes, both domestic and international, are not sufficient to ensure the sustainable use of Great Lakes water or to ensure Canadian sovereignty with respect to these waters. If these objectives are to be realized, Canada and the United States will need to address the deficiencies of the international agreements concerning the stewardship of boundary waters.

In the context of the Great Lakes this would mean either negotiating amendments to the *Boundary Waters Treaty* or a new and complementary international agreement, that would:

- encompass all waters in the Great Lakes Basin, including groundwater and tributaries to the five Great Lakes;
- strengthen bi-national control over use and diversion;
- adopt ecological integrity and the precautionary principle as the cornerstones of the Treaty; and
- establish the priority of this Treaty in the event of conflicts with NAFTA or other international trade agreements.

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<sup>34</sup> “Water Dependent Natural Resources” means the interacting components of land, water and living organisms affected by the Waters of the Great Lakes Basin.



In other respects, we have summarized our views in the introduction to this opinion and will not repeat that exercise here, save to note that given the risks and challenges presented by the Compact, it would be prudent, in our view, to extend the moratorium on water diversions advocated by the IJC in its 2000 Report until a more satisfactory regime can be established.

**Steven Shrybman**  
**SACK GOLDBLATT MITCHELL**  
**October, 2004**

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WRITTEN SUBMISSION  
JAMES BRUCE

# GREAT LAKES AGREEMENT AND COMPACT: DRAFTS of 19 July 2004

## REVIEW FOR GORDON FOUNDATION

James P. Bruce

26 August, 2004

### 1. INTRODUCTION

The drafts of "The Implementing Agreement for Annex 2001" and the related U.S. States Compact, released on July 19, 2004, are the most recent proposals for preventing the Great Lakes-St. Lawrence waters from becoming a tragedy of the commons, through multiple withdrawals and diversions. Both the "international" Annex Agreement and the U.S. States Compact, address the taking of water from the Great Lakes system as a process by which proponents of the withdrawals or diversions must return as much as possible, and/or provide "improvements" to the ecosystem in compensation. Such improvements, however helpful to the ecosystem, would generally not replace the lost volume of water which, downstream in the system, has many beneficial uses, for hydro-electric power, shipping, recreation, etc. Comparing "resource improvements" with "water withdrawals" will be comparing apples and oranges.<sup>1</sup>

Thus while this attempt to come to grips with the critical issue of water takings is to be commended, the proposals are seriously flawed and would not really solve the problem. In addition, the proposal to divert water to communities close to, but outside, the basin has potentially serious adverse effects on Canada and indeed may compromise provisions of the Boundary Waters Treaty of 1909.<sup>2</sup>

### 2. POSITIVE ASPECTS IN FACE OF THREATS TO BASIN WATERS:

The draft Annex Agreement and Compact represent an important and valiant attempt of 8 Great Lakes States, Ontario and Quebec to agree to rules governing withdrawals, diversions and consumptive uses of waters from the Great Lakes-St. Lawrence system.

They could form a basis for protecting and conserving waters of the basin, if they were to be significantly modified. The modifications the documents required would be quite extensive if full protection of the waters is to be achieved. The urging of water conservation programs on all jurisdictions, in the Agreement Articles could be helpful.

Threats to the waters of the basin, many alluded to in the proposals, are very real and growing, making consideration of this issue timely, even urgent. Such threats include:

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<sup>1</sup> Pentland, R., June 2004.

<sup>2</sup> Olson, James, June 2004.

- a) Increased evaporation and reduced lake levels and flows of interconnecting rivers and the St. Lawrence due to climate change. The trend towards declining average annual flow at Niagara River, which integrates all of the basin effects above that point, has continued to the end of 2003 beyond the 500 cms (17,600 cfs) loss (7%) in average flow from 1970 to 2000 reported earlier. Eighty percent of this loss can be attributed to changing climatic conditions and 20% to increased consumptive uses upstream.<sup>3</sup>
- b) Increased polluting discharges from agricultural and urban areas due to increased rain intensities with climate change and growth of intensive farming.<sup>4</sup>
- c) Growing water shortages in the U.S. mid-west and southwest as well as in communities, closer to, but outside the surface water boundaries of the basin.
- d) Expanding use of waters of the basin for bottled water, most of it subsequently exported.
- e) Increasing exploitation of ground water for growing communities, industry, including bottled water plants, reducing ground water contributions to the Great Lakes through lowered flow of tributary streams.
- f) Lack of adequate water conservation programs by jurisdictions within the basin.
- g) Reductions of monitoring, surveillance and research programs, due to government funding restraints, making accurate assessments of quantities and quality of water within the basin, increasingly difficult. This reduces the capability to make informed judgments on water management issues.

In short there is a rapidly growing crisis, and attention by jurisdictions to better control of water withdrawals and consumptive uses, which recognizes the above issues, is to be welcomed.

### 3. PROBLEMS POSED BY PRESENT PROPOSALS:

However, from a perspective of water conservation and protection, the proposals have serious flaws, particularly from a Canadian point of view.

- 3.1 The Annex Agreement and Compact are only about withdrawals, diversions out and consumptive uses, and pay no attention to **diversions into the system**. Since the early 1940s. the Canadian Ogoki and Long Lac diversions into Lake Superior averaging about 5400 cfs (153 cms)

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<sup>3</sup> Bruce, J.P., et al., 2003.

<sup>4</sup> Soil and Water Conservation Society, 2003.

(3.5 billion gal./day), far more than compensates for Canadian consumptive uses within the basin. (While gaining credit for hydro-electric production from this additional water at Niagara Falls, Canada does not receive this credit at power plants along the St. Lawrence River or at Sault Ste. Marie.)

- 3.2 There is considerable discussion of protecting water quality and ecosystem values in the Annex Agreement and Compact but little recognition of the **economic and atmospheric environment values**, particularly for non-consumptive hydro-power production and shipping uses. These too need protection. This is especially true for hydro-electricity production since thermal power generation of similar amounts of electricity would seriously increase the region's greenhouse gas emissions, as well as smog precursors. Reduction of greenhouse gas emissions and other air pollutants, which can affect the lakes, could also be considered "improvements",
- 3.3 There is some **geographical confusion**. The Annex Agreement speaks of the basin waters down to the St. Lawrence River at Trois Rivieres. This then should include the Lake Champlain-Richelieu River system (as well as the Ottawa River). Yet the State of Vermont bordering Lake Champlain is not a party to either the Annex Agreement or the Compact.
- 3.4 The Annex Agreement and Compact propose **new Regional Bodies** to manage the Agreement. However, many of the water quantity and ecosystem issues are already dealt with by the 1909 Boundary Waters Treaty and the 1978 Great Lakes Water Quality Agreement as administered by the bilateral International Joint Commission. There would be very extensive overlap and possible conflict between the Regional Bodies and the IJC if no changes are made. This could seriously weaken IJC. U.S.A. and Canada have equal representation on the IJC, but it would be 8 to 2 on any Annex Body.
- 3.5 One of the greatest and most imminent threats to Great Lakes basin waters lies in the potential for far greater withdrawals (from present 3,200 cfs to as much as 9,000 cfs) from Lake Michigan-Huron **through the Chicago Diversion** to meet needs in the drying mid-West and south-West U.S.A. Yet the wording of the Agreement (Chapter 2.11) and of the Compact (Article 3.10) give very little assurance that this could be prevented. Indeed, the Compact would only do "best efforts to ensure participation of provinces" if there were hearings to consider additional diversions out of the system. The Annex Agreement does not address potential for additional diversion at Chicago, but only states (Article 203, #11) that the withdrawals presently approved by the U.S. Supreme Court, are not subject to review by the process of the Annex.

- 3.6 The **First Nations and Tribes** are to be consulted, but only along with the general public, in any consideration of withdrawals. What if a First Nations group wishes to withdraw water for irrigation or a commercial enterprise? Would this be treated in the same way other applications are treated?
- 3.7 The **dispute resolution process** (Article 601 of Draft Agreement) appears to be open only to the Parties, i.e. the 10 jurisdictions. There is no provision for a public interest group or a company to appeal decisions or to be a direct party to resolution of disputes. An “independent” assessment of proposed withdrawals or diversions is not a requirement, only an option.
- 3.8 The **criteria proposed for decisions** on withdrawals by the jurisdictions or the Annex Regional Body, (Appendix 1 and 2 to Annex Agreement including Procedures Manual) are constructive and well intentioned. However, some are vague and difficult to interpret. For example, water for communities less than 12 miles (19.3 km) from the basin boundary may be permitted “where adequate quantities of potable-quality water are not available”. – Adequate for what? – a rapidly growing urban area where such growth is unwise, and “not available” taking into account other potential sources from how far away? Or, “disruption of pre-proposal temperature regime of the hydrologic system: - by how much, how far from the power plant or cooling water source?
- Note: Toronto is moving towards use of Lake Ontario waters to cool large downtown buildings in order to save energy? Reducing greenhouse gas emissions in this and others ways does not seem to enter into the improvements criteria of the Annex Agreement. Some of the suggested offsetting water protection measures, such as removal of dams, say for flood control, could be counterproductive to present ecosystems, water levels, flows and food damages.*
- 3.9 The list of **water conservation measures** given in Table 1 of Appendix 2 is very helpful. However, these are just suggestions to those applying for water takings and in no way are they required actions. As has been pointed out (e.g. Nikiforuk)<sup>5</sup> per capita consumption of water in Great Lakes jurisdictions is among the highest in the world, several times greater than European consumption. Thus, there are many opportunities for offsetting new water takings with conservation measures.
- 3.10 The requirement for returning flows of water withdrawn, less consumptive use, sounds reasonably good initially. However, under IV Jurisdictional Review of Appendix 1 the return flow requirement is seriously compromised, especially for uses near (within 19.3km) but outside the

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<sup>5</sup> Nikiforuk, Andrew, June 2004.

basin or where the return flow “is not feasible”, whatever that means. In addition, the quality of the return flow is not necessarily required to meet the water quality objectives of the Great Lakes Water Quality Agreement.

- 3.11 While the Draft Annex Agreement and Compact wisely call for greater efforts at monitoring and surveillance by all jurisdictions of both withdrawals and of the ecosystem itself, it is clear that budget reductions of the last decade, on both sides of the border, have resulted in inadequate data and understanding for wise management decisions. Ground water resources and their effects on the Lakes are poorly known. These create serious uncertainties, compounded by the uncertainties about the rates of climate change and its impact – probably large. In this condition of major uncertainty, the internationally accepted approach is to follow the Precautionary Principle. In this case, this Principle would require no net diversions out of the basin.

#### 4. CONCLUSIONS AND RECOMMENDATIONS:

From the above comments, the evident conclusion is that the Draft Annex procedures and Compact will not adequately protect the waters and ecosystems of the Great Lakes-St. Lawrence basin. Indeed, the basic idea or principle that the withdrawal or diversion of water from the basin can be compensated for by “resource improvements” somewhere in the basin, is seriously flawed. The proposals would compromise the work of the IJC in implementing provisions of the Boundary Waters Treaty and Great Lakes Water Quality Agreement.

Several alternative proposals have been put forward by the IJC<sup>6</sup>, by A. Nikiforuk<sup>5</sup> and others. After considering these and the current proposals, I would recommend major revisions to Annex procedures and the Compact as follows:

- (i) A policy of **no-net additional diversions** or withdrawals from the basin be adopted. (See A. Nikiforuk<sup>5</sup>) Each jurisdiction proposing an additional withdrawal or diversion would be required to provide for off-setting reductions in existing water takings. Such reductions should be readily achievable by some of the methods listed in Table 1 in Appendix 2. The present relative profligacy of water use within the basin makes it clear that substantial reductions in use, through conservation measures, are readily achievable.
- (ii) A requirement that all return flows be of a quality that meets the **water quality objectives of the 1978 Great Lakes Water Quality Agreement**.

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<sup>6</sup> International Joint Commission, Feb. 2000.

- (iii) Rather than establishing a new Regional Body to administer any process dealing with withdrawals and diversions, assign these **responsibilities to the IJC**. This will avoid overlap and conflicts.
- (iv) Once the needed monitoring, surveillance and data collection systems are fully in place by all jurisdictions in order to assess both local and cumulative impacts and change, **a further review of these policies and procedures** be implemented. This would require an estimated **10 years** to put the programs in place and assemble sufficient data to support a review.

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WRITTEN SUBMISSION  
RALPH FENTLAND

**Comments Prepared by R. L. Pentland  
for the  
Standing Committee on the Environment and Sustainable Development  
Ottawa, November 16, 2004**

**GREAT LAKES COMPACT AND SUSTAINABLE WATER RESOURCES  
AGREEMENT**

Before I start I should note that I am speaking as an interested and concerned citizen only. I have in the past co-chaired three binational committees on this topic, most recently about two years ago. But at this time I am not associated with any government, agency or organization that is involved with the Great Lakes Basin diversion issue. My most recent exposure to the issue came about when I was contracted by the Woodrow Wilson Centre to analyse the proposed agreements and report my findings, which I did at a meeting in Washington on September 14, 2004.

In my Woodrow Wilson essay, I started by describing the Aral Sea disaster. The Aral Sea in central Asia used to be the third largest lake in the world. Since 1960, its area has declined more than 60% and salinity levels tripled. All native fish species have disappeared. Winds pick up millions of tons of toxic dust, poison nearby farmlands and contribute to respiratory illnesses. Drinking water from low river flows has become hazardous and incidences of fevers and diseases are alarming. Shrinking the size of the sea has also led to a more continental climate of hotter summers and colder winters, with a shorter growing season.

I could have just as easily chosen other examples. For example, the area of Lake Chad in central Africa has been reduced by over 90%. And right in the United States, groundwater levels under seven southwestern states have been lowered by as much as 150 feet. For anyone interested in learning more about water tragedies in North America, I would recommend a very good book entitled "Water Follies" - by Robert Glennon. Hopefully we can still avoid the "Great Lakes Water Folly".

**Based on my analysis of the proposed agreements, I arrived at two primary conclusions:**

1. The draft agreements, if implemented in their current form would, for the first time, put Great Lakes water in its natural state up for sale to potential buyers anywhere in the world; and
2. The draft agreements risk starting the region down a very slippery slope that could seriously jeopardize both the economy and ecology of the entire region.

Great Lakes net water supplies and water levels now face major uncertainties related to climate change, unpredictable future consumptive use patterns, potential diversions and other forms of bulk removal, and possible modifications to their connecting channels. What is most disconcerting is that each and every one of these factors is likely to diminish supplies and/or water levels in a cumulative way over the next several decades. For that reason, the International Joint Commission, in its year 2000 report on Protection of the Waters of the Great Lakes concluded that there should be a bias in favour of retaining water in the system and using it more efficiently and effectively. They also suggested that no water should be removed from the basin unless it can be demonstrated, with certainty, that the integrity of the Great Lakes ecosystem would be preserved.

