



**Legal Opinion:
Great Lakes Basin Sustainable Water Resources Compact and the
Diversion of Great Lakes Waters
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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.¹

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

¹ 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*² (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.³

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

² 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.

³ 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.⁴ 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;

⁴ 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.⁵

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.

⁵ 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.⁶

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.⁷ 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 1986⁸ 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.⁹

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.¹⁰

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

⁶ See for example, the International Joint Commission; *Review of the Recommendations of the February 2000 Report*, August 2004, at p.3, and 12-13.

⁷ Lochhead, Asarch et al, Report to the Council of the Great Lakes Governors: Governing Water Withdrawal of Water from the Great Lakes, May 1999.

⁸ 42 U.S.C. 1962d-20.

⁹ 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.*

¹⁰ *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.*¹¹

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.¹² 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.¹³

¹¹ 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.

¹² 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.

¹³ 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.¹⁴

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.¹⁵ 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

¹⁴ *Idem* p. 44.

¹⁵ 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.*¹⁶

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

¹⁶ 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.¹⁷ Trade tribunals have consistently adopted a similar approach to assess the effect of government measures, regardless of their form.¹⁸

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.

¹⁷ 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>.

¹⁸ 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%¹⁹. 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 3rd 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.”²⁰

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.

¹⁹ IJC protection Section 3 *Consumptive Use*, fn. 11

²⁰ 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.²¹ In a more recent decision, the Court offered similar support for the 'polluter pays' concept.²²

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 day²³ 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

²¹ [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.

²² *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624.

²³ 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.²⁴

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

²⁴ 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 sovereignty²⁵ 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,²⁶ 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.²⁷

²⁵ 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...'"

²⁶ 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.

²⁷ 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*,²⁸ 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.²⁹

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.

concern to Canada as a whole, and has a “singleness” and “indivisibility” that distinguished it from matters of mere provincial concern.

²⁸ 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.*

²⁹ 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.³⁰

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.³¹

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

³⁰ 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.

³¹ 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,³² 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.³³ 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,

³² International Joint Commission; *Protection of the Waters of the Great Lakes: Review of the Recommendations of the February 2000 Report*, Aug.31, 2004.

³³ 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.

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.³⁴ 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.

³⁴ “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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