

Brief to the International Joint Commission Concerning the examination and reporting on the consumption, diversion and removal of waters along the common border, including removal in bulk for export.

**Presented to the IJC by Doug Belanger
Fisheries Resource Coordinator
Batchewana First Nation of Ojibways
March 22, 1999**

EXECUTIVE SUMMARY

The Batchewana First Nation of Ojibways was a self-governing nation at pre-European contact and this was re-affirmed by the signing of the Robinson Treaty of 1850. The Batchewana First Nation continues to maintain its nationhood that the Creator placed us on this land, gave us laws that govern all our relationships to live in harmony with nature and mankind. The laws of the Creator defined our rights and responsibilities. In acting upon our rights and responsibilities, the Batchewana First Nation hereby states that existing management principles and conservation measures are inadequate to ensure future sustainable use of shared waters of the Great Lakes.

IJC Mandate

According to the Press Release of February 22, 1999 from the International Joint Commission on February 10, 1999 the United States and Canadian federal governments asked the International Joint Commission to examine and report on the consumption, diversion and removal of waters along the common border, including removals in bulk for export. In response, the IJC began a major investigation by holding public hearings. Further, the IJC stated that such a review is needed to ensure that water and related resources are managed in a rational, consistent and anticipatory way to prevent trans-boundary disputes.

In regard to the mandate of the International Joint Commission and the concerns of the federal governments of the United States and Canada, the Batchewana First Nation, as an indigenous nation living from time immemorial on the Great Lakes requests that the IJC recognize that First Nations of Canada or Tribal Nations of the United States are indigenous nations. We are not interest groups. As indigenous nations we have a special legal relationship with the nation states.

Historically, indigenous nations of the Great Lakes were excluded from developments related to the Great Lakes and its water ways. Time has shown that so-called rational, scientific or progress developments have resulted in tremendous harm to the waters, fishery habitat, