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PREFACE

Great Lakes Legal Seminar: Diversion and Consumptive Use

*By Maxwell Cohen**

A preface, as the distinguished Canadian historian Chester Martin once wrote, is “the first page to be read and the last to be written.” To that extent, there are risks imposed by the nature of the tradition, since an accurate summary of the contents, though valuable perhaps, is often redundant, while a random “tour d’horizon” of the subject cannot compete with the precision of the individual papers that follow. The dilemma perhaps can best be met by a cautious mix of something more than a summary index and something less than an *ipse dixit* that superficially rewrites the themes.

These papers are the result of substantial preparatory work by an editorial board monitoring the individual contributions and a seminar held in December of 1985 at Case Western Reserve University. The primary focus is the central and challenging question of the legal problems associated with diversions into and out of the Great Lakes and consumptive uses within the Great Lakes region; the substantive questions of law, however, can only be understood against the backdrop of the large issues of water management and Great Lakes policy. Existing plans for water quality and water quantity issues embrace eight states, two provinces, and two federal governments. Indeed, it is never possible to ask questions of resource supervision and conservation, particularly of fresh water, without a sense of the close linkages between the engineering, biochemical, and general environmental/ecological problems and systems for which the legal regimes are designed. These provide a framework of order and of equity for all those involved. And since the Great Lakes are not only the world’s largest fresh water/lakes system, which is bilaterally shared (except for Lake Michigan) between Canada and the United

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States, and since over forty million of its littoral inhabitants are deeply dependent on its waters, these physical facts must be grasped fully before the legal framework can be understood and designed for optimum satisfaction.

Some notion of the scope of the Conference and the papers in this volume can be grasped at once by a review of the subjects dealt with in the papers that follow:

Great Lakes Diversion and Consumptive Use

The Great Lakes Charter

A Model State Water Act for Great Lakes Management

Inter- and Intrastate Usage of Great Lakes Waters

Public International Law and Water Quantity Management in A
Common Drainage Basin

An Overview of Canadian Law and Policy Governing Great Lakes
Water Quantity Management

Binding Ties, Tying Bonds: International Options for Constraints
on Great Lakes Diversions

Lake Diversion at Chicago

It is not without some significance that this issue of Great Lakes diversions should be coming to the forefront of debate at a time when Canadian/American relations are burdened and exhilarated by the prospect of freer trade, or better market access through negotiations about to be pursued by both countries. The Great Lakes are an immense common asset and the special history of the modest but politically sensitive experience of Canadian diversions "into" the lakes and U.S. diversions "out of" the lakes may impinge, directly or indirectly, upon the larger interacting questions of the future economic shape of a common continent to be reexamined by both countries in the course of these trade and investment negotiations.

Other influences on the emerging legal framework, as argued in these papers, are the warning signs flagged by years of study of Great Lakes water quality and quantity problems. In particular, three important documents have been published in recent months: the Final Report on Federal Water Policy presented in Canada in September 1985 (the Pearse Report); the International Joint Commission's significant report based upon the reference to it by both governments in February 1977 and entitled Great Lakes Diversions and Consumptive Uses presented in January 1985; and the Report to the Governors and Premiers by the Great Lakes Governors Task Force on Water Diversion and Great Lakes Institutions also presented in January 1985. Add to these the tangentially significant (if not entirely relevant for immediate purposes) proposals by T.W. Kierans dealing with the "Great Recycling and Northern Develop-

ment (Grand) Canal Concept" of 1983 and follow up conference held in December of 1985 under the auspices of the Canadian Environmental Law Association, which discussed "Canada's Water for Sale?" (which featured the Grand Canal concept).