The draft Great Lakes Basin Water Resources Compact and associated state-provincial arrangements originated with concepts recommended by a Denver law firm in mid 1999. In essence, that firm suggested that decisions regarding new or increased withdrawals of water, either for use within the basin or for removals from the basin should be based on a common “benefits” standard. There were clearly two unreasonable assumption underlying the common standard for both in-basin and out-of-basin withdrawals. The first was that anyone, anywhere in the world has the same basic right to Great Lakes water as do basin residents. The second was that one could equate damages caused by a diversion with an improvement to water or some other resource within the basin such as wildlife, fisheries or an improvement to water quality.

Although it's buried deep in the bowels of the draft agreements and renamed "resource improvement", that standard is still the most critical feature of the proposed regime. The reason it is so important is that it is the "enabling" provision. It is enabling in the sense that it is the provision that opens the door very wide to removing water from the Great Lakes Basin. It not only opens the door to removing water, but may actually put it up for sale, potentially making it a commodity or good subject to interstate and international trading rules. Admittedly, there are other rules that selectively plug some and arguably even the majority of the leaks. But the most fundamental flaw in the agreement is the fact that it starts with an inappropriate assumption and a common standard that opens the door very wide to removals, with no limits on the total quantity of water that can be removed, the duration of the removals, the purpose of the removals, or the geographical region to be served by the removals.

At the time the benefits standard was first proposed in 1999, I was asked for my personal views on that approach by a staff member in the office of the Council of Great Lakes Governors. I would like to repeat four of the points that I made in an e-mail in June of 1999, because I think they are still relevant:

3. "It is absolutely impossible to compensate for bulk removals, in the sense of being able to maintain enough resilience to cope with future unpredictable stresses like climate change".
4. "We cannot, at this time, quantify the negative effects of bulk removals in order that they could be mitigated. Consultants (like me) could make a case for almost anything, but they would in reality be meaningless".
5. "One might argue that the Great Lakes ecosystem could be compensated by doing something else "good" in the same or some other area, but that would merely encourage harmful bulk removals, while at the same time excusing other "bad" environmental actors

from meeting their responsibilities. While environmentalists might like the idea initially, they would eventually realize that it is conceptually self-defeating environmental policy”.

6. “With respect to the primary objective of discouraging or preventing large scale, irreversible diversions, it would have the opposite effect. It would end up being a “water chasing dollars” approach. And once the public figured that out, it would also become extremely bad politics”.

Before the Council chose a specific way forward in the Great Lakes Charter Annex in 2001, they had not only the advice of the Denver law firm, but also the advice of the International Joint Commission. The IJC recommended very different approaches for in-basin and out-of-basin withdrawals, and a regime centred on preserving “ecosystem integrity”. Others have suggested regimes based on “no diversions” or “no net loss of water”. Any of these would have been preferable starting points to the “resource improvement” or “water for sale” standard. The superficial appeal of the resource improvement approach is obvious. Citizens outside the basin would get access to Great Lakes water, and those inside would somehow be convinced the Great Lakes are being improved even as the water disappears.

By this time, some of you may be wondering if the magic inferred by the so-called resource improvement standard is really possible. It isn't. Investigative journalist Andrew Nikiforuk interviewed about 20 experts and concluded “At best resource improvement is compensation, at worst smoke and mirrors, and always hubris”. Award winning water scientist Davis Schindler asks “What does resource improvement mean? Does it mean God forgot something and clever engineers can do it better?” Clearly, on a basin-wide scale it is absolutely impossible to improve water and water dependent resources if there is significantly less water in the basin. If anyone doesn't believe that, look ahead to the time when perfectly protected wetlands become perfectly protected drylands. In any event, there is no objective way to equate a water loss with an improvement in some other natural resource.

Despite all the obvious flaws with the “resource improvement” standard, when the Council issued Annex 2001 three years ago and initiated negotiations on the agreements, they unfortunately chose that standard as the central feature. The good news is they also added some other safeguards recommended by the International Joint Commission, for example, those related to return flow, cumulative impact and conservation. The bad news is their return flow requirements are very much weaker and fuzzier than those recommended by the IJC.

When the draft agreements came out are out for public review, my concerns became even greater than they were in 1999 and 2001. There are really three primary tests plus a few other conditions that would have to be satisfied to remove water from the Great Lakes basin. The way I think the three primary tests will eventually be interpreted with respect to diversions and other forms of bulk removal, especially by international trade panels and the courts is as follows:

1. The resource improvement standard as defined is tantamount to a Water for Sale sign. It necessarily implies an exchange of money, or at least bartering, with the proceeds going towards meeting the responsibilities of resource abusers, or to agencies dealing with resource abusers or abuses within the basin;
2. The return flow requirements will discriminate, probably quite arbitrarily, between who gets to buy and who does not; and.
3. The cumulative impact requirement is a very loose way of deciding when to stop selling, especially where the term impact is limited to “significant”.

My copy of the Webster’s dictionary defines the word “sell” as “to give up in return for money or other valuable consideration”. Reading that definition along with the way the resource improvement standard is to be applied in the agreements leaves no doubt, at least in my mind, that the draft agreements do in fact put Great Lakes water up for sale. But, for what price? If one has to figure out how many buckets of water are equivalent to a dozen ducks in order to set that

price, the logical conclusion would have to be that the price will be almost entirely arbitrary.

Now let's look at who gets to buy. In my Woodrow Wilson essay, I gave several examples of "wobble-room" or possible loopholes in the return flow regime. I would be the first to agree that at least some of those examples are arguable, as are several others that have been pointed out to me. All I am trying to say is that I, or anyone else, could interpret the many return flow provisions either very stringently or very loosely, and make a good case for saying "yes" or "no" to almost any proposal. If that is the case, the choice of buyers will also be quite arbitrary. Contrast that with the IJC proposal that makes it very clear exactly how much water must be returned, and exactly where it will be returned. "The governments of the Great Lakes states and Ontario and Quebec shall not permit any proposal for removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that .....there is no net loss to the area from which the water is taken and, in any event, there is no greater than a 5% loss....".

Now let's look at when they might stop selling. Based on numerous studies and workshops over the past several years, it is quite clear that the use of the cumulative impact concept in a regulatory or quasi-regulatory way in the Great Lakes water level context will pose serious conceptual problems, as well as difficult scientific challenges. The simple fact is that nobody knows how to define "the straw that will break the camel's back". And even if they could, nobody can convince me that any government would allow proposals to proceed until that point is reached, and then suddenly prohibit all further water-dependent development in the region. I think you all understand the "just one more" syndrome that never ends. So the cumulative impact requirement is yet another source of arbitrariness.

There are other sources of ambiguity. I will mention just a couple. I asked four people who are pretty knowledgeable about these things to interpret how the agreement would apply to an increase in the Chicago Diversion. Two said those increases would be largely exempt. The other two weren't sure, but thought the intent was merely to "grandfather" the existing diversion. But all four could likely interpret it either way, and justify their decision based on the current

wording. Even the definition of the basin seems a bit ambiguous. For example, the watershed down to Trois-Rivieres would include Lake Champlain. Is Vermont a Great Lakes State? That is not defined, but if so, why was Vermont excluded from the negotiations?

I would now like to deal briefly with the slippery slope issue. In the first instance the agreements would facilitate several small diversions to nearby communities right away - to places like Waukesha County in Wisconsin, Lowell in Indiana, and urban sprawl around Chicago and Milwaukee. In fact some people suggest that may be the "tail that is wagging the dog". That in and of itself would not likely be a major problem. The amount of water involved would be very small - I would venture a guess that in total the net loss may be equivalent to about one percent of the Chicago Diversion.

But, those smaller diversions will have established the respectability of new and formally sanctioned removals. If the proposed regime is really as flexible or "elastic" as I have concluded, we all know that elasticity will eventually be stretched to and likely even beyond its limits. So the precedent of small and formally sanctioned diversions, combined with a conceptually flawed regime that will necessarily be applied quite arbitrarily, will eventually lead to larger diversions over longer distances. In the water business no means no, but maybe almost always ends up being yes.

At this stage of my slippery slope, the diversions may or may not still be contained within the agreement jurisdictions. But, the more serious problems will likely come about when the Great Lakes jurisdictions begin to be accused of discriminatory practices under interstate commerce or international trade rules. They can still try to say no, but they may not be successful. If the agreements do proceed in their current form, with the unreasonable underlying assumption that anyone, anywhere in the world has the same right to Great Lakes, at some point in the future, some or all of the restrictions could be struck down as being disguised protectionism, and Great Lakes waters could flow to anyone who can afford it. I am not a lawyer myself, but for those wishing to explore the legal risks in greater detail, I would refer you to a recent analysis prepared



by Steven Shrybman of Sack Goldblack Mitchell Baristers and Solicitors of Toronto.

Over the longer term, the slipperiness of the slope will also be accentuated by the fact that, by merely entering into the agreements, some existing safeguards will be weakened. For example, even though the relevant Boundary Waters Treaty provisions will continue to exist, they are less likely to be invoked where there is state-provincial agreement. And existing protections afforded by the public trust doctrine in the United States portion of the basin will be weakened because the agreements do not include any public purpose or other standards required by the public trust.

In my Woodrow Wilson essay, I considered five basic alternatives:

1. No diversions or other forms of bulk removal combined with wise use inside the basin
2. The IJC recommendations, which were built mainly around preservation of ecosystem integrity and very strong return flow requirements;
3. A no net loss option;
4. The status quo; and
5. The draft Annex agreements.

The options are presented according to my assessment of the level of protection they would provide to the Great Lakes ecosystem, with the “no diversions or other forms of bulk removal” option providing the highest level of protection, and the draft agreements the lowest level. The IJC and no net loss options would lie somewhere between the two extremes, but either would be preferable to the draft agreements.

I should clarify a few things about the rankings. Why do I rank the IJC recommendations well ahead of the draft agreements vis-a-vis level of protection? In the draft agreements, as I said earlier, the resource improvement standard opens the door very wide for removals by allowing trade-offs between different components of the ecosystem, and then very selectively plugs some but not all of the leaks. In the IJC proposal, the ecosystem integrity standard only leaves the door for diversions slightly ajar, and then closes it even further with very “water-tight” return flow

requirements. The IJC proposals also begin from the much more sensible assumption that standards that treat in-basin uses and out-of basin removals differently are reasonable.

The no net loss option would obviously provide far better protection than the draft agreements, because it would place an absolute cap of zero on net removals. No net loss could be achieved in a number of ways, including requiring a 100% return flow, or by limiting the amount of water removed from the basin to the amount of water saved through water conservation within the basin. I ranked the agreements well below the status quo because they would both loosen the removals regime and weaken some existing safeguards.

If I were asked to summarize the agreements in a single sentence, it would be something like "What the proposed agreements do is turn an environmental issue into a resource trading issue, where market forces may eventually overwhelm public administration". The potential impact on the regional environment and two national economies could be quite profound, and would almost surely be negative. At this time, it is unclear how national interests are or will be reflected in the negotiating process.

WRITTEN SUBMISSION  
ELIZABETH MAY



**Testimony to the Standing Committee on Environment and Sustainable Development**

**House of Commons**

**In the matter of the proposed Great Lakes Basin Water Resources Compact**

**Elizabeth May**

**Executive Director, Sierra Club of Canada**

**November 18, 2004**

**1) Introduction:**

The Sierra Club has been active in Canada since 1969. Its mission is to develop a diverse, well-trained grassroots network working to protect the integrity of global ecosystems. The national office of the Sierra Club of Canada in Ottawa works closely with its chapters in British Columbia, the Prairies, Ontario, Quebec, and Atlantic Canada. The Sierra Club of Canada also has a national youth arm, the Sierra Youth Coalition. The organization is non-profit and membership, with over based 10,000 members and supporters. Financial support comes primarily from these members and supporters. The Sierra Club of Canada is proud to be democratically governed, with national elections for the board.

The Sierra Club of Canada has devoted considerable time to the review of the proposed agreement designed to implement Annex 1 of the Great Lakes Charter. As a membership-based, grassroots environmental organization with chapters in Ontario and Quebec, the Sierra Club of Canada regards the future health of the Great Lakes, in terms of water quality and quantity as a matter of the gravest importance.

The Sierra Club of Canada (SCC) recognizes that the negotiations and consultations over the last two years have been difficult. We recognize the good will of those engaged in the process of negotiating a regulatory procedure, grounded in standards, to allow control over Great Lakes water to be retained in the hands of jurisdictions and governments within the Great Lakes Basin. Nevertheless, the Sierra Club of Canada was the first Canadian environmental organization to raise the alarm about the proposed compact. (see May, Elizabeth, "Great Lakes for Sale," *Toronto Star*, September 17, 2004).

We are then extremely heartened by the announcement of Ontario's Minister of Natural Resources, the Hon David Ramsay, on Monday, November 15, 2004, that Ontario would not sign the compact and agreement in their current forms. The Ontario government has heard the widespread public comments that the agreement and compact are not adequate to protect the Great Lakes from diversions. The Attorney General of Michigan, Mike Cox, made similar comments about the serious flaws in the proposals. In an October 19, 2004 press release, the Michigan Attorney General said:

As Attorney General, I am committed to preserving our environment for future generations.....These proposed agreements fly in the face of that effort. While Annex 2001 promised an enhanced water management system, in actuality, these agreements propose a complex, time-consuming, regional review process that only weakens current state authority to limit diversions. This could harm our Great Lakes by increasing the number of withdrawals.

This might suggest that the current Committee hearings are redundant to rejection of the proposal by the more immediate parties – at least one Governor and one Premier. In fact, your hearings are timely and vital. It is urgent that the federal government take a stronger role in the whole matter.

What is at stake is management of one of the world's largest water bodies. It is nothing less than the future of Canada. Reduced groundwater levels of 150 feet or more in the Ogallala Aquifer in

the south-western part of the United States, and offshore examples like Lake Chad with a sharp decline in lake surface area of over 80 %, and the Aral Sea with its surface area reduced by two-thirds, are but a few examples of many recent “water follies” all around the world. These kinds of disasters always start out quite innocently. But, even very small political, economic or legal errors can lead to virtually irreversible trends. We often hear the expression “the devil is in the detail.” That is true, but in these kinds of cases the devil is also in the precedent.

If the proposed compact and state-province agreement were consummated tomorrow, the most significant immediate change would be a few additional “trickles” of water out of the Great Lakes Basin to meet requests from several nearby communities. But that precedent, combined with a fundamentally flawed decision-making regime could very well result in those short-term “trickles” turning into mid-term “cascades,” and then into long-term “torrents” of water travelling well beyond the borders of the ten Great Lakes jurisdictions, and perhaps even beyond the boundaries of the two countries. This is not only a Canada - U.S. issue.

All leaders of jurisdictions in the Great Lakes Basin must exercise extreme caution in considering any new regime dealing with diversions and other forms of bulk removal of water from the Great Lakes. Any proposal must be grounded in the reality that the Great Lakes are already under numerous stresses. The largest threat to the Lakes is climate change. With more than 30% higher levels of greenhouse gases by atmospheric concentration than at any time in the last 20 million years, there is no question that our climate will be destabilized over the next several centuries. These climatic changes are now irreversible, even with aggressive implementation of Kyoto and future climate conventions. Although uncertainties remain as to the specific impacts on the Great Lakes, the vast preponderance of modelling and expert opinion is that the Great Lakes will experience significant declines in water levels. This context must be borne in mind in any scheme to control diversions. We can no longer assume the Great Lakes are so large as to be indestructible. We cannot take the Great Lakes for granted.

