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**BRIEF FROM THE CHIPPEWAS OF NAWASH
TO THE INTERNATIONAL JOINT COMMISSION
CONCERNING BULK WATER TAKING**

(Presented to the IJC by Chief Ralph Akiwenzie)

Less than 150 years after we surrendered our homes at Owen Sound, Ontario, we look around at the state of the environment and wonder, "What have you done with our inheritance?" The Anishnabek surrendered to the governments of Canada and the United States a paradise, full of plenty but, just as our rights to our Mother Earth are being recognized in your constitutions and in your courts, we discover how badly you have abused her. We don't recognize the fish in her waters. We cannot find her forests. We cannot drink her water. We choke on the very air.

We come before you today to say enough and to warn you that you are in mortal danger. If you are not able to stop those who want to buy and sell water and divert it or ship it with no thought for the consequences, you yourselves will perish.

This paper was prepared to express the concerns of the Chippewas of Nawash regarding bulk water takings. We are opposed to any large transfer of water out of any ecosystem, and that includes the taking of surface water for bulk sale or of ground water for sale, in bulk or in bottled form. We are especially concerned about recent attempts to transport, out of the Great Lakes, tanker-loads of water for sale and of the various schemes we have heard of to divert water from the Great Lakes. We believe that, once the commercialization of water on such a scale begins, it will be hard to shut it down. Indeed, from our reading of Chapters 3 and 11 of the North American Free Trade Agreement (NAFTA), it would be impossible.

We believe that large water transfers or exports will, in the long run, adversely affect the ecosystems from which they are taken. We also believe such transfers will affect our ability to practice, enjoy and benefit from our aboriginal and treaty rights as recognized in s. 35 of the Constitution and as affirmed by the courts. In the case of the Chippewas of Nawash (and our sister Band, the Chippewas of Saugeen) these rights include the right to fish for trade and commerce in the waters around the Bruce Peninsula as recognized and affirmed by the *Jones-Nadjiwon* decision of 1993. [*J. David Fairgrieve, Ontario Division, April 26 1993*].

The rest of this paper gives substance to our claims.

Background to the Aboriginal and Treaty Rights of the Chippewas of Nawash

Neyaashiinigiing (Cape Croker on the maps of the Bruce Peninsula in Ontario) is the ancestral home of the Chippewas of Nawash. Neyaashiinigiing is unceded Nawash land—it was never surrendered. We have practiced a way of life interdependent on the resources of the Bruce (hunting and fishing, and when our land was taken, fishing) from time immemorial. From this unbroken habitation and these traditional practices, and from the treaties we signed, we derive our rights now recognized by the Constitution of Canada of 1982 and the Ontario Court decision of *Jones-Nadjiwon* of 1993.

Section 35(1) of the Canadian Constitution (1982) says:

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

It is recognized by the Supreme Court of Canada (in *Sparrow* and others) that these rights are of a priority nature—the needs of First Nations must be recognized and honoured before the needs of other users but after the needs of conservation are met. Later Supreme Court of Canada decisions suggest other, “traditional” activities may be considered when taking account of First Nations’ needs, but nowhere do the courts suggest that bulk water taking is one of those activities.

Section 25 of the Charter of Rights and Freedoms says:

“The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlements.”

In 1993 J. David Fairgrieve built on the Constitution and on judgments of the Supreme Court of Canada to find that the Chippewas of Nawash and Saugeen have section 35 rights to harvest fish for trade and commerce from an area 10 kilometers from shore all the way around the Bruce Peninsula, from Owen Sound to Southampton.

The traditional waters of the Chippewas of Nawash and Saugeen are “section 35” waters and, as such, anything that impacts adversely on them must be subject to an Environmental Assessment (*Canadian Environmental Assessment Act*, section 48).

There is no reason to assume that bulk water taking (by transfer or by shipping) will *not* have an adverse and long term impact on the traditional waters of the Chippewas of Nawash and Chippewas of Saugeen and therefore on the practice and enjoyment of our aboriginal and treaty rights to a commercial fishery. (See “Evidence of harm”, below).

We know the responsibility that comes with the practice of rights. That is why nawash has become a spirited defender of the ecosystems in our traditional territories. For example, we have:

- ▶ successfully opposed an unsustainable, indeed risky, development proposed for Hay Island in Georgian Bay, even though the governmental agencies responsible had approved the project;
- ▶ submitted detailed concerns about Ontario Hydro’s proposal to build above-ground storage facilities at Bruce Nuclear Power Development;

- ▶ turned away potentially lucrative developments from our reserve because of their risk to the environment.
- ▶ begun to work with non-Native groups in our traditional territories on environmental issues.

When it comes to protecting First Nations' rights, Canada is our fiduciary. This obligation is not just wishful thinking on our part (although the federal government's lack of enthusiasm for its responsibility would make it seem so). It is an obligation clearly stated by the Supreme Court (most notably in *Sparrow*). If the treaties were signed between two sovereign nations, as we believe they were, then Canada has a problem. Which treaties will Canada honour—those it signed 150 years ago with us or the free trade agreements it signed with the US ten years ago? For if bulk water takings are allowed under the North American Free Trade Agreement (NAFTA), it would certainly result in a breach of Canada's treaty obligations to First Nations.

We have some experience with treaties, and if Canada had asked our opinion before signing the Free Trade Agreement with the US and the NAFTA, we would have said, "It's a trap! Don't do it!"

Background to the current water debate in the light of NAFTA

There are three serious attempts to take fresh water in bulk from Canada for shipment to China or to the US—one by the McCurdy Group in Newfoundland, Sun Belt (a US company) in BC, and by the Nova Group from Lake Superior. All point to the likelihood that bulk water exports are not that far away unless the US and Canadian governments prove themselves to be strong enough to resist the tide of international trade.

The Ontario government withdrew the permit to take water it had issued to the Nova Group. Nova appealed, but withdrew their appeal amidst a fire-storm of opposition from the public and governments on both sides of the border. However, Nova has said that it may look inland, for ground water to export. In the meantime, it waits and watches to see how Sun Belt's NAFTA challenge plays out.

Sun Belt has now sued Canada under the North American Free Trade Agreement (NAFTA) because BC banned the bulk export of water just as Sun Belt was getting ready to ship millions of litres south to California. Foreign Companies can do this because chapter 11 (the investment chapter) of NAFTA forces Canada and the other partners to treat foreign companies "investing" here as though they were Canadian companies. It also allows companies whose profits have been "expropriated" (and in NAFTA, that term has a very broad definition) by a country to sue for damages.

The cases are heard, in secret, by a Tribunal, also set up by NAFTA. One company, Ethyl Corp. from the US, has already successfully sued Canada under NAFTA claiming a ban imposed by Canada on one of their products cost them money and other markets. The product was MMT, a gasoline additive used to replace lead, and Canada had banned it because it is a proven neurotoxin. Canada folded during the Tribunal and agreed to pay Ethyl \$20 million and issue a statement saying that there was no solid evidence that MMT was harmful to gasoline engines or to humans. This does not make us believe Canada has the strength to protect our water.

The Canadian government is saying that only water taken and bottled can be exported, and that the NAFTA doesn't kick in until someone allows bulk exports. But some trade lawyers think that it is already too late—that even bottled water exports have made water a “commodity” under the NAFTA and that bulk water exports will be allowed. Sun Belt's NAFTA action against Canada is very important.

To make things even more complicated, the federal government seems to have tied its own hands in this. It signed, along with all the provinces and territories, except Quebec, a “Canada-wide Accord on Environmental Harmonization” in January, 1998. This Accord obliges the federal government to work with the provinces in setting standards and resolving issues of concern. It has significantly narrowed the scope of the federal government's power to act to protect the environment—and that includes stopping the bulk export of fresh water. In fact, during the recent public discussion around the developing federal strategy on water, the federal government admitted it will have to consult with the provinces before defining their strategy.

Meanwhile, Ontario has proposed a regulation under the *Ontario Water Resources Act* (“Surface Water Transfers Policy”) to control water transfer. However, the Act deals primarily with allocations of water between municipalities and between landowners. It is not designed to deal with inter-basin transfers and water diversion projects. And the OWRA does not give Cabinet the power to regulate water transfers or removal. The proposed regulation also excludes groundwater altogether. Nova Corp. has said that, if prevented from taking surface water, it would try to access ground water.

Whether Ontario has the authority, under its laws, to regulate the taking of surface water may be a moot point if the issue requires federal and provincial consensus under the Harmonization Accord. And even if that were achieved, the NAFTA may have already trumped Canada's ability to protect water from exploitation.

Evidence of Harm

We know of no studies that have examined the impact of bulk water takings on the ecosystems from which the water is removed or on the rights of Natives who rely on fish and wildlife for food, ceremony, and commerce.

However, we have seen (and so has the world) what happens to the normal ecological processes of areas that have been dammed to produce hydro electricity. The huge flood planes that form above the dams, and the trickles of water that run below them, change nature. They disrupt the lives of fish and wildlife. They unbalance the harmony of ecosystems that have taken thousands of years to develop.

The James Bay Project

First Nations people, for thousands of years, have been part of that delicate balance. In the case of the Cree of Québec, mega-projects that changed whole water systems ruined, not only the environment, but a way of life; and not only a way of life, but also the aboriginal and treaty rights of First Nations peoples.