There is nothing really new about Canadian anxieties regarding the Great Lakes system being held in trust by both countries for each other's "permanent benefit": a trust embracing not only consumptive uses, but the recreational, hydroelectric, and St. Lawrence Seaway requirements in an immense complex that is both economic-environmental and socio-political. The Canadian fears in particular stem from a few experiences that perhaps in perspective may appear to have been excessive: the continuing controversy over the meaning during World War I and afterward of "lending power" at Niagara to the United States and its controversial recovery by Canada; the never-ending watchfulness about the Chicago Diversion; the unresolved problems of the sharing of power additionally generated because of the Long Lac/Ogoki Diversion; and, perhaps most important, the International Joint Commission's forecast of mounting consumptive uses on both sides of the lakes when at the same time foreboding cries for Great Lakes water are heard from the dry western states, however distant from reality may be the fulfillment of those plaintive expectations. When to this litany of anxieties are added the unhappy state of unresolved toxins located in dumps perhaps more heavily concentrated on one side of the boundary than the other; and the continuing damage to water quality for which some industries in both countries are responsible; and, finally, the conflicting views, particularly in the United States, on trans-boundary environmental issues (the acid rain debate being possibly the most conspicuous of these). These are, together, sources of serious uncertainty and particularly so in Canada.

There are also some fundamental differences in political and social attitudes, as well as in constitutional structures and systems, that complicate the future joint management of the Great Lakes for both countries. It is quite clear, from the long history of Canada-U.S. relations that the differences in the organizations and style of government impact directly on negotiations, ratifications, implementation of agreements, as well as on the final administrative responsibilities where an arrangement requires it. It need only be observed that water in Canada is a provincially "owned" resource. Consequently, both trans-provincial and Canada-U.S. trans-boundary waters, as well as waters running "along the boundary," are all disciplined with this "ownership" in the provinces, even though there is an important federal jurisdictional presence for dealing with

some aspects of "inter-provincial" and "international" rivers and lakes.

By contrast, the "commerce clause" and other sources of constitutional authority have vested in the U.S. Federal Government a degree of policy and resource control which enables the Congress to enact legislation on almost any aspect of rivers and lakes, even when totally intra-state, if national interest so requires. So large a difference in the constitutional position may often appear to be less severe when Congress delegates certain sectors of a regime to cooperative state action, as in the Clean Air Act. However, such delegation is subject generally to the overriding and basic authority of the Federal Administration and Congress. In Canada, however, such delegation is frowned upon by the Supreme Court of Canada, and federal administrative or legislative power rests often upon cooperative agreements with the provinces where, of course, the ownership of, and jurisdiction over, the fresh water resource generally remains. Even the doctrine of a subject being vested with a vital national concern, and labelled as such by the parties, would not, except in a severe emergency, weaken this provincial jurisdiction over rivers and lakes. Thus, the wide gulf between the two constitutional approaches to water as a resource renders the agreement making process an elusive one if the object is to achieve a common management policy for the Great Lakes system.

One of the more remarkable results of the seventy five years of success of the Boundary Waters Treaty of 1909, and the work of the International Joint Commission under the Treaty, has been the negligible amount of "direct" planning that has taken place in respect to boundary and trans-boundary waters, especially where the management is designed to provide optimum joint use of water systems crossing the boundary or along the boundary. Something amounting to a "management" approach, of course, is to be found in the St. Mary and Milk River arrangements enshrined in the Treaty and, more recently, in the semi-planned uses arising out of the Souris River Reference of 1948, and the follow-up in the Poplar River recommendations on allocations of water in the 1977 Report of the Commission. Indeed, the celebrated Helsinki Rules of 1966 on the reasonable and equitable share in the beneficial uses of the waters of an international drainage basin were first discussed in the Pembina River Reference Report in the late 1960's and again in the Poplar River Report referred to above.

Similarly, it may be argued that "management" objectives may be found in the Columbia River Treaty of 1963-64 and in the St. Lawrence Seaway development for power and navigation which had the benefit of a Joint Board of Engineers in a "planning" role (later

taken over by the International Joint Commission). Then too, there was "planning" of the two power entities, Ontario Hydro and the Power Authority of the State of New York, paralleled by the working arrangements between the two Seaway authorities in the United States and Canada. Arguably, the St. Lawrence Seaway navigation and power arrangements represent the largest joint planning exercise of the two countries in dealing with fresh water and certainly with respect to the Great Lakes system, although the Great Lakes Water Quality Agreements of 1972 and 1978 are a powerful rival model.