**2) Substantive Concerns:**

Our first and most fundamental point is that, as Committee members may have noted from the lack of answers available from previous witnesses, is that governments collectively have far too little information available to take risks with the hydrology of the Great Lakes. Key information is missing. The Great Lakes Charter of 1986 required that an inventory be prepared of water uses and conservation plans within the basin. This has not yet been done. The need for the public, not to mention decision-makers, to be fully informed about current uses and withdrawals from the Great Lakes is essential. No agreement should be concluded without this essential foundation of knowledge.

This not “just another water agreement.” The proposals would fundamentally change the Great Lakes diversions and consumptive use issue from an environmental one to a resource trading issue. It could also conceivably lead to the commercialisation of water and related natural resources in an unprecedented way. There are risks inherent in the agreement’s decision making process as well as in the substance of those decisions.

**3) Concerns about the Concepts:**

The essential purpose of the agreement and the Annex is to create a process for regulating uses and diversions of Great Lakes waters. Under the proposed agreement, requests for diversions would be judged under a review relying on eight criteria, including requirements relating to the development of conservation plans and the assessment of significant cumulative impacts of such withdrawals on both the quantity and quality of Great Lakes waters. A benefit of the proposed approach is that it would be more transparent than decisions under the current Water Resources Development Act of the U.S. Congress, or the decisions under current Ontario and Quebec law. Additional improvements include that the proposal clearly applies to ground water as well as the surface water of the Great Lakes.

However, these improvements are not sufficient grounds to accept the agreement in its current form. A careful of the proposal makes it clear, that regardless of the intent, in practice the agreement could facilitate the diversions of Great Lakes waters.

In particular, the agreement does not place limits on the amount of water that can be diverted, no limits on the duration of diversions, nor on the purpose for which the waters may be used, nor on the geographic area to be serviced.

The agreement appears, in our view, to be contrary to the advice of the International Joint Commission (the IJC). The Council of Great Lakes Governors (CGLG) approach is founded on a “common standard” for approving withdrawals of waters from the Great Lakes, treating in-basin and out-of-basin uses and users the same. For the first time, users out of basin would be able to claim equal rights of access to those inside the basin.

**a) Legal foundation**

The legal foundation for the approach taken by the agreement stems from some questionable legal opinions. These opinions are not universally shared. In fact, the International Joint Commission came to a different conclusion. The far greater danger than an interstate trade challenge in the US is that by following the scheme for permitting diversions, particularly the resource improvement standard, the waters in the Great Lakes in their natural state can be seen to have been traded. The risk of triggering NAFTA trading rules to water in its natural state is a very large level of risk indeed. The legal opinion from the Denver law firm on which so much of the negotiation was premised mistakenly focuses on GATT and WTO rules. Far more likely will be trade challenges from NAFTA. *It is the NAFTA regime that will open the taps for both countries from all water bodies should the Great Lakes scheme inadvertently treat water in its natural state as a “good” in commerce.*

Worse yet, the legal opinion of Lochhead et al (Brownstein, Hyatt and Farber, Denver, May 18, 1999, in collaboration with Davis, Ward and Black of Toronto), reaches a poorly reasoned and



unresearched conclusion that *water in its natural state in the Great Lakes Basin is already a commodity*. This completely erroneous and dangerous view is made based on domestic US case law relating to restrictions on commerce in groundwater in Nebraska and New Mexico. Rather than make the logical distinction between cases based on the fact that the Great Lakes Basin is subject to an international treaty, the 1909 Boundary Waters Treaty, the Denver opinion merely states:

“Great Lakes Basin water is *even more likely* than Nebraska or New Mexico groundwater to be held to be an article of commerce subject to the commerce clause (of the US Constitution). Given the two-nation, multi-state nature of the resource, the multi-jurisdictional and public interest in the resource is self-evident.” (emphasis added)

After citing the various agreements, the Boundary Waters Treaty and the water quality agreements, the Lochhead opinion concludes:

“However, it is equally clear that the interests of the Great Lakes States in this resource does not rise to a level necessary to justify a ban or facially discriminatory restriction on the interstate or out-of-basin export of water.”

This breathtakingly audacious opinion is supported with not one legal reference, not one case citation, much less with any biological or ecological background. The whole Great Lakes Annex mess traces back to a few paragraphs of conclusory opinion. In order to satisfy conditions set out by this one legal opinion, the whole house of cards of the Great Lakes Annex has been constructed. I will examine this deck of cards one at a time.

**b) Resource improvement standard**

The proposed decision-making regime appears to be based on two largely illusory “have your cake and eat it too” notions. The first is the so-called “resource improvement standard.” Under this standard, the price to be paid for removing water from the Great Lakes Basin would be an improvement to some water related resource within the basin. On the surface, this has obvious political appeal. Constituents outside the basin would get access to Great Lakes water, and those

inside would somehow be convinced their ecosystem was being improved even as the water disappears.

There could in fact be local environmental improvements in the short run. But, if we look a little deeper and broader, and assume accelerating removals over time, very serious social, economic and environmental issues begin to arise. For example, look ahead to the time when lake levels are permanently lowered by several feet, which is a very likely due to the combined effects of accelerating diversions, uncertain future consumptive use patterns, increased hydroelectric power development, climate change, and probable changes to the connecting channels for navigation purposes. Local environmental improvements such as the protection and enhancement of fish and wildlife habitat will become meaningless as the wetlands become drylands. And local water quality improvements will be more than offset on a system-wide basis, as the amount of water flowing through the system is diminished, and as significant amounts of toxic substances that are now trapped in sediments become re-suspended.

There are other problems with the resource improvement standard as well. First, as a matter of ecological principle, it is never a good idea to encourage the trading off of one ecosystem component against another. Ecosystem health depends on a number of very sensitive interrelationships that need to be preserved. Secondly, those trade-offs will have to be largely arbitrary, because one cannot logically equate quantities of water with environmental protection measures. That arbitrariness will inevitably lead to all kinds of political rancour and unpredictable legal problems further down the road. As Canadian co-chairman of the IJC study board on the issue of Great Lakes diversions and consumptive uses, and before that, the Director of Environment Canada's water policy, Ralph Pentland has commented, the resource improvement standard asks us to calculate "how many buckets of water are worth a dozen ducks?"

**c) Return flow**

The second illusory “have your cake and eat it too” concept is return flow. Proponents will claim that nobody should worry about “selling” water because that will be offset by waters returned to the basin by the diverters. The problem here is that there seems to be an attempt to achieve a delicate “balancing act” in the agreements. That balancing act seems to be designed to allow just enough permanent water loss to satisfy out-of-basin constituents within the agreement jurisdictions, but not enough to satisfy demands from other North American or offshore jurisdictions.

There are a few things wrong with that scenario. First, the return flow regime itself may turn out to have more loopholes than anticipated. Just as with the resource improvement standard, sometimes imprecise language in the draft agreement would suggest that return flow decisions may also turn out to be largely arbitrary. But just as importantly, the very fact that the return flow provisions at least appear to be designed with inter-jurisdictional discrimination in mind suggests that they would be unlikely to withstand legal challenges related to interstate commerce and international trade. What we are suggesting is that the arbitrary nature of both “have your cake and eat it too” concepts may turn the “trickles” of water losses into “cascades,” and subsequent legal challenges may turn them into “torrents”.

It is a sign of the problems with the agreement’s reliance on “return flow” that so many supporters of the proposed approach believe it to be unworkable. The argument runs that those concerned about the Great Lakes being compromised by withdrawals need not worry because the return flow requirements being unworkable will result in fewer withdrawals. Sierra Club of Canada is concerned that the logical flaws in the return flow requirements could just as easily result in water withdrawals without return flow, resulting in an abandonment of that requirement as unworkable or prejudicial to out of basin users.

**d) Significant cumulative impact**

Another “safeguard” touted against the risk of eroding the Great Lakes in fundamental ways are provisions related to “significant” cumulative impact. However, we know the science needed to identify “significant” impacts in this context is ill-defined. Is it possible to define “the straw that breaks the camel’s back?” And even if it were possible, would anybody actually allow proposals to proceed until some threshold level of harm is reached, and then suddenly prohibit any additional water-dependent development in the region? In any event, if inter-jurisdictional discrimination is demonstrated in any one of the many inevitable legal challenges, this safeguard may also be struck down.

The modification of “cumulative impact” as “significant” is very worrying. The term “significant” is undefined in the agreement. Given the scale of the Lakes in terms of ecological services, quantity and quality, fine tuning monitoring and assessment to identifying that level of cumulative impact that is “significant” is unlikely. We will not likely spot the significant cumulative impact until the damage is done.

**e) Demands from out of basin**

We further question whether demands from outside the basin are really legitimate. All of eastern North America is blessed with a vast abundance of freshwater. Those immediately outside the basin receive the same three feet of precipitation and one foot of runoff as those inside. We can fully understand that there are several situations where the least cost short term solution would entail siphoning water out of the Great Lakes. But, that is only because in the short run bad water and environmental management is nearly always cheaper than good water and environmental management. Even without looking at the individual cases, we would hazard a guess that each and every one of them would be better off both economically and environmentally in the long run if they were to find a more local solution. Every drop of Great Lakes water is already serving some useful purpose where it is, so as a matter of principle one should think long and hard before sacrificing those uses to meet outside demands that may not be fully legitimate.

**f) Market forces/property rights**

We would also like to challenge those that argue the agreements will “unleash market forces in favour of the environment.” The primary market force that will be unleashed is water for sale to the highest bidder. And what will the revenues be used for? They will be used to meet the responsibilities of some “environmental laggards” within the basin - what economists refer to as a perverse incentive. And, application of the resource improvement standard within the basin is tantamount to a new tax on the wrong people for the wrong reason. It is important to get water prices right, and there is a well defined science to do that. In many cases that would result in a higher price, but at least those paying it would receive the local benefits. But, to raise additional revenue through a new tax on local water bills for the purpose of meeting the responsibilities of “environmental laggards,” perhaps hundreds of miles away would be entirely inappropriate.

Last, but not least, we would like to raise a conceptual concern about the extent to which the proposed agreements may shift property rights in favour of claims of private ownership of water. We would like to quote a paragraph from a recent essay by U.S. environmental lawyer James Olson to illustrate this point.

“Beyond impacts, this Great Lakes Basin water issue goes to the heart of citizens’ liberty and freedom as members of communities that have evolved for centuries, all of them interdependent but dependent on water as a secure public commons. The agreement must be carefully evaluated for any risk of any unintended subordination or privatization of this commons. When the commons is not respected or citizens’ fundamental right to water is alienated or at the mercy of private interests, people rebel. Citizens revolted in Bolivia, and they organized in Plachimada, India to stop Coca Cola from capturing a century old common water supply for bottles of soda pop. Citizens in Michigan and around the Great Lakes have successfully resisted efforts by Nestle to remove or divert water that would shift property rights in favour of claims of private ownership of water. These agreements could allow others to turn communities into vast water farms to serve a global economy in which citizens have little say.”

**g) Specific concerns**

- i) The most immediate threat to the Great Lakes ecosystem is a possible increase to the Chicago Diversion, because it could take place without significant new works. We understand a request may already be on the table from Illinois to do just that, and all jurisdictions may have agreed to keep that request “under wraps” until after the 90 day review period. If that turns out to be the case, we would consider that to be hugely disrespectful of the public’s “right to know”. What is even more disconcerting is that at least some reviewers have interpreted the agreement as exempting increases to the Chicago Diversion from most provisions in the agreement. We will give negotiators the benefit of the doubt on that question for now, but would request that it be made very clear in any agreements that all increases to existing diversions will be treated the same as new diversions.
  
- ii) The International Joint Commission concluded that there should be a bias in favour of retaining water within the basin and using it more efficiently and effectively, and in its recommendations followed through on that conclusion. They also made it clear that different treatment of in-basin and out-of-basin withdrawals would be quite consistent with national and international traditions and legal requirements. The draft agreements, on the other hand, require exactly the same tests to be applied to in-basin and out-of-basin withdrawals, even though they would in some circumstances be applied by different people. That identical treatment is entirely inconsistent with water management and environmental principles and practices as they are applied all around the world. The result would be that either in-basin withdrawals would be treated too stringently or out-of-basin withdrawals would be treated too leniently.
  
- iii) Resource improvement, as defined, is very clearly tantamount to offering water in its natural state for sale, and would therefore support the position of those who would argue that Great Lakes waters have effectively become a “good” under the terms of international trade agreements. That could in turn lead to pressures from both foreign

public and private interests for offshore exports, pressures that may very well be supported by international trade tribunals.

- iv) The agreements use a number of terms that are ambiguous and undefined. These include, for example, “reasonable use,” “significant impact,” and “evolving tools.” Because these notions include no clear or objective tests, they would seriously weaken any attempts to ward off challenges under international trade or interstate commerce rules. As suggested by the IJC, it is critical that water management policies be clearly articulated and consistently implemented so that undue expectations are not created.
- v) The IJC recommended a clear and unambiguous return flow requirement, that is “no net loss from the area from which the water is taken and, in any event....no greater than a 5% loss” (the average loss of all consumptive uses within the basin). The draft agreements, by speaking about but not defining water use sectors open up a number of loopholes regarding the amount of return flow, and are at times confusing and seemingly inconsistent about where the return flow will come from and where it will be returned. This level of ambiguity could lead to all kinds of acrimony and legal problems.
- vi) The IJC recommended that all return flow should meet the objectives specified in the Great Lakes Water Quality Agreement. The draft agreement’s requirements with respect to the quality of all return flows are much less specific, and depending on how they are ultimately interpreted, could even end up being quite inconsistent with Water Quality Agreement requirements.
- vii) The draft agreements make no mention at all about preventing the introduction of alien invasive species by way of return flow, as recommended by the IJC. This is a very serious omission.
- viii) The draft agreements exempt diversions for straddling communities and smaller diversions of less than 12 kilometres from most requirements. This could lead to serious

problems, especially with respect to both water quality requirements and preventing the introduction of alien invasive species.

- ix) Regarding withdrawals and consumptive uses within the basin, there is a clear emphasis on new and expanded uses. We understand the agreements also call for broader conservation measures, but that seems to be an afterthought much as it was in the 1986 Great Lakes Charter, with the result that many uses are still not even metered nineteen years later. There is a lot of potential for water saving within the basin, but those savings will only be achieved by dealing seriously with 100% of the uses 100% of the time.
- x) There are several problems of potential “incrementalism” that are not dealt with adequately in the agreements. For example, what would prevent a proponent from diverting in several small increments over time rather than all at once, thereby avoiding certain requirements? What would prevent a proponent from diverting for one use with little or no return flow, and then changing that use later? What would prevent a proponent from diverting a short distance to avoid the agreement requirements, and then selling that water to some more distant location later?