For example, the James Bay Project in Québec diverted massive quantities of water from the Eastmain, Opinaca and Caniapiscau rivers to La Grande Rivière, doubling the flow of La Grande. Huge dams were constructed and huge reservoirs—half the size of Lake Ontario—formed behind them. Forests were incinerated simply to clear debris from the reservoirs. The Eastmain is now just a creek, its flow reduced by 95%.

The biodiversity of the area has been harmed forever. At least one sturgeon population has been destroyed. Sea grass beds along the James Bay coast are in danger of disappearing. They require a moderate salinity that the huge outpouring of fresh water from La Grande is displacing. Migratory fish stocks are in danger. The critical area where salt water meets fresh (the FSTZ—fresh water-salt water transfer zone) is a breeding ground for a number of species of animals; now it has been flushed out into the Bay.

In spite of the treaties and agreements Québec signed with the Cree, very little information on the effects of the diversions is available. What data collection is being done is being done by Hydro Québec and they are not sharing. [*Personal correspondence with Alan Penn, Grand Council, James Bay Cree*]

Water Taking in the US

After decades of taking Florida groundwater, combined with massive tourism and resettlement, underground water resources are being depleted, sinkholes are opening up and sea-water is being sucked into near-empty water-tables.

The Ogallala Aquifer that runs under the plains states of Nebraska, Kansas, Oklahoma and west Texas is being emptied by the thirst of agribusiness at a much higher rate than expected. When the US Army Corps of Engineers checked it out in 1976, water was being pumped out of the Aquifer at a rate of 27 billion cubic metres a year. The Corps recommended it be filled up with Great Lakes water. [*Joyce Nelson, Canada Dry, This Magazine, October 1987*].

In the early 1980s, the US Supreme Court ruled that it is unconstitutional for any state to ban water export across its boundary—to do so would be a restriction of interstate commerce. The Court's rulings have helped to define water as a commodity, and they have helped to discourage a conservation ethic under which people might conserve the water in their own back yards rather than think they can always buy more from their neighbours.

And if their neighbours south of the 49th parallel should run out, then it's time to look to the friendly giant in the north—the one with 90% of North America's surface supply of fresh water.

Canada has done nothing to discourage the US from seeing us as drawers of water. As Brian Mulroney put it in a *Fortune* interview: "I'm favourably disposed to anything that improves our relationship with our neighbor. If it [water export] happens to make good economic sense and improves the environment, why not?" Or, as Robert Bourassa put it in his *Power from the North*, "Water is a good, like any other, and can be bought and sold." Or, as Simon Reisman, Canada's negotiator during the free trade talks with the US, said, "America's interest in trading with us has always been linked to something else they wanted from us. I felt water should be looked at in economic terms." [*Joyce Nelson, Canada Dry, This Magazine, October 1987*].

To the Anishnabek, as we explain later, these statements are highly offensive and could only be said by extremely foolish men.

The St. Lawrence River

The only other place where we might look for the ecological effects of massive displacements of water is in the St. Lawrence River. Here there is more information, much of it being gathered by Warwick Vincent and Julian Dodson of the Département de biologie, Université Laval, Québec. The following quotes are taken from their paper, "The St. Lawrence River, Canada-USA: the need for an Ecosystem-Level Understanding of Large Rivers" (currently in press in a symposium edition of the Japanese *Journal of Limnology* (1999):

Discharge plays a pivotal role in the structure and functioning of all flowing water ecosystems including large rivers. According to the analysis by DYNESIUS and NILSSON (1994), the hydrological regime of 77% of the 139 largest rivers in North America and Eurasia has now been subject to modification by dams and other control structures, with deleterious effects (including fragmentation) on habitat quality, land-water interactions and migration corridors for aquatic wildlife. Throughout the twentieth century, the St. Lawrence River has been extensively modified for navigation, flood control and hydroelectricity generation, but little consideration has been given to the ecological impacts of these changes.

Variability in discharge is an important feature that influences the productivity and biodiversity of flood plain environments. The flood-pulse concept draws attention to dynamic character of the floodplain and the importance of periodic flooding for vegetation dynamics, nutrient exchange and access by fish and other animals to wetland habitats as well as to the main stem of the river (JUNK et al., 1989)." ...

Certain freshwater fish species have life cycles that are intimately linked to the hydrological cycle and variations in the St. Lawrence. For example, the year class strength for lake surgeon in the river appears to be strongly determined by hydrological conditions in June, the time of year when the larvae drift from their spawning grounds and begin exogenous feeding (NILO et al., 1997).

