

1986

Great Lakes Legal Symposium: Diversion and Consumptive Use

Sydney G. Harris

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Sydney G. Harris, *Great Lakes Legal Symposium: Diversion and Consumptive Use*, 18 Case W. Res. J. Int'l L. 11 (1986)
Available at: <https://scholarlycommons.law.case.edu/jil/vol18/iss1/4>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Great Lakes Legal Symposium: Diversion and Consumptive Use

*by Sydney G. Harris**

I. WATER POLICY IN CANADA

Thank you for inviting me to address you today on the subject of "Water Policy in Canada." When I was first informed of your request to speak on this subject, I did some research of the literature, only to find that water policy in Canada consisted of a hodgepodge of fractured jurisdictions spread around a number of government agencies, both federal and provincial, and even shared with one international agency, the International Joint Commission. Nowhere was there a centre where all the pieces came together to command the integrated attention of anyone.

There was one encouraging sign, however, and that was that the Canadian Government has recognized the problem and, in order to lend some rationale to the situation, a study of Canadian water policy was commissioned with the hope of shedding some light on where we were in the process and making some recommendations about where we ought to be going. The "Inquiry on Federal Water Policy" was established in January 1984 and reported on September 30, 1985. The inquiry team was made up of:

Peter Pearse, Chairman, Professor of Forestry at the University of British Columbia and an active writer on public policy issues in the natural resources field;

Françoise Bertrand, Dean of Administration at the University of Quebec at Montreal, an active writer on environmental and community issues; and,

James McLaren, a consulting engineer, formerly head of his own company specializing in water, sewerage and flood control projects.

Together they formed a small and well balanced team which is probably why they reported so quickly and so coherently on a rather complex subject.

Their final report, appropriately entitled, "Currents of Change," is filled with a wealth of fascinating and varied detail about many aspects of water and the history of water in the life of Canada and Canadians. I recommend it as interesting reading to all of you. The inquiry looks into

* Consul General for Canada.

three main areas of interest; water supply, water quality, and water management. I expect that some of you are already familiar with the report but I hope that you will bear with me as I take you quickly through the highlights as seen from a Canadian perspective.

II. WATER SUPPLY

The world generally, and Canada in particular, is well endowed with fresh water. In fact we are so well endowed that we often take it for granted. Essentially, we do not charge for it; we rarely have had to question its quality; and it is continually being replenished by natural processes. However, we need to reflect that only one tenth of one percent of the world's water is fresh and flowing, another one half of one percent is groundwater, and the rest is saltwater in our seas and oceans. We need to ask ourselves how important is that one tenth of one percent of freshwater to mankind and in particular to North Americans, remembering that the largest body of that vital resource is present right here in the Great Lakes.

Canada has more fresh water in relation to its size than most countries. We are a country renowned for our lakes which cover seven percent of our land area. We discharge to the sea nine percent of the world's fresh water from seven percent of the world's land mass. Further, it is our good fortune that geology and climate have been kind to us, in that we are endowed with many lakes and ample marshes and swamps which hold our water throughout the seasons and release it slowly year round. In addition, in the west, we have enormous stores of water in mountain glaciers which perform a similar function. Only in a few areas in the southern prairies, are there scarcity problems which can be described as being in any way serious.

III. WATER QUALITY

With the exception of some saline surface waters in the prairies, Canadian water is of high quality, or at least it was originally. In fact, Canada has had so much high quality water continually available, that only recently has there been cause for concern about its use and misuse.

IV. WATER MANAGEMENT

Since water management has not been perceived as a significant problem until recently, no one has focused on it, at least not in any comprehensive fashion. Until the past decade, Canada's water management system was a combination of often competing jurisdictions, both federal and provincial, that had grown up over time as the need for new or more extensive controls became necessary.

Significantly, a very large portion of our waterways are shared in

greater or lesser extent with the United States. This brings a strong international dimension into any discussion of water policy and water management. Waterways cross provincial boundaries with the same carefree abandon that they cross international boundaries so there are strong domestic political considerations to be taken into account as well.