**4) Recommendations:**

While the Sierra Club of Canada cannot support the current draft, we recognize that the *status quo* may not be sufficiently robust to protect the Great Lakes from diversions. Achieving the goal of workable, enforceable, legally defensible agreements and compacts to ensure the Great Lakes are not eroded in quantity or quality is within our reach, but not yet within our grasp.

*There is no external time limit to be imposed on such significant negotiations.* Both the Canadian and United States federal governments and the International Joint Commission must be granted sufficient time to offer their legal and scientific opinions. As the Committee has noted, there has been no clear indication from the Council of Great Lakes Governors that Canadian federal government views will still be accepted following the extremely limited review time offered the



public.

If political will exists to protect the Lakes, then the Council must continue the analysis of this draft, provide a foundation in ecological principles and not become over-awed by a handful of legal opinions from private law firms. The development of the agreement to implement the Annex must be grounded in the precautionary principle. The Supreme Court of Canada decision in the Hudson case clears the way, as do the many references in Canadian law to the precautionary approach. The clear enunciation of the precautionary principle will orient the agreement to place the health and levels of the Lakes front and center. Its absence is noted in the current draft.

Therefore, we urge this committee to call for a stronger federal government role. The issue of protecting the Great Lakes should be elevated on the bi-national agenda with the United States. It must be made clear to the Great Lakes Governors that the current draft compact and agreement are not to proceed. The Canadian and United States federal governments, as well as the provincial and state governments within the Great Lakes Basin, should commit to undertaking the following work, *before any new regulatory instruments for permitting diversions are negotiated*.

- a) The inventory promised through the 1986 Great Lakes Charter must come before concluding any agreement with long-lasting impacts on the uses, diversions and withdrawals of water. This inventory is long over-due.
  
- b) A law commission with senior counsel from Canada and the U.S. should be created and mandated to address the key issues of legitimacy of bans on diversions and the most robust legal approaches to implement them. More analysis from a more impartial legal forum would be extremely useful. The option of ensuring that diversions of Great Lakes waters are not expanded may best be achieved at the federal government to federal government level. The state and province level through compacts is, at best, a challenging way to approach an international water issue. In this regard, the 2001 comments from Canada's Department of Foreign Affairs

and International Trade are interesting. The DFAIT comment focuses on the risk this approach poses to Canada's ability to prevent diversions. In DFAIT's 2001 view, the Annex approach could weaken Canada's ability to protect the Lakes from diversions.

c) Given the nature of uncertainties about the existing pressures on the Great Lakes, a science commission within the jurisdiction of the International Joint Commission would also help better inform the current debate.

d) The issue of diversions should be handled separately from conservation and control on consumptive uses. Investigating bi-national approaches to diversions, while leaving conservation and consumption issues at the state and provincial jurisdictions should also be explored. The option of just saying "no" (or at least insisting on the principle of "no net loss" of water) to all out-of-basin diversion proposals is still open and should underpin any agreement. Failure to do so could actually place the Annex in opposition to the 1909 Boundary Waters Treaty. The lawful option of saying "no" to any diversions would be in the best long-term interest of the regional environment, and likely even in the best long-term interest of the regional economy. It is our view that such a restriction, as long as it is related to legitimate local concerns such as preservation of the water resources of the basin, and is grounded in scientific analysis, would be valid even if it may have an incidental effect on interstate commerce and international trade. On the other hand, it seems to us that the agreements as drafted would be ripe for dispute and litigation as the demand for and stakes over water rise.

Thank you.

NOVEMBER 25, 2004

FINAL REPORT OF THE  
STANDING COMMITTEE ON  
THE ENVIRONMENT & SUSTAINABLE  
DEVELOPMENT

GREAT LAKES ANNEX

TABLED IN PARLIAMENT  
FRIDAY NOVEMBER 25, 2004

Français

Standing Committee on Environment  
and Sustainable Development



Comité permanent de l'environnement  
et du développement durable

HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
OTTAWA, CANADA  
K1A 0A6

For immediate release

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## NEWS RELEASE

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### GREAT LAKES CHARTER ANNEX 2001

Ottawa, November 25, 2004 - Media representatives please be advised that Mr. Alan Tonks, Chairman of the House of Commons Standing Committee on Environment and Sustainable Development, will table a report on Friday 26 November regarding the Great Lakes Charter Annex 2001 Implementing Agreements.

The report was triggered by the release by the Council of Great Lakes Governors (which includes the premiers of Ontario and Québec) of two Agreements in July 2004 that outline Standards for permitting new diversions and consumption of Great Lakes water. The Committee concludes that the Agreements, as they stand, are too permissive and that the federal government should recommend to the Council of Great Lakes Governors changes to strengthen the Agreements.

The full report will be available after tabling on the Committee website at:  
[http://www.parl.gc.ca/committee/CommitteeList.aspx?  
SelectedElementId=e24\\_&Lang=1&ParlSession=381&CommitteeId=8976](http://www.parl.gc.ca/committee/CommitteeList.aspx?SelectedElementId=e24_&Lang=1&ParlSession=381&CommitteeId=8976)

- 30 -

*For more information, please contact:*

*Eugene Morawski, Clerk of the Standing Committee on Environment and Sustainable Development  
Tel: (613) 992-5023  
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E-mail to

Content-class: urn:content-classes:message  
Subject: Great Lakes Annex: Standing Committee Report  
Date: Fri, 26 Nov 2004 10:55:41 -0500  
Thread-Topic: Great Lakes Annex: Standing Committee Report  
Thread-Index: AcTTFEzJW0jwQJN7Q2yQ/CQs1bWY5gAun3jg  
Priority: Urgent  
Importance: high  
From: <Shawn.Morton@international.gc.ca>  
To: <millers@lao.on.ca> ,  
<drstack@glu.org>  
Return-Path: Shawn.Morton@international.gc.ca

Sarah and Derek. Report will be tabled today (noon ?). I will send you a copy as soon as I receive it. My understanding is the report will contain recommendations along the following lines:

- \* Standard should be based on precautionary principle
- \* Agreement should include clear language that the BWT would prevail and that the IJC would remain final arbiter
- \* Agreements should be revised and strengthened and at minimum adopt recommendations in IJC 2000 report
- \* Canada should remove support for IJC 5% recommendation and IJC should revisit same
- \* ENVCDN should carry out an analysis of their science capacity in freshwater research and the federal water policy and report back to the committee. Should look at significant increase of allocation of money to freshwater research in government departments.
- \* Canada should more fully explore its referral options under the IJC and ensure adequate resources for the IJC.

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-----Original Message-----

From: Sarah Miller [mailto:millers@lao.on.ca]  
Sent: November 25, 2004 12:28 PM  
To: Morton, Shawn -NUE  
Subject: Hearings

Try as I may I cannot seem to locate where i can obtain Hansard of the Standing Committee Hearings. Might you be able to send me the proceedings from the day Ralph Pentland and Jim Bruce attended and the day Sierra CELA and COC were there. Thanks I appreciate it. How will we know how the Committee responds next week?

\* \*\*\*\*\*

Sarah Miller



HOUSE OF COMMONS  
CANADA

**THE GREAT LAKES CHARTER ANNEX 2001  
IMPLEMENTING AGREEMENTS**

**REPORT OF THE STANDING COMMITTEE  
ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

**Alan Tonks, M.P.  
Chair**

**November 2004**

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**THE GREAT LAKES CHARTER ANNEX 2001  
IMPLEMENTING AGREEMENTS**

**REPORT OF THE STANDING COMMITTEE  
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**Alan Tonks, M.P.  
Chair**

**November 2004**





# STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

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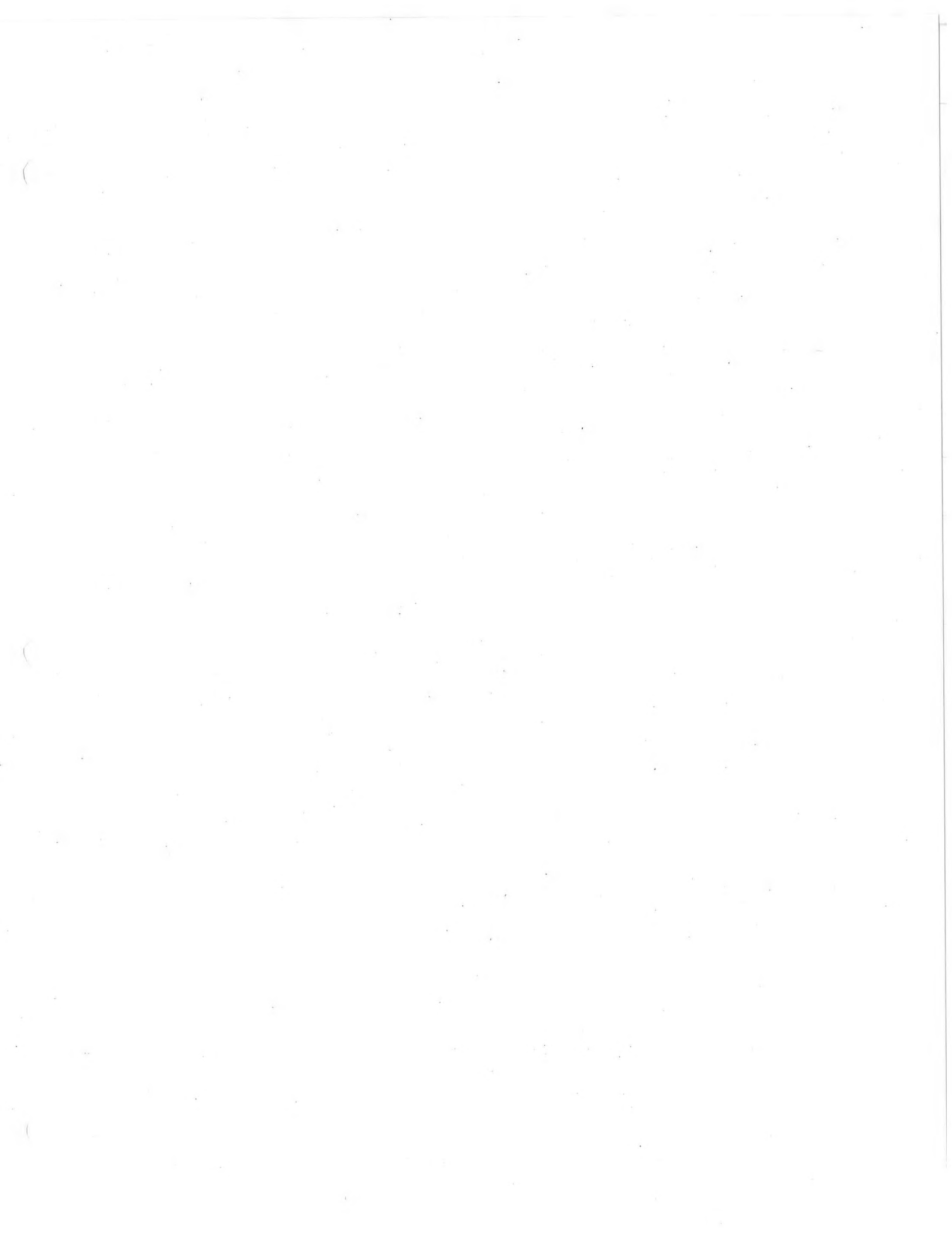


# **THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

has the honour to present its

## **SECOND REPORT**

In accordance with its permanent mandate under Standing Order 108(2) and the motion adopted by the Committee on October 21, 2004, your Committee undertook, beginning in October 2004, a study of the Great Lakes Charter Annex 2001 Implementing Agreements.



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# THE GREAT LAKES CHARTER ANNEX 2001 IMPLEMENTING AGREEMENTS

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... you have to be darned careful about what you start doing, because if you're dealing with something of this nature it may be very difficult, if not impossible, to turn it around.

The Right Honourable Herb Gray, Chair of the  
Canadian Section of the International Joint  
Commission<sup>1</sup>

## INTRODUCTION

The Great Lakes Basin contains such an enormous amount of freshwater that it is all too easy to take it for granted. Only a very small portion of this water is renewable and we cannot be complacent about its management.

The population of the Basin relies on the Great Lakes for a clean supply of water to meet their immediate needs. The economies of the Basin are also highly dependent on flows and water levels. The ecological integrity of the Lakes and the services that they provide are clearly dependent on the quality and quantity of the water within the Basin.

It is clear that humans have reduced the ecological integrity of the Lakes. Inputs of phosphate into the Lakes led to massive blooms of algae in Lake Erie. Toxic chemicals have built up in water and sediments. Invasive alien species such as the zebra mussel have been and continue to be introduced with dramatic and likely permanent consequences.

Human activity can have an impact on water quantities as well. Already diversions out of the Great Lakes are equivalent to over 1% of the total natural flow out of the Basin. So far this is more than balanced by diversions into the Basin, but it is clear that diversions can impact levels and flows of the Great Lakes system. It is also possible that the cumulative impacts of smaller withdrawals could also impact the ecological integrity of the Basin.

In addition, should greenhouse gas emissions warm the region as predicted, water will evaporate more readily, and at the same time demands for water will almost certainly increase.

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<sup>1</sup> Suggesting a possible conclusion for the Committee, *Evidence*, 2 November 2004.



With the need for care of this precious resource in mind, federal, state and provincial governments have introduced a wide array of management regimes in order to protect the ecological and resource integrity of the waters of the Great Lakes. The latest management tool is an annex to the Great Lakes Charter signed in 2001 by the governors of the Great Lakes states and the premiers of Ontario and Quebec. In July of 2004, two draft implementing agreements for this annex were released for a 90-day discussion period.

The Draft Implementing Agreements were apparently released in a rush to meet a three year deadline. There seems little doubt that the Agreements as written will not survive as is, since the government of Ontario has already rejected the Draft International Agreement and the U.S. State Department as well as the Attorney General of Michigan have both stated clear reservations.

The Canadian government has yet to respond to the draft agreements. Given the importance of the Great Lakes to Canada, the House Standing Committee on Environment and Sustainable Development (the Committee) decided to study the agreements in order to better understand their implications and to make recommendations on how the federal government should respond.

<b>Some Quick Facts* (numbers approximate):</b>	
Volume of the Great Lakes:	22,000 cubic kilometres
Flow Through (water renewed):	220 cubic kilometers per year or 6910 cubic metres per second (1 % of the total volume per year)
Flow of Chicago Diversion:	88 cubic metres per second (1.3% of total flow)
Population of Great Lakes Basin:	42 million <sup>2</sup>
* As modified from Great Lakes Information Network, <a href="http://www.great-lakes.net/envt/water/levels/flows.html">http://www.great-lakes.net/envt/water/levels/flows.html</a> , accessed 17 November 2004.	

## **THE ISSUE**

It is now not just the 42 million people in the basin who desire the water of the Great Lakes. Because of the natural topography of the land, the surface water boundary of the Basin in many places lies very close to the lakes. Population growth in these areas, particularly in the United States, is creating unprecedented demand to export water from the Basin.

<sup>2</sup> The Great Lakes Information Network states the population on the U.S. side of the basin at 24,033,244 from the 2000 U.S. census while the 2001 Canadian census states 17,698,641 in the Great Lakes St. Lawrence Basin (Statistics Canada, Human Activity and the Environment, 2004).

Some areas have already depleted their groundwater supplies to the extent that groundwater which used to flow into the Great Lakes now flows away. In the future, particularly if the climate changes to more dry conditions, demand outside of the Basin for Great Lakes water will likely increase dramatically. Management of this water will become more and more difficult.

## **BOUNDARY WATERS MANAGEMENT: THE STATUS QUO**

### ***The Boundary Waters Treaty***

The *Boundary Waters Treaty (BWT)*<sup>3</sup> was signed in 1909, and remains the fundamental tool by which the Great Lakes are managed cooperatively by the governments of the United States and Canada. It provides the principles and mechanisms to help resolve disputes and to prevent future ones, primarily those concerning water quantity and water quality along the boundary between Canada and the United States.<sup>4</sup>

Before Canada was granted formal independence by the *Statute of Westminster, 1931*, many treaties affecting this country were entered into by Great Britain on Canada's behalf. Such treaties are referred to as "Empire treaties". Where they required internal implementation by legislation or otherwise, the parliament and government of Canada were given the power to do so by section 132 of the *Constitution Act, 1867*. Since the *BWT* is an empire treaty the federal government has authority to implement it.

Boundary waters in the *BWT* are defined in such a way as to exclude "tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary." There is also some question as to whether or not the waters of Lake Michigan are boundary waters as defined under the Treaty.

The Treaty contains a number of articles particularly relevant to this study. Under Article III of the Treaty:

... no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, *affecting the natural level or flow of boundary waters on the other side of the line* shall be

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<sup>3</sup> *Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada.*

<sup>4</sup> International Joint Commission, "What is the *Boundary Waters Treaty*?", Preface to the Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States And Canada.

made except by authority of the United States or the Dominion of Canada within their respective jurisdictions *and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.*<sup>5</sup>

Under Article VIII, the International Joint Commission (IJC) has jurisdiction over and passes upon all cases involving the use or obstruction or diversion of the waters under Article III. This article further elaborates that "The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of" boundary waters.

Article IX of the Treaty states that the Parties agree that further questions or matters of difference can be referred to the IJC by *either* Party. The decisions made by the IJC in these cases are not considered law or equivalent to an arbitral award. In practice, the Committee learned that referrals have always been made jointly, as a referral by an individual party would apparently weaken the impact of the non-binding recommendations.<sup>6</sup>

Binding recommendations can be made by the IJC if a joint referral is made under Article X. Such a referral, however, requires approval of the United States Senate and Canadian cabinet, and has never been used.

The *BWT* has formed the foundation of cooperation between the U.S. and Canada on boundary water issues for over a century. Two strong positive aspects of this treaty for Canada became apparent in the testimony. First the *BWT* enshrines equal rights to use of boundary water. Secondly, the IJC is made up of three commissioners from each side of the border whose job it is to implement the Treaty, not to represent their respective governments. Canada therefore has both equal status at the IJC and access to boundary waters despite its much smaller population.

A number of weaknesses were also pointed out. As mentioned, the *BWT* does not cover tributary waters or groundwater. In addition, since the Treaty is over a century old, environmental concerns were not considered in the negotiations and so are not mentioned explicitly in it.

### **The Great Lakes Water Quality Agreement**

The Great Lakes Water Quality Agreement (GLWQA), first signed in 1972 and renewed in 1978, expresses the commitment of each country to restore and maintain the chemical, physical and biological integrity of the Great Lakes Basin

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<sup>5</sup> Emphasis added.

<sup>6</sup> Right Honourable Herb Gray, *Evidence*, 2 November 2004.

Ecosystem and includes a number of objectives and guidelines to achieve these goals. It reaffirms the rights and obligation of Canada and the United States under the *BWT* and has become a major focus of IJC activity.

The IJC monitors and assesses progress under the GLWQA and advises Governments on matters related to the quality of the boundary waters of the Great Lakes system. The GLWQA also calls upon the IJC to assist the governments with joint programs under the GLWQA, and provides for two binational boards — the Great Lakes Water Quality Board and the Great Lakes Science Advisory Board — to advise the IJC.<sup>7</sup>

### **Managing Bulk Water Removals and Diversions**

In April 1998, the Ontario Government granted a permit to NOVA Group to export 600 million litres of water per year from Lake Superior. The permit was subsequently withdrawn, but the incident brought attention to the possibility of bulk water removals and their potential impacts on the Great Lakes. This in turn caused state, provincial, and federal governments to re-examine the strength and adequacy of the legal foundations upon which water management authorities rest.

#### **1. Canada**

In Canada the federal government introduced a three-pronged strategy regarding bulk water removals. The three parts of the strategy were to:

- make a joint U.S.-Canada referral to the IJC regarding water uses;
- introduce changes to the *International Boundary Waters Treaty Act*; and
- invite provincial collaboration through a federal/provincial accord.

The first two actions have been fulfilled. The IJC released an interim report in August of 1999 and the final report<sup>8</sup> in February of 2000, and it followed up with a

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<sup>7</sup> International Joint Commission, "What is the Great Lakes Water Quality Agreement?", Preface to the Great Lakes Water Quality Agreement of 1978, Agreement, with Annexes and Terms of Reference, between the United States and Canada signed at Ottawa, 22 November 1978 and Phosphorus Load Reduction Supplement signed 16 October 1983 as amended by Protocol signed, 18 November 1987 <http://www.ijc.org/rel/agree/quality.html> accessed, 17 November 2004.

<sup>8</sup> Protection of the Waters of the Great Lakes — Final Report to the Governments of Canada and the United States February 2000, <http://www.ijc.org/php/publications/html/finalreport.html> accessed 18 November 2004.

review of its recommendations in August of 2004. The recommendations of the year 2000 report are attached as an appendix to this report.

Changes to the *International Boundary Waters Treaty Act* (IBWTA) came into force in December of 2002. The changes effectively ban bulk water removals from the boundary waters where:

... "removal of boundary waters in bulk" means the removal of water from boundary waters and taking the water, whether it has been treated or not, outside the water basin in which the boundary waters are located

(a) by any means of diversion, including by pipeline, canal, tunnel, aqueduct or channel; or

(b) by any other means by which more than 50,000 L of boundary waters are taken outside the water basin per day.<sup>9</sup>

It is significant to note that the changes to the Act were based on the premise that:

... removing water from boundary waters and taking it outside the water basin in which the boundary waters are located is deemed, given the cumulative effect of removals of boundary waters outside their water basins, to affect the natural level or flow of the boundary waters on the other side of the international boundary.<sup>10</sup>

While not all provinces agreed to the federal/provincial accord, the governments of Quebec and Ontario have implemented legislation which generally prohibits transfers of water outside of the basin and outside of Quebec, respectively. The IJC has commended all levels of government in Canada for these actions.<sup>11</sup>

## 2. The United States

In the year 2000 the government of the United States amended the *Water Resources Development Act* (WRDA) so that the relevant section now reads, in part:

1962d-20. Prohibition on Great Lakes Diversions

(a) The Congress finds and declares that:

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<sup>9</sup> International Boundary Waters Regulations, section 2 (1).

<sup>10</sup> *International Boundary Waters Treaty Act*, section 13 (2).

<sup>11</sup> International Joint Commission, "Protection of the Waters of the Great Lakes, Review of the Recommendations in the February 2000 Report," August 2004.

1. The Great Lakes are the most important natural resource to the eight Great Lakes states and two Canadian provinces, providing water supply for domestic and industrial use, clean energy through hydropower production, an efficient transportation mode for moving products into and out of the Great Lakes region, and recreational uses for millions of United States and Canadian citizens;
2. the Great Lakes need to be carefully managed and protected to meet current and needs within the Great Lakes Basin and Canadian provinces;
3. *any new diversions of Great Lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes states and Canadian provinces; and*
4. four of the Great Lakes are international waters and are defined as boundary waters in the *Boundary Water Treaty* of 1909 between the United States and Canada, and as such any new diversion of Great Lakes water in the United States would affect the relations of the Government of the United States with the Government of Canada.

(b) It is therefore declared to be the purpose and policy of the Congress in this action:

1. to take immediate action to protect the limited quantity of water available from the Great Lakes system for use by the Great Lakes States and in accordance with the *Boundary Waters Treaty* of 1909;
2. *to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin;*
3. *to prohibit any diversion of Great Lakes water by any State, Federal agency, or private entity for use outside the Great Lakes Basin unless such diversion is approved by the Governor of each of the Great Lakes States;*<sup>12</sup>

Because of part 3 of this section, which effectively gives a veto to any of the Great Lakes governors, new diversions to outside of the basin are very difficult to approve. This has led some to believe that the status quo effectively bans new diversions.

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<sup>12</sup> Department of Environmental Quality, *Water Resources Development Act of 1986*, [http://www.michigan.gov/deq/0,1607,7-135-3313\\_3677\\_3704-12588--,00.html](http://www.michigan.gov/deq/0,1607,7-135-3313_3677_3704-12588--,00.html), accessed 17 November 2004, emphasis added.

The Canadian Environmental Law Association, however, believes that:

... most experts have little confidence in *WRDA* standing up to a legal challenge as it may be contradictory to the commerce clause of the U.S. constitution. This clause makes water an article of commerce and has been evoked by the U.S. federal government to compel states to share water beyond their boundaries.<sup>13</sup>

Others believe that the Dormant Commerce Clause of the United States Constitution would not be violated as a result of the *WRDA*, precisely because it was amended to direct the states to develop and implement a mechanism for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.<sup>14</sup> In fact some believe that the Annex 2001 Implementing Agreements themselves, as written, would strengthen the case for those wanting water outside of the basin under the Dormant Commerce Clause.<sup>15</sup>

### 3. The Annex 2001 to the Great Lakes Charter

The Annex 2001 Draft Implementing Agreements pertain to the Annex 2001 of the Great Lakes Charter, which was itself signed in 1985. The Annex was also in large part a response to the NOVA Group application.

The Great Lakes Charter is a good faith agreement that attempted to respond to concerns regarding the potential for adverse effects from diversions and consumptive use of Great Lakes Basin water resources on the environment, economy, and welfare of the Great Lakes region. It also addressed the need for cooperative management to protect the water and ecosystem of the Great Lakes Basin.<sup>16</sup>

The Annex was designed to create a process toward a binding arrangement regarding withdrawals, which culminated in the release of the Draft Implementing Agreements on 19 July 2004 for a 90-day comment period. There are two parts to the Draft Implementing Agreements:

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<sup>13</sup> Canadian Environmental Law Association, "Statement to the Standing Committee on the Environment and Sustainable Development from the Canadian Environmental Law Association and Great Lakes United on the Great Lakes Charter Annex", 18 November 2004.

<sup>14</sup> See Steven Shrybman, "Legal Opinion : Great Lakes Basin Sustainable Water Resources Compact and the Diversion of Great Lakes Waters," October 2004, Commissioned by The Council of Canadians, [http://www.canadians.org/documents/legalop\\_greatlakes\\_14oct04.pdf](http://www.canadians.org/documents/legalop_greatlakes_14oct04.pdf) accessed 17 November 2004.

<sup>15</sup> James Olson, Great Lakes Compact — Water for Sale?" in *One issue, Two Voices*, The Woodrow Wilson International Center for Scholars, <http://www.wilsoncenter.org/events/docs/water.pdf> accessed 17 November 2004.

<sup>16</sup> Ontario Ministry of Natural Resources, The Great Lakes Charter, [http://www.mnr.gov.on.ca/mnr/water/N10121\\_p741.html](http://www.mnr.gov.on.ca/mnr/water/N10121_p741.html) accessed 17 November 2004

- The Great Lakes Basin Sustainable Water Resources Agreement involves all eight states and the two provinces. It is a good-faith agreement in which each province and state commits to implement by developing or modifying appropriate laws and regulations for their jurisdiction.
- The Great Lakes Basin Water Resources Compact, is a binding agreement among the eight Great Lakes states. Under certain circumstances the provinces would be consulted, but they would not be included in final decisions.

At the Agreements' core is a set of Standards that would apply to withdrawals. Essentially permits would be given for withdrawals only if the following criteria were met:

- There is no reasonable alternative to the proposed use, such as conserving existing water supplies.
- Withdrawals are limited to reasonable quantities for intended purposes.
- All water withdrawn is returned to the same Great Lake watershed, less an allowance for consumptive use.
- There are no significant adverse individual or cumulative impacts.
- There is a conservation plan (for major proposals) or measures.
- Proposals include measures to improve the physical and biological integrity of the basin (for major proposals).
- The proposal is in compliance with applicable laws and agreements (for example, Ontario's Water Taking and Transfer Regulation, and the federal *International Boundary Waters Treaty Act*).<sup>17</sup>

The criteria in the Standards would eventually apply to any withdrawal greater than 100,000 gallons per day averaged over any 120-day period, though the deadline for this to come into effect is 10 years.

For smaller withdrawals and diversions the jurisdiction of the withdrawal would review the proposal. For larger withdrawals a regional review of the proposal

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<sup>17</sup> Ontario Ministry of Natural Resources, Backgrounder, 19 July 2004  
[http://www.mnr.gov.on.ca/mnr/csb/news/2004/jul19fs\\_04.html](http://www.mnr.gov.on.ca/mnr/csb/news/2004/jul19fs_04.html) accessed 17 November 2004.



would take place, though the jurisdiction of withdrawal would still make the final determination. Larger withdrawals are defined as follows:

- A New or Increased Diversion of 1 million gallons per day (3.8 million litres per day) or greater average in any 120-day period;
- A New or Increased Consumptive Use of 5 million gallons per day (19 million litres per day) or greater average in any 120-day period, or
- A New or Increased Diversion and a Consumptive Use where the total combined Diversion and Consumptive Use is 5 million gallons (19 million litres per day) per day or greater average in any 120-day period.

From the standpoint of the Committee the essential question is whether or not the Standards and the thresholds for triggering them provide sufficiently tight control over licensing withdrawals to protect the ecological integrity of the waters of the Great Lakes. The Committee heard from no witnesses that felt that the Agreements in their current form offer sufficient protection to the Great Lakes Basin.

While some felt that the Annex 2001 process was generally good and would likely yield a final result that provides better protection than the status quo, others felt that the Draft Agreements were fundamentally flawed and would lead to a "slippery slope" of withdrawals that would threaten the integrity of the Great Lakes Basin.

It is the Committee's belief that the two opinions are not so far apart as to be inconsistent. The Draft Annex 2001 Agreements must certainly be improved upon and the testimony regarding improvements should be reflected in the government of Canada's response to the Council of Great Lakes Governors (CGLG).

## **THE GOVERNMENT OF CANADA'S RESPONSE**

### **Responding to the Council of Great Lakes Governors**

When the CGLG released Annex 2001 on 14 December 2001, the Canadian government responded relatively quickly and in fairly strong terms. In a letter dated 28 February 2002, the government outlined three serious concerns that it had regarding the Annex:

- The standard proposed is too permissive, and could compromise the ecological integrity of the Great Lakes Basin by the

cumulative impacts of diversions below the *de minimis* threshold, as well as by opening the door to long-distance, large-scale removals out of the basin.

- There are a number of unanswered legal and jurisdictional questions, not the least of which is the possibility of conflict between the Annex and the *Boundary Waters Treaty*, thereby diminishing the importance of the protections the latter offers to the Great Lakes.
- There should be greater clarity on a number of important aspects related to implementation, as these would have a significant impact on how the Annex is applied.<sup>18</sup>

Given the serious concerns that the Canadian government voiced at the time that the Annex was first released, the Committee believes that the government should have taken a more active and advisory role in the development of the Implementing Agreements through close discussions with the provinces. It is also troubled that the Government of Canada has yet to comment on the Draft Implementing Agreements. Nonetheless, it is also pleased to note that testimony from government officials suggested openness to hearing the parliamentary perspective that this Committee can provide to the response through this study.<sup>19</sup>

## 1. Thresholds

It is clear from the testimony and analysis provided to the Committee that the thresholds for application of the Standard to withdrawals are too permissive.

The U.S. *WRDA* states that any new diversion will have “significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes states and Canadian provinces.”

The <sup>(ontario)</sup> Canadian position reflects more the wording of the *BWT* in that any withdrawal is deemed to “affect the natural level or flow of the boundary waters on the other side of the international boundary.” In any event, it sets a threshold of 50,000 litres per day with no apparent averaging as a requirement for a permit to withdraw.

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<sup>18</sup> Comments from the Government of Canada on Annex 2001 to the Council of Great Lakes Governors, 28 February 2001.

<sup>19</sup> Karen Brown, *Evidence*, 28 October 2004.

In addition, the IJC recommended that the states and provinces not permit any removal unless it could be demonstrated that the removal did not endanger the ecological integrity of the Basin.<sup>20</sup>

The Implementing Agreement Standards on the other hand set a limit of 100,000 gallons (378,500 litres) before the standards are triggered and this must be the average over a 120-day period. As the Canadian Environmental Law Association and Great Lakes United pointed out, the Great Lakes Charter, under which the Annex operates, sets criteria based on withdrawals averaged over a 30-day period.

Clearly the thresholds for triggering the Standards are higher than any of those in Canadian law, the Great Lakes Charter itself, and in the IJC's recommendations. The Committee therefore concludes that the thresholds must be made more stringent.

## **2. Return of Flow Requirements**

One of the requirements for approval of a proposal under the Standards (should the proposal meet the thresholds) is for the water to be returned to the Basin.

All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water Withdrawn from a watershed of a stream that is a direct tributary to a Great Lake or a direct tributary to the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively, with a preference to the direct tributary stream watershed from which it was Withdrawn.<sup>21</sup>

There are exemptions, however, for diversions which are for public water uses no further than 12 miles (19.3 km) from the basin or that are less than 250,000 gallons (946,000 litres) per day averaged over a 120-day period.

The IJC, in its year 2000 recommendations, set a standard of "no net loss to the area from which the water is taken." The proposed Standard leaves open the question of how much "an allowance for Consumptive Use" could be and offers a set of exemptions. The IJC clearly recommended a maximum loss of 5%, though

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<sup>20</sup> International Joint Commission, International Joint Commission, "Protection of the Waters of the Great Lakes, Final Report to the Governments of Canada and the United States," 22 February 2000.

<sup>21</sup> The Great Lakes Basin Sustainable Water Resources Agreement, and the Great Lakes Basin Water Resources Compact.

the Committee feels quite strongly that even this is too high. As the Committee learned,<sup>22</sup> the Canadian government rather reluctantly agreed to support the IJC 5% proposal stating in its response to the 2000 report:

Recognizing the inter-jurisdictional nature of this recommendation, and while not as strict as Canada's approach, the Government of Canada supports this recommendation as it takes account of the concerns of all governments in the Great Lakes Basin, and affords protection to the integrity of the Basin, while effectively preventing any large-scale or long-distance removals of water.

The Committee heard compelling evidence that the "no-net loss" to the area requirement would be a far better standard to judge proposals than leaving an open-ended allowance to anywhere in the watershed of the lake from which the water was taken.<sup>23</sup> It is also of the strong opinion that the recommendation of the IJC for a maximum 5% loss should set a minimum level to be met in the return flow requirement of the Standard, and feels that in most cases return flow should be significantly more than this. The Committee was also pleased that the Ontario government now clearly wants a "no diversions" agreement, or the position of "no net loss".<sup>24</sup>

### 3. Quality of Return Flow

The quality of the water returned to the Basin is not mentioned in the Standard. The Proposal Review Guidance section of the International Agreement, however, does state that a requirement would be that "The Return Flow meets all applicable water quality Standards." The Committee heard in testimony and strongly believes that at the very least there should be explicit mention in the Standard of return water meeting the guidelines for water quality set under the Great Lakes Water Quality Agreement.<sup>25</sup>

The IJC recommended that measures also be put into place to prevent the introduction of invasive alien species. These species are a significant and growing problem within the Basin, indeed throughout North America. Nowhere in the Agreements are invasive alien species mentioned. The Committee believes that this is a serious oversight that must be rectified, particularly since they involve diversions.

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<sup>22</sup> Ralph Pentland, *Evidence*, 16 November 2004.

<sup>23</sup> James Bruce, *Evidence*, 16 November 2004.

<sup>24</sup> Ontario Ministry of Natural Resources, Press Release "Level of Protection in Draft Great Lakes Charter Annex Agreements Not High Enough *Changes Needed Before Ontario Will Sign*," 15 November 2004 [http://www.mnr.gov.on.ca/MNR/csb/news/2004/nov15nr\\_04.html](http://www.mnr.gov.on.ca/MNR/csb/news/2004/nov15nr_04.html) accessed 23 November 2004.

<sup>25</sup> James Bruce, *Evidence*, 16 November 2004.

#### 4. Resource Improvement vs. Ecological Integrity

The *WRDA* encourages the Great Lakes states to develop a “conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water.” This is perhaps why the Standard relies on the concept of resource improvement.

The Committee, however, heard evidence that to apply a resource improvement standard could well put a price on water that would effectively put the water of the Great Lakes up for sale.<sup>26</sup> This would occur because removals of water in one area could be essentially bartered for unrelated “improvements” somewhere else. While the Committee is not convinced that this will be the case, there are other problems with the concept of “resource improvement” that suggest it should be approached with care.

“Resource improvement” is defined under the Annex to the Great Lakes Charter as:

**Improvement to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin** means additional beneficial, restorative effects to the physical, chemical, and biological integrity of the Waters and Water-Dependent Natural Resources of the Basin, resulting from associated conservation measures, enhancement or restoration measures which include, but are not limited to, such practices as mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer.

The Implementing Agreements add the words “Environmentally Sound and Economically Feasible Water” in front of the word “conservation” both times it is used in the definition of the Charter.

The International Agreement further refers to a document produced by a consulting agency that lists examples of improvement under the headings “Hydrologic Conditions”, “Water Quality” and “Habitat.” The Committee is concerned that water removals may have an impact on one of these aspects of integrity, in one place, while the improvement in the proposal may be for a different aspect in a different geographical area. The improvement aspects of the Agreements therefore leave open the possibility of trading off unrelated aspects of integrity in geographically distinct areas.

The IJC based its approval criteria solidly on the grounds of maintaining the ecological integrity of the Great Lakes stating that the various aspects of the Great

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<sup>26</sup> Ralph Pentland, *Evidence*, 16 November 2004; Elizabeth May, *Sierra Club Brief*, 18 November 2004.

Lakes should be treated as a "unified whole". The Committee acknowledges that the concept of "ecological integrity" is very complex<sup>27</sup> and difficult to measure, but it also recognizes that the Great Lakes must be treated carefully and in a holistic manner. It is possible that a coordinated set of "resource improvements" could lead to ecological integrity. Without specific directions stating this clearly in the Agreements, however, the Committee is very concerned that piecemeal and unrelated improvements could lead to a deterioration of the overall integrity of the Lakes.

## 5. Uncertainty

A recurring theme of the testimony before the Committee was the lack of certainty regarding our knowledge of the Great Lakes waters. In particular there was concern about a lack of knowledge regarding:

- the quantity, quality and movement of the Basin's groundwater,
- how to measure cumulative effects, and,
- the possible overriding effects of climate change on levels and flows.

The Committee is very concerned to learn that in the absence of such knowledge to back up decision making, serious damage has occurred, for instance, to groundwater resources in the United States.

Given these significant gaps in our knowledge, and given the high stakes involved, it was suggested by witnesses that a guiding principle of the Agreements

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<sup>27</sup> See for instance: J. Kay and H. Regier, "Uncertainty, Complexity, and Ecological Integrity: Insights from an Ecosystem Approach," in P. Crabbé, et. al (eds), *Implementing Ecological Integrity: Restoring Regional and Global Environmental and Human Health*, 2000 Kluwer, NATO Science Series, Environmental Security, p. 121-156.

"In essence ecological integrity is about the integrity of the self-organization of ecological systems. The very nature of these self-organizing phenomena, and by implication any discussion of ecological integrity, is such that they are characterized by emergency, surprise, inherent uncertainty and limited predictability"

Also: H. Regier, 1993, "The notion of natural and cultural integrity", in Woodley, S., Kay, J., and Francis, G., eds., *Ecological integrity and the management of ecosystems*: 1993 Delray Beach, Fla., St. Lucie Press, p. 3-18.

"A living system exhibits integrity if, when subjected to disturbance, it sustains an organizing, self-correcting capability to recover toward an end-state that is normal and "good" for that system. End-states other than the pristine or naturally whole may be taken to be normal and "good."

Parks Canada defines ecological integrity as (with respect to a park):

"... a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes."

should be the Precautionary Principle.<sup>28</sup> The Committee concurs in this conclusion and suggests that the definition of the Precautionary Principle be that of the Rio Declaration:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

### **Recommendation 1**

**The Committee therefore recommends that, in its response to the Council of Great Lakes Governors, the Canadian government urge the Governors and the Premiers to base the criteria in the Standard on the Precautionary Principle.**

### **6. The Interaction with the *Boundary Waters Treaty***

Many other weaknesses of the Agreements were brought to light during testimony. The one that was repeated many times, however, was the potential for the Agreements to conflict with the jurisdiction of the IJC, as outlined in the *BWT*.

As mentioned previously, various aspects of the Agreements are apparently inconsistent with:

- Canada's interpretation of the removals influencing flows and levels;
- various recommendations of the IJC; and
- the *WRDA*'s interpretation of any removals adversely affecting the use of the resource.

The Minister of Foreign Affairs, however, has stated emphatically in the House of Commons:

Mr. Speaker, the proposed Annex does not affect Canadian and U.S. obligations under the *Boundary Waters Treaty*. It does not affect levels and flows of the Great Lakes.<sup>29</sup>

The Committee is not reassured by this conclusion because there does not seem to be any basis for this claim and it seems to contradict Canada's

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<sup>28</sup> Elizabeth May, Sierra Club of Canada, Brief, 18 November 2004.

<sup>29</sup> Hon. Pierre Pettigrew, *House of Commons Debates*, 21 October 2004.

interpretation of flows and levels in the *IBWTA*, particularly ignoring the possibility of cumulative impacts of smaller withdrawals.

The International Agreement does have a clause that attempts to rectify the apparent conflict:

Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any person any right, claim or remedy under any international Agreement or treaty.<sup>30</sup>

The Compact, however, does not include this language, relying only on the Standard's statement that the proposal will be in accordance with laws.

It is important to note, however, that the U.S. State Department has asked that a non-derogation clause be added to the Compact clearly stating the supremacy of the *BWT*. The Committee is somewhat reassured by this and believes that, notwithstanding the remarks of the Minister of Foreign Affairs, the Canadian government should reinforce this request with one of its own.

## **Recommendation 2**

**The Committee therefore recommends that, in its response to the Council of Great Lakes Governors, the Canadian government urge the governors and the premiers to include specific language in the Agreements stating clearly that in the final analysis of proposals for water removal, the *Boundary Waters Treaty* will prevail and that the IJC must remain the final arbiter of decisions regarding such proposals.**

The Committee, however, remains concerned over the potential for conflict if the wording of the Agreements is not significantly changed. The problem is that there is little recourse to the Canadian government should the governors decide that a withdrawal meets their criteria under the Compact even though the IJC recommendations have been ignored and there is a potential for conflict with the *BWT*. Such a potential could only be resolved in courts based on the application of international law between Canada and the United States,<sup>31</sup> with a very unsure outcome.

The IJC has yet to come to a conclusion itself as to whether or not the Implementing Agreements follow its 2000 recommendations, as it is waiting for the final versions to come to a conclusion.

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<sup>30</sup> The Great Lakes Basin Sustainable Water Resources Agreement, Article 702.

<sup>31</sup> Michael Vechsler, Legal Adviser to the Canadian Section of the IJC, *Evidence*, 2 November 2004.



Finally, the Commission recommends that the outcome of the Annex 2001 process should include a standard and management regime consistent with the recommendations in our 2000 report. Until this process is complete, it is not possible to say whether and to what extent Annex 2001 and measures taken under it will give effect to the recommendations in the Commission's 2000 Report.<sup>32</sup>

While the IJC's recommendations fall short of the action taken in Canada regarding withdrawals, the Canadian government has accepted most of their recommendations. It is a respected body with years of experience behind it. To avoid conflict with the IJC, the Committee believes that the Agreements must meet the recommendations of the IJC.

### **Recommendation 3**

**The Committee therefore recommends in the strongest of terms that, in its response to the Council of Great Lakes Governors, the Canadian government urge the governors and the premiers to revise and strengthen the Agreements. In so doing the Agreements should adopt the language and the intent of the recommendations of the IJC as outlined in their year 2000 report on the Protection of the Waters of the Great Lakes as minimum requirements for the approval of projects to remove water from the Great Lakes Basin, as the IJC has recommended.**

As has been stated, the full acceptance and implementation of these agreements is some years away. The question therefore arises as to how to manage withdrawals in the meantime. In a similar situation to this, the IJC released an interim report before its final version in 2000 and in it stated:

Recommendation I. Pending submission of its final report under the Reference, the Commission recommends that the federal, state, and provincial governments should not authorize or permit any new bulk sales or removals of surface water or groundwater from the Great Lakes Basin and should continue to exercise caution with regard to consumptive use of these waters, in accordance with existing laws in both countries and with the Great Lakes Charter.<sup>33</sup>

Since the IJC has yet to determine whether or not the Agreements meet their recommendations of the year 2000, and in following the precedent of the IJC's interim recommendation in 1999, the Committee believes that until such

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<sup>32</sup> International Joint Commission, "Protection of the Waters of the Great Lakes, Review of the Recommendations in the February 2000 Report," August 2004, <http://www.ijc.org/php/publications/pdf/ID1560.pdf>.

<sup>33</sup> IJC, "Protection of the Waters of the Great Lakes," Interim Report to the Governments of Canada and the United States, 10 August 1999.

Agreements are finalized and there is reasonable scientific evidence that their implementation will not cause harm to the ecological integrity of the Great lakes Basin, a moratorium should be put in place on approval of new or revised withdrawals.

#### **Recommendation 4**

**The Committee recommends that, until the IJC is satisfied that the Agreements meet their recommendations and that their implementation will not cause harm to the ecological integrity of the Great Lakes Basin, Foreign Affairs Canada adopt the position of placing a moratorium on any new bulk sales or removals of surface water or groundwater from the Great Lakes Basin, and that the Government of Canada recommend this position in its response to the Council of Great Lakes Governors.**

### **FURTHER RESPONSE OF THE CANADIAN GOVERNMENT**

#### **Return Flow**

As the Committee learned,<sup>34</sup> the Canadian government rather reluctantly agreed to support the IJC proposal that return flow should be a minimum of 95%, stating in its response to the 2000 report:

Recognizing the inter-jurisdictional nature of this recommendation, and while not as strict as Canada's approach, the Government of Canada supports this recommendation as it takes account of the concerns of all governments in the Great Lakes Basin, and affords protection to the integrity of the Basin, while effectively preventing any large-scale or long-distance removals of water.

The Committee is very concerned that the maximum amount to be used in a diversion or use is set at 5%. In particular it is concerned that the 5%, instead of being a maximum, will become a benchmark to rate return flows. The Agreements have an open ended allowance for use, and the Committee believes that if that is set at 5%, there is a potential for cumulative harm.

#### **Recommendation 5**

**The Committee therefore recommends that the Canadian government remove its support for the 5% maximum use threshold which it considers to be too high and urge the IJC to revisit this provision of its year 2000 recommendations.**

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<sup>34</sup> Ralph Pentland, *Evidence*, 16 November 2004.

## **Decreasing Uncertainty**

The Committee believes that a more robust set of scientific data would greatly increase confidence that criteria to be met by proposals would make it more likely that withdrawals would have no significant adverse effect on the ecological integrity of the Great Lakes Basin.

The federal government's capacity in freshwater research has been greatly reduced over the last two decades and it is time to significantly reverse this trend. The issue of freshwater security is paramount to Canadians, and the current government effort to reallocate dollars to priority areas offers a perfect opportunity to rectify the situation.

While the Committee concurs with one witness that Canadian freshwater science is better than most in the world, it is also sure that this is not sufficient and that a more central hand in this research would help increase coordination and data compatibility among the jurisdictions collecting data. With greater investments Canada could not only become the world leader and position itself to export this expertise, it could also help resolve significant issues surrounding its own freshwater management.

### **Recommendation 6**

**The Committee recommends that the Canadian government, with the Department of the Environment as lead agency, carry out an interdepartmental analysis of its scientific capacity in freshwater research as well as federal water policy and that it report back to the Committee the results of this analysis. Subsequent to this, the Committee recommends that, in its efforts to reallocate money between and within departments to priority areas, the government apportion, in a coordinated manner, significantly increased resources to freshwater research.**

### **Unleashing the International Joint Commission**

The IJC is a respected organization with a long track record of resolving disputes and advising governments. Part of the reason for this track record, however, is that only joint referrals have ever been made.

As stated above, this is apparently because its recommendations under Article IX are not binding, and, according to the chair of the Canadian section, this means that recommendations made by the IJC from a unilateral referral would not carry as much weight. It also means that many referrals that the IJC would like to be

given, such as invasive species and flows and levels in the upper lakes, have yet to be approved.

In effect this means that the reliance on joint referrals has leashed the IJC. The IJC has a large store of credibility, which the Committee believes would hold considerable weight even with a single country reference. Canada should consider using its right of unilateral referral in the case of important scientific research and, more importantly, if the implementation of Annex 2001 is found to be at odds with the IJC's recommendations.

The importance of Annex 2001 to the ecological integrity of the Great Lakes and its potential to conflict with a long-standing treaty, is such that all options with the IJC must be examined. This includes the option of attempting to invoke Article X, if the final Agreements and their implementation are clearly at odds with the IJC's recommendations.

Referrals under this Article must be pre-approved by the United States Senate and by the Canadian cabinet. This clearly makes invocation difficult. The United States government, however, has shown some discomfort with the Draft Implementing Agreements by recommending the non-derogation clause. Michigan too has shown that it has difficulties with the agreements. Should the Canadian government find the implementation of Annex 2001 to be in clear contradiction to the Treaty, it should consider opening diplomatic efforts toward invoking Article X.

The power of the IJC has also been limited by information and financial restriction created by the Canadian government. The Commissioner of the Environment and Sustainable Development, in her year 2001 report, cited many examples of how the Canadian government's actions have limited the effectiveness of the IJC. The Commissioner's recommendations included:

8.35 Our findings show that the federal government needs to provide better and more timely information to the International Joint Commission, follow up on its recommendations, and ensure that resources are adequate.

The Committee believes that the power of the IJC could be increased by giving serious consideration to using all of the referral powers under the Treaty and by more fully supporting the IJC with timely information and resources. The Canadian government must make it absolutely clear that the IJC must remain the final arbiter for cases of withdrawals affecting levels and flows, but this can only be realized if it is provided with the proper resources and if it is backed up by the political will of government.

## Recommendation 7

The Committee recommends that the Canadian government more fully explore its referral options under the *Boundary Waters Treaty* and that it support the IJC by supplying it with more timely information, better following up on its recommendations, and ensuring that its resources are adequate.

### Better Coordination with Provinces

As stated previously, the *BWT* is an “empire treaty”, and as such the federal government has the authority to implement it. The Committee recognizes, however, that the provinces of the Great Lakes Basin have a powerful interest in maintaining the ecological integrity of the waters of the Great Lakes and, as it learned, the provinces have gained a great deal of capacity to manage these waters effectively. The provinces should therefore have a significant role to play in implementing the *BWT*.

One witness, however, suggested that perhaps the devolution of implementing powers to the provinces had gone too far.

There's a broader question here about the roles of the provinces, the federal government, states, and so on in water matters. When I first started working in the federal government some 40 years ago, they did almost everything on boundary waters. Over the years, the provinces and states gradually gained more and more capability. We found that in many cases it was better to let the provinces and states work out their little disputes all by themselves, because there were hundreds of these things and they were able to do it. Over time they got better and better at it. It may be that over the four decades or so we've gone too far.<sup>35</sup>

Others felt quite strongly that, since the Annex involves boundary waters, the federal government should be more involved.<sup>36</sup>

The Committee also heard testimony that on the one hand seemed to suggest that the federal government was out of the loop during negotiations and on the other that it was being kept well informed.<sup>37</sup>

The Committee is of the opinion that (if indeed it was not) the federal government should have at least been kept abreast of the details of the negotiations. The serious reservations that the government expressed regarding the

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<sup>35</sup> Ralph Pentland, *Evidence*, 16 November, 2004.

<sup>36</sup> Elizabeth May, *Evidence*, 18 November, 2004.

<sup>37</sup> Karen Brown and Peter Fawcett, *Evidence*, 28 October 2004.

Annex 2001 should have been followed up by the government taking a more active and advisory role in the development of the Implementing Agreements through close discussions with the provinces.

The Committee heard testimony of the existence of formal federal/state working groups in the U.S. which attempt to act in a proactive and visionary fashion on issues.<sup>38</sup> These should be examined as a potential model for Canada. Some form of better communication and coordination must be established between the federal government and the provinces, particularly when the issue at hand is clearly under one or the other's jurisdiction and both have policies with similar goals.

## **CONCLUSION: THE BIG PICTURE**

The Draft Implementing Agreements are a work in progress. There seems little doubt that the Agreements as written will be modified, since the Government of Ontario has already rejected the Draft International Agreement and the U.S. State Department as well as the Attorney General of Michigan have both stated clear reservations.

During the next phase of negotiations, it is hoped that the concepts and recommendations of this report specific to the Agreements will be seriously considered along with the many other comments submitted to the CGLG. Apparently, around the negotiating table, there is a will to take into account the recommendations of the IJC.<sup>39</sup> This acceptance of the IJC recommendations must be considered a minimum requirement in order to avoid a conflict between the Standards process and the role of the IJC.

It is also hoped that the federal government will take heed of the recommendations regarding other federal actions. Some of these will require more funding, but water security is without a doubt the most important environmental issue on the minds of Canadians, and it should be for the government as well.

The implications of these Agreements could be far reaching. Local issues are often a reflection of those being felt at much larger scales. In Canada's case, as a result of NAFTA, we are increasingly being drawn into discussions involving the entire continent, whether regarding energy policy or environmental management.

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<sup>38</sup> Sarah Miller, *Evidence*, 18 November, 2004.

<sup>39</sup> *Ibid.*

In this context, the management of the Great Lakes is essential, not just to Canada, but to all of North America. The Annex Agreements are a very important part of this management, and the time must be taken to get them right. The tragedies of water mismanagement around the globe are all too evident, and they must not be repeated here.

# LIST OF RECOMMENDATIONS

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## Recommendation 1

The Committee therefore recommends that, in its response to the Council of Great Lakes Governors, the Canadian government urge the Governors and the Premiers to base the criteria in the Standard on the Precautionary Principle.

## Recommendation 2

The Committee therefore recommends that, in its response to the Council of Great Lakes Governors, the Canadian government urge the governors and the premiers to include specific language in the Agreements stating clearly that in the final analysis of proposals for water removal, the *Boundary Waters Treaty* will prevail and that the IJC must remain the final arbiter of decisions regarding such proposals.

## Recommendation 3

The Committee therefore recommends in the strongest of terms that, in its response to the Council of Great Lakes Governors, the Canadian government urge the governors and the premiers to revise and strengthen the Agreements. In so doing the Agreements should adopt the language and the intent of the recommendations of the IJC as outlined in their year 2000 report on the Protection of the Waters of the Great Lakes as minimum requirements for the approval of projects to remove water from the Great Lakes Basin, as the IJC has recommended.

## Recommendation 4

The Committee recommends that, until the IJC is satisfied that the Agreements meet their recommendations and that their implementation will not cause harm to the ecological integrity of the Great Lakes Basin, Foreign Affairs Canada adopt the position of placing a moratorium on any new bulk sales or removals of surface water or groundwater from the Great Lakes Basin, and that the Government of Canada recommend this position in its response to the Council of Great Lakes Governors.



#### **Recommendation 5**

The Committee therefore recommends that the Canadian government remove its support for the 5% maximum use threshold which it considers to be too high and urge the IJC to revisit this provision of its year 2000 recommendations.

#### **Recommendation 6**

The Committee recommends that the Canadian government, with the Department of the Environment as lead agency, carry out an interdepartmental analysis of its scientific capacity in freshwater research as well as federal water policy and that it report back to the Committee the results of this analysis. Subsequent to this, the Committee recommends that, in its efforts to reallocate money between and within departments to priority areas, the government apportion, in a coordinated manner, significantly increased resources to freshwater research.

#### **Recommendation 7**

The Committee recommends that the Canadian government more fully explore its referral options under the *Boundary Waters Treaty* and that it support the IJC by supplying it with more timely information, better following up on its recommendations, and ensuring that its resources are adequate.

# Appendix A

## Year 2000 Recommendations of the International Joint Commission

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### Recommendation I. Removals

Without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that the removal would not endanger the integrity of the ecosystem of the Great Lakes Basin and that:

- a. there are no practical alternatives for obtaining the water,
- b. full consideration has been given to the potential cumulative impacts of the proposed removal, taking into account the possibility of similar proposals in the foreseeable future,
- c. effective conservation practices will be implemented in the place to which the water would be sent,
- d. sound planning practices will be applied with respect to the proposed removal, and,
- e. there is no net loss to the area from which the water is taken and, in any event, there is no greater than a 5 percent loss (the average loss of all consumptive uses within the Great Lakes Basin); and the water is returned in a condition that, using the best available technology, protects the quality of and prevents the introduction of alien invasive species into the waters of the Great Lakes.

In reviewing proposals for removals of water from the Great Lakes to near-Basin communities, consideration should be given to the possible interrelationships between aquifers and ecosystems in the requesting communities and aquifers and ecosystems in the Great Lakes Basin.

In implementing this recommendation, states and provinces shall ensure that the quality of all water returned meets the objectives of the Great Lakes Water Quality Agreement.

At this time, removal from the Basin of water that is used for ballast or that is in containers of 20 liters or less should be considered, *prima facie*, not to endanger

the integrity of the ecosystem of the Great Lakes. However, caution should be taken to properly assess the possible significant local impacts of removals in containers.

Removal of water for short-term humanitarian purposes should be exempt from the above restrictions.

The governments of Canada and the United States and the governments of the Great Lakes states and Ontario and Quebec should notify each other of any proposals for the removal of water from the Great Lakes Basin, except for removal of water that is used for ballast or that is in containers of 20 liters or less.

Consultations regarding proposed removals should continue in accordance with the procedures and processes that are evolving throughout the Great Lakes Basin and should be coupled with additional opportunities for public involvement.

Any transboundary disagreements concerning any of the above matters that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the *Boundary Waters Treaty*.

Nothing in this recommendation alters rights or obligations under the *Boundary Waters Treaty*.

## **Recommendation II. Major New or Increased Consumptive Uses**

To avoid endangering the integrity of the ecosystem of the Great Lakes Basin, and without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for major new or increased consumptive use of water from the Great Lakes Basin to proceed unless:

- a. full consideration has been given to the potential cumulative impacts of the proposed new or increased major consumptive use, taking into account the possibility of similar proposals in the foreseeable future,
- b. effective conservation practices will be implemented in the requesting area, and,
- c. sound planning practices will be applied with respect to the proposed consumptive use.

In implementing this recommendation, states and provinces shall ensure that the quality of all water returned meets the objectives of the Great Lakes Water Quality Agreement.

The governments of Canada and the United States and the governments of the Great Lakes states and Ontario and Quebec should notify each other of any proposals for major new or increased consumptive uses of water from the Great Lakes Basin.

Consultations regarding proposed major new or increased consumptive uses should continue in accordance with the procedures and processes that are evolving throughout the Great Lakes Basin and should be coupled with additional opportunities for public involvement.

Any transboundary disagreements concerning the above that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the *Boundary Waters Treaty*.

Nothing in this recommendation alters rights or obligations under the *Boundary Waters Treaty*.

### **Recommendation III. Conservation**

In order to avoid endangering the integrity of the ecosystem of the Great Lakes Basin, the governments of the Great Lakes states and Ontario and Quebec should apply conservation measures to significantly improve efficiencies in the use of water in the Great Lakes Basin and should implement the conservation measures set out in this recommendation.

The governments of the Great Lakes states and Ontario and Quebec, in collaboration with local authorities, should develop and launch a coordinated basin-wide water conservation initiative, with quantified consumption reduction targets, specific target dates, and monitoring of the achievement of targets, to protect the integrity of the Great Lakes Basin ecosystem, and to take advantage of the other economic and environmental benefits that normally flow from such measures.