Discharge also has a decisive influence on the estuarine environment into which a river discharges. For example, in San Francisco Bay the position of the 2 ppt isohaline within the upper estuary (i.e. the FSTZ) is a correlate of discharge and a sensitive index of many biological variables including the annual phytoplankton production, benthic macroinvertebrate density, mysid population abundance and larval fish survival (JASSBY et al., 1995). Similar effects are likely to operate within the FSTZ of the St. Lawrence River. We surmise that discharge influences not only the flux of autochthonous and allochthonous production in the FSTZ, but also the relative importance of shallow versus deep water environments and thus the balance of photosynthesis and respiration in this turbid, optically deep system.

There is some preliminary evidence that discharge influences certain biological variables in the downstream, marine reaches of the St. Lawrence ecosystem. SUTCLIFFE (1972) found a strong positive correlation between the lobster and halibut catch in Québec (mostly from the Gulf of St. Lawrence) and the mean annual discharge of the St. Lawrence which he attributed to the influence of freshwater flow on thermohaline circulation, upwelling and nutrient supply in the Gulf. He subsequently extended these observations by showing that the catch of halibut and lobster was most highly correlated with the discharge during certain months in which the larvae are

passing through critical life stages (Fig. 3). More recently, SAVENKOV et al. (1997) have shown that peaks in freshwater discharge of the St. Lawrence River can exert a strong influence on mesoscale circulation and the distribution of algal blooms in the lower St. Lawrence Estuary. ...

A major impediment to a full understanding the pathways and effects of contaminants in the St. Lawrence is the lack of information about food web relationships and biogeochemical cycling processes in this system. Even for the base of the food web our understanding of in situ production processes is still rudimentary.

In certain parts of the world, considerable funds are now allocated towards the process of "renaturalization" of heavily modified streams and rivers. For example, the Danube River has been subjected to large-scale hydraulic modification for more than 100 years. All the meanders have been cut off from certain reaches thereby shortening the channel by c. 20%, resulting in an increased hydraulic gradient. This in turn has led to more rapid erosion and a lowering of the river by 2.5 m in some places with the concomitant of a lowering of the water table and loss of wetland habitat. The German government has allocated 100 million DM for the rehabilitation of a 160 km stretch of the Danube involving re-adjustment of water levels, re-activation of old meanders and the retention of the straight channel sections for flood control. This trend towards renaturalization has been strengthened by environmental laws in most of the German states (LARSEN, 1995).

We have quoted at length from the Vincent-Dodson paper in order to make one, crucial point: the ecosystems of large bodies of water and tremendously complex and extremely fragile. The best scientists admit our scientific knowledge of their complexity is shallow. No one can say with certainty what will or won't happen when those ecosystems are thrown out of balance. It begs the question: "If we don't know, what do we do?"

Our answer is: "Nothing. Let it be."

The taking of water offends the spirit and is a violation of core Anishnabe values

This we know: the earth does not belong to man; man belongs to the earth ... Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself.

—Chief Seattle to the President of the United States, 1854

What is happening right now not only affects us native people because we are very close to the earth .. we take pity on Mother Earth. But it really affects us, the responsibility, the total responsibility of all people in Canada is to take care of the earth. ... We are all in this together. Where the Mother is at is where we have put her. the state where she's at is our responsibility.

—Pauline Shirt, Anishnabe elder in conversation with Nawash Band member Lenore Keeshig-Tobias, *Earthkeeper* vol. 2, issues 3 & 4, 1992.

We know of no reliable studies except the lessons of direct experience, of the Cree in Quebec and the Anishnabe in Ontario ... the experience of the Cree with James Bay water diversion mega-

projects, and our own experience with the dark side of making treaties with a country with voracious appetites.

We also know that water takings such as those being contemplated violate the Native principle of respect due to all living things and the principle by which we should all operate: *first, do no harm*.

How fragile ecosystems will be harmed by the bulk taking of water (however it is removed), we do not know. And if we do not know what the effect will be, *for seven generations*, it should not be done.

What affects the environment, affects those who live in it, including the Anishnabek and the fish and wildlife we rely on for food, ceremony and commerce.

Therefore, our only position is to oppose any plan to remove water in quantity from an ecosystem. Our opposition includes the taking of ground water and the taking of surface water.

It may be that the taking and bottling of water has already opened the tap for bulk water exports. If this is the case, new laws by either Ontario or Canada banning bulk surface water taking may be subject to the expropriation clause of Chapter 11 of the North American Free Trade Agreement (NAFTA). Even if this is not the case, bulk water transfers to other countries may be forced on First Nations by NAFTA suits brought against Canada by exporters and laws banning or restricting fresh water exports may still succumb to the NAFTA.

Therefore, our only recommendation to non-Native governments and agencies, whose job it is to protect the environment, is to ban, for environmental reasons, all water takings of quantity from any ecosystem.

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