It is a commentary on the differing styles of government that so sophisticated a development as the Seaway could not be enshrined with appropriate detail in some comprehensive treaty; instead, the entire scheme rested upon Exchanges of Notes, executive agreements about the joint Board of Engineers, and bilateral autonomous arrangements between the two power authorities, with perhaps less formal cooperative measures to bring the two Seaway Authorities into tandem for their operations. Yet all this might not have been possible without the International Joint Commission whose Board of Control regulated "levels and flows" and thus indirectly "managed" a joint system. For the IJC deals with critical elements of water quantity and flows affecting both navigation and power on the St. Lawrence River international section and thereafter upstream into the Great Lakes wherever that regulation was relevant, necessary and possible under other IJC Boards of Control on the Lakes themselves at the Sault and Niagara.

All this is said in view of the importance these papers attach to the concept of better "management" to prevent excessive consumptive uses or harmful diversions to the long term detriment of the Great Lakes system and to the millions that depend upon it for health, sanitation, recreation, livelihood and a pleasurable environment. The tempting image of diverting fresh water for the dry western states and for Southern Saskatchewan perhaps — although few Canadians have made claims for such a diversion — should be understood not only on the economic and hydrological merits, but also in terms of the large planning and political difficulties involved in achieving consensus and administrative unity. Even so urgent a question as groundwaters along the common boundary has yet to be satisfactorily explored by both countries although the IJC has recommended its necessity over the years — with little success. The recent suggestions that governments are moving to investigate boundary and trans-boundary groundwaters is perhaps a sign of a late blossoming wisdom. It is clear that before diversions out of the Great Lakes in aid of the dry regions of the West are even discussed

(if ever), serious research needs to be done on groundwaters which could be a valuable and (as yet little used) source of supplies along the boundary and about which so little is known.

These papers also demonstrate the initiatives that can be taken by states and provinces to stimulate the common interest in maximizing the value to all parties of the unique resource that is the Great Lakes. But the character of municipal law and obligations under international law, both conventional and customary, require prior planning which considers all of the substantive and procedural conditions and implications. This collection may be most important in its warnings not to risk undeveloped ideas about diversions and not to fail to fashion common managerial or institutional arrangements. These can be of significant benefit to both countries beyond the present rather indirect "planning" that today characterizes the experience of both countries in dealing with their water resources along and traversing the boundary. It would be ironic if Canada and the United States, with their technology, their stability, and their long experience under the Boundary Waters Treaty and elsewhere, should appear to lag behind other less experienced regions perhaps which have succeeded in fashioning systems of planning for the benefit of the co-riparians and have often done so with imagination and some daring. That kind of planning is long overdue for both Canada and the United States. Before the concept of diversions out of the Great Lakes, and consumptive uses within, are too loosely discussed much homework needs to be done both by Canada and the United States.

Finally, there is an irony in the timing of the publication of these papers. Perhaps never before in the recorded history of the Great Lakes have water levels been so persistently high. The 1964 Reference to the IJC on lake levels was inspired by low water. By the time the report was issued in 1975-76 levels were very high and made the 1964 concerns dated and moot. Ten years later, today, levels may even be higher and proposals are now being heard for new types of diversion to relieve the pressure on the shorelines of almost the entire system, particularly the lower lakes. Five years from now, it may be a different story again. The game of diversions, therefore, however tempting, from time to time may be a dangerous one to play.

These essays provide therefore a thoughtful and knowledgeable beginning for an intensive systematic dialogue which now must be undertaken if both countries are to achieve the optimum values from the Great Lakes system without permitting the dissipation of an immeasurable resource through periodic indifference to water quantity questions and their management.