In developing and implementing this initiative, the governments should, among other things, consider:

- a. state-of-the-art conservation and pollution-control technologies and practices,

- b. potential cumulative impacts,
- c. the application of sound planning practices,
- d. to the extent practicable, the setting of water prices at a level that will encourage conservation,
- e. conditioning financial help from governments for water and wastewater infrastructure on the application of sound conservation practices,
- f. promotion of eco-efficient practices, especially in the industrial and agricultural sectors,
- g. establishment of effective leak detection and repair programs for water infrastructure in all municipalities,
- h. the inclusion of strong performance and environmental standards and financial incentives for water saving in contractual arrangements for delivery of water-related services, whether public or private,
- i. the application of best practicable water-saving technologies in governmental facilities,
- j. sharing experiences with respect to the planning and implementation of conservation policies and programs and the use of water-saving technologies, and,
- k. joint preparation of promotional and educational materials and publication of success stories, including sponsoring conferences and workshops on water conservation, in partnership with others

#### **Recommendation IV. Great Lakes Charter Standards**

Without prejudice to the authority of the federal governments of the United States and Canada, the Great Lakes States and Ontario and Quebec, in carrying out their responsibilities under the Great Lakes Charter, should develop, within 24 months, with full public involvement and in an open process, the standards and the procedures, including the standards and the procedures in Recommendations I and II, that would be used to make decisions concerning removals or major new or increased consumptive uses. Federal, state, and provincial governments should not authorize or permit any new removals and should exercise caution with respect to major new or increased consumptive use until such standards have been promulgated or until 24 months have passed, whichever comes first.

## **Recommendation V. Existing Institutions and Mechanisms**

To help ensure the effective, cooperative, and timely implementation of programs for the sustainable use of the water resources of the Great Lakes Basin, governments should use and build on existing institutions to implement the recommendations of this report. In this regard, the governments of the states and the provinces should take action, with respect to the implementation of the Great Lakes Charter, to:

- a. develop and implement, on an urgent basis, the Basin Water Resources Management Program,
- b. develop a broader range of consultation procedures than is currently called for in the Charter to assure that significant effects of proposed uses of water resources in the Great Lakes Basin are assessed, and,
- c. ensure that the notice and consultation process under the Charter is open and transparent and that there is adequate consultation with the public.

## **Recommendation VI. Data and Research**

Federal, state, and provincial governments should move quickly to remedy water use data deficiencies by:

- a. allocating sufficient staff and financial resources to upgrade the timeliness, precision, and accuracy of water use data,
- b. working much closer together to ensure consistency in water use monitoring, estimation techniques, and reporting,
- c. emphasizing and supporting the development and maintenance of a common base of data and information regarding the use and management of the water resources of the Great Lakes Basin, establishing systematic arrangements for the exchange of water data and information, and undertaking coordinated research efforts to provide improved information for future water planning and management decisions.

Furthermore, governments should immediately take steps to ensure that, on a binational basis, research is coordinated on individual and cumulative impacts of water withdrawals on the integrity of the Great Lakes Basin ecosystem. In support of their decision-making, governments should implement long-term monitoring programs capable of detecting threats (including cumulative threats) to ecosystem

integrity. Such monitoring programs should be comprehensive, particularly in their approaches to detecting threats to ecosystem integrity at a spectrum of space and time scales.

As part of an anticipatory policy for identifying emerging issues, governments should, on a binational basis, undertake more active science and research and, in particular, should implement appropriate long-term monitoring programs for key indicators of ecosystem change.

### **Recommendation VII. Groundwater**

Governments should immediately take steps to enhance groundwater research in order to better understand the role of groundwater in the Great Lakes Basin. In particular, they should conduct research related to:

- a. unified, consistent mapping of boundary and transboundary hydrogeological units,
- b. a comprehensive description of the role of groundwater in supporting ecological systems,
- c. improved estimates that reliably reflect the true level and extent of consumptive use,
- d. simplified methods of identifying large groundwater withdrawals near boundaries of hydrologic basins,
- e. effects of land-use changes and population growth on groundwater availability and quality,
- f. groundwater discharge to surface water streams and to the Great Lakes, and systematic estimation of natural recharge areas, and,
- g. systematic monitoring and tracking of the use of water-taking permits, especially for bottled water operations.

In recognition of the frequent and pervasive interaction between groundwater and surface water and the virtual impossibility of distinguishing between them in some instances, governments should apply the precautionary principle with respect to removals and consumptive use of groundwater in the Basin.

### **Recommendation VIII. Climate Change**

Recognizing that the Intergovernmental Panel on Climate Change has concluded that human activities are having a discernible effect on global climate, and despite the uncertainties associated with the modeling of future climate, the governments of Canada and the United States should fully implement their international commitments to reduce greenhouse gas emissions.

### **Recommendation IX. Trade Law**

The governments of the United States and Canada should direct more effort to allaying the public's concern that international trade law obligations could prevent Canada and the United States from taking measures to protect waters in the boundary region, and they also need to direct more effort to bringing greater clarity and consensus to the issue.

### **Recommendation X. Standing Reference**

The Commission should be given a standing reference to review its recommendations for the protection of the waters of the Great Lakes in three years and thereafter at 10-year intervals unless conditions dictate a more frequent review.

### **Recommendation XI. Next Steps**

The Commission recommends that the governments consider for adoption the proposed plan of work for Commission activities on the rest of the border, focusing on priority issues and on specific regional issues where the Commission can contribute binational experience and resources.

### **Recommendation XII. Implementation**

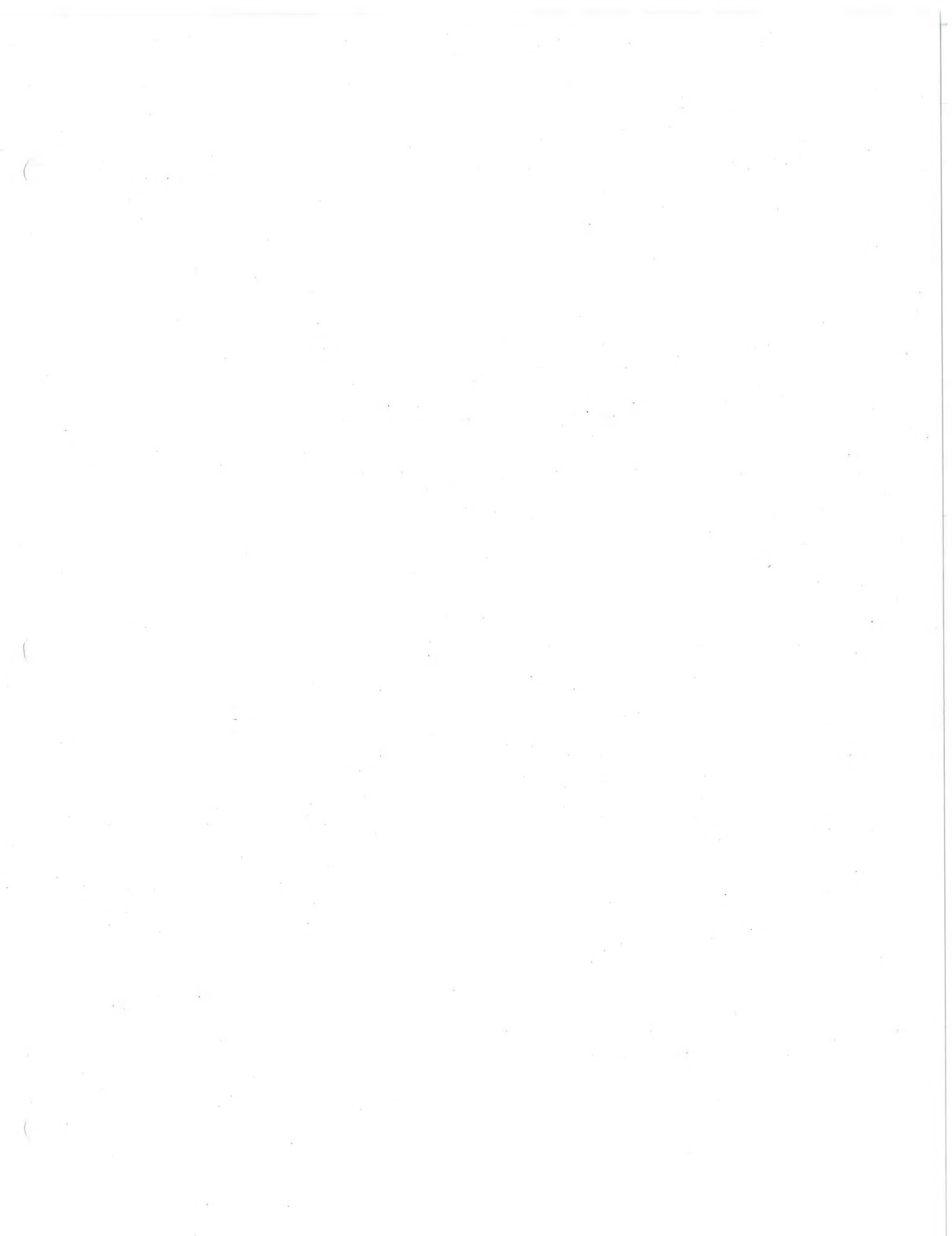
The Commission recommends that the governments of the United States and Canada and the governments of the Great Lakes states and Ontario and Quebec, acting individually or collectively, as appropriate, take the necessary steps to implement the recommendations contained in this report.





## APPENDIX B LIST OF WITNESSES

Associations and Individuals	Date	Meeting
<b>Department of the Environment</b> Karen Brown, Assistant Deputy Minister, Environmental Conservation Service Jennifer Moore, Director General, Water Policy and Coordination Directorate, Environmental Conservation Service	28/10/2004	3
<b>Department of Foreign Affairs</b> William Crosbie, Director General, North American Bureau Peter Fawcett, Deputy Director, U.S. Relations Division		
<b>International Joint Commission</b> Murray Clamen, Secretary, Canadian Section Herb Gray, Chairman, Canadian Section Michael Vechsler, Legal Adviser	02/11/2004	4
<b>As an Individual</b> James Bruce Ralph Pentland	16/11/2004	6
<b>Canadian Environmental Law Association</b> Sarah Miller, Coordinator/Researcher	18/11/2004	7
<b>Council of Canadians</b> Sara Ehrhardt, National Water Campaigner Steven Shrybman, Legal Counsel		
<b>Great Lakes United</b> Derek Stack, Executive Director		
<b>Sierra Club of Canada</b> Elizabeth May, Executive Director		



## **APPENDIX C LIST OF BRIEFS**

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Bruce, James P.

Canadian Environmental Law Association

Council of Canadians

Department of Foreign Affairs

Department of the Environment

Ducks Unlimited Canada

Great Lakes United

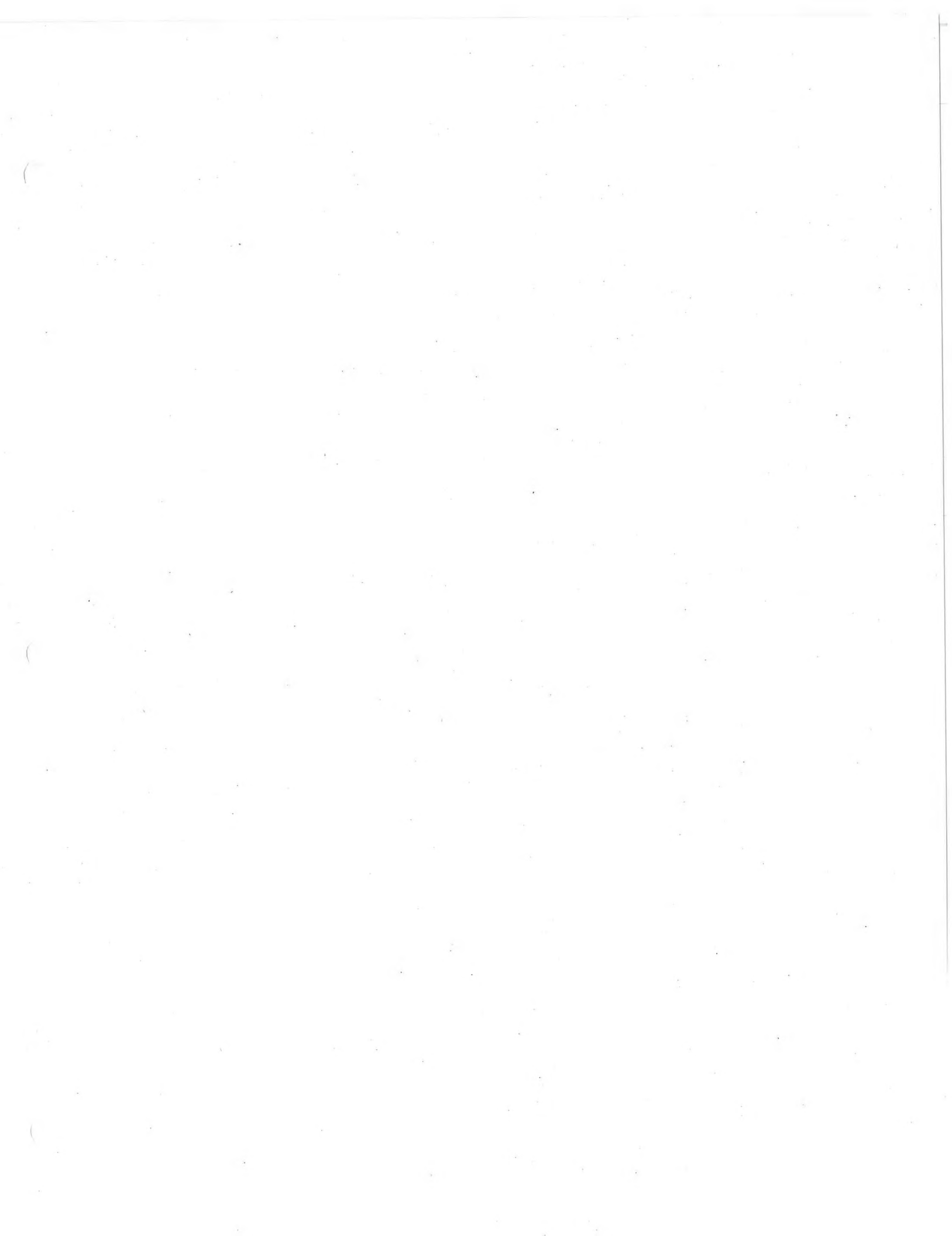
International Joint Commission

Pentland, Ralph

Sierra Club of Canada

Sierra Legal Defence Fund

University of Toronto, Munk Centre for International Studies



## REQUEST FOR GOVERNMENT RESPONSE

In accordance with Standing Order 109, the Committee requests that the government provide a comprehensive response to the report within 150 days.

A copy of the relevant Minutes of Proceedings of the Standing Committee on Environment and Sustainable Development (*Meeting Nos. 3, 4, 6, 7 and 9 which includes this report*) is tabled.

Respectfully submitted,

Alan Tonks, M.P.  
*Chair*