Historically, waterways were the routes for the opening up and settlement of Canada. The American "Thirteen Colonies," on the Atlantic coast, established on generally short rivers which ended in the Allegheny Mountains, were confined to the Atlantic coastal plain. Only later did Americans venture across the mountains to find the French already active in the Ohio and Mississippi valleys. The French fur traders eventually came into conflict with the British operating through Hudson's Bay, both seeking access by water to the fur-rich interior of the continent. In sum, the early history of Canada was dominated by the competition for the waterways which controlled access to the territory and the commerce of the new land.

Serious exploitation of other resources did not arise until the Napoleonic Wars in Europe cut off the supply of Baltic timber to the British Navy. The British then had to seek an alternative source in the Canadian interior, and naturally floated the logs down its abundant rivers. So we had our first commercial navigation. Following the American War of Independence, there was perceived a need to secure our waterways, free from threat from the Americans, and so our first major canal, the Rideau Canal was cut from Ottawa to Kingston.

Despite water's importance, the British North America Act (Canada's constitution) does not mention water. It gives "natural resources" to the provinces as their private preserve but makes no mention of water. Even when the old Hudson's Bay Company territory of Rupert's Land was returned to Canada as the new West, no mention was made of irrigation or water since it was felt that it might put off the "farmer immigrants" it was hoped would be attracted to these new lands. Since then, various fisheries and navigation treaties and regulations have given authority over certain aspects of water and waterways to various government agencies in Canada. The year 1905 saw the establishment of the Waterways Commission which in turn led to signing the Boundary Waters Treaty with the United States, and gave the first international recognition to the subject of water and waterways. The International Joint Commission or IJC, as it has become known, was an outgrowth of that treaty and has proven to be a very useful institution in water management. The IJC has served as a forum for discussion of issues and resolution of problems between the two countries. The IJC's reports and studies provide a useful source and background on water issues.

The development of hydroelectricity by private interests at Niagara Falls and the digging of the Welland Canal pushed the pace of interna-

tional treaties to govern the use and diversion of Great Lakes waters and led to a series of treaties which ultimately included the building of the St. Lawrence Seaway and a number of other joint ventures with the United States. Finally in 1970, the Canada Water Act was passed, and in 1971, the Federal Department of the Environment was created which has since become a focal point for most federal water policy. The Great Lakes Water Quality Agreement of 1972, revised in 1978, was an excellent start to addressing water quality problems as they affect both countries in the Great Lakes. The 1972 agreement deals mainly with the problem of phosphorus contamination in the lakes. Much progress has been made in dealing with this problem. The 1978 agreement deals with toxic contaminants, a far more difficult task and much work remains to be done. While progress has been made, there is a long way to go on both sides of the border.

V. FUTURE ISSUES TO BE ADDRESSED BETWEEN CANADA AND THE USA IN THE GREAT LAKES CONTEXT

We have to seek agreement on, and decide what should be done about several Great Lakes problems:

1. High water levels in the Great Lakes; is there anything practical that we can do about them to reduce shoreline erosion and property damage?
2. There is the question of long term climatic changes that may be affecting us at the moment. If this is indeed the case, and the "green house" effect is truly a long term phenomenon of importance, then we may have to consider what we must do to preserve the Great Lakes for future generations and preserve what we have built around the Lakes.
3. Acid rain is a matter which materially affects water quality on both sides of the border. It is a problem with profound international implications.
4. Persistent and hazardous wastes; chemical and radioactive wastes are becoming a question of far reaching concern. We must adopt policies to deal with these on a long term basis.
5. Finally, there are regions with water shortages far removed from the Great Lakes Basin, such as southern Saskatchewan, which need help. What is our obligation to them?

VI. WATER DIVERSION

To date we have recognized the importance of present and future consumptive uses in the Great Lakes Basin. The only diversions of consequence into the Basin are the Long Lac and Ogoki diversions from Ontario's Hudson Bay watershed. The only important diversion out of the Basin is the Chicago Sanitary and Ship Canal leading into the Mis-

Mississippi River Basin. The Welland Canal diversion keeps water within the Great Lakes Basin and since it is used for international navigation, is of lesser concern.

While many diversion schemes have been suggested over the years, the only one that is actively being promoted in Canada is the GRAND Canal scheme. (GRAND standing for "Great Recycling and Northern Development"). This project would involve the damming of James Bay with a coffer dam to eventually create a huge fresh water lake as it filled up with water from the Ontario and Quebec rivers draining into James Bay. This fresh water could then be pumped into Lake Huron via the Ottawa and French Rivers to be subsequently siphoned off to the water-hungry states of the west and southwest United States. The cost would be staggering and the construction time would be measured in decades. But then we would be seeking to solve a problem of shortage which is largely man-made and which will take another twenty plus years to mature. But the costs and benefits and the time frame are, at first blush, not incompatible. Interestingly, of the states and provinces in the Great Lakes region, it is only the Canadian Provinces of Ontario and Quebec that have substantial quantities of fresh water which could be diverted to resolve the problems of the water-short states, hence, both countries are involved.

One must remember that despite the size, the Great Lakes have only a relatively small flow of water. Most of the lakes are deep and contain a huge volume of water but a volume which does not recharge quickly. It has even been estimated that some of the water in the deepest strata of the lakes may date from the ice ages, some ten thousand years ago. Further it has been calculated that it takes a drop of water in Lake Superior, on average, about 200 years to reach Quebec City. The flushing mechanisms in the lakes is, as yet, not well understood. This means that pollution buildup in lake waters and bottom sediments is a very long term problem indeed. All the more reason therefore, that we give it our early attention.

In considering the long term management of Great Lakes water, we must take into account many competing interests: life and environmental quality, industrial needs, hydropower generation, navigation needs and the Seaway, fisheries, tourism and recreation. Which should have priority? Not an easy question to answer. The Pearse Inquiry Report does make a number of recommendations.

VII. WHERE DO WE GO FROM HERE?

The Pearse inquiry makes fifty-five recommendations, and puts forth a number of novel ideas. Here are some of the highlights in my view:

One suggestion calls for a system of "cradle to grave" management for chemical pollutants that are used or manufactured in the Great Lakes Basin. This would mean the full recording of the life cycle of all named polluting substances, of which there are now over 800 in the Great Lakes themselves. If this seems far fetched, then we should recall that it is precisely this sort of regime which we now apply to radioactive materials.

We need to distinguish between small scale consumptive uses of water, major new uses, and massive diversions. The former are of lesser consequence, while in the latter case, we need to develop firm provincial and federal positions on future uses.

We need to clearly define the federal government's role in water policy. We need to define clear direction for the formation of decisions in this area.

We should consider water policy on the basis of individual watersheds. We should move to a "user pays" principle for water projects.

We need a more systematic review of new water use proposals, especially environmental considerations.

We should encourage more public debate on water issues.

We should reaffirm our support for the International Joint Commission.

We should establish more centres for water research.

We must improve water treatment and sewage disposal facilities.

It calls for a stronger federal role in water policy management in coordinating federal and provincial government policies.

It is suggested that a new environmental council should be formed to report annually on the state of the nation's environment.

These, and others, are all fine recommendations, but they are merely a start. All must be considered and enacted by the Canadian Parliament before they become law. So far what has been set in motion is a process which, hopefully, will lead to just that. The report has been referred to the provinces and a response is expected by next April, and a Federal Provincial Conference may be required before the end of 1986. Finally a federal bureaucratic task force has been set up to push the process along. Perhaps two years from now, if all goes well, we may expect to see some of these suggestions taken up in the form of new legislation and regulations. The hope is that in the end we will have put in place an institutionalized legal and decision making system, within which to consider the issues which face us now and will continue to face us in the water policy field.

I detect that at this seminar we have been hearing over the last few days a steady chorus of "no" to any suggestion that water be diverted from the Great Lakes to other areas of North America. However, we must reflect that this conference has been called to consider the question of "Diversion and Consumptive Uses." The fact that the question has already been raised and occupies our attention suggests that it is one of

immediate reality. We have heard this morning the very eloquent proposal from Mr. Kierens for his GRAND Canal scheme. As time progresses, pressures may build for this scheme and, no doubt, others of this nature. It is our hope that when that time comes, we will have done our homework, and we will have in place the studies and the decision making machinery which will allow for sane, reasoned, policy decisions to meet the new situations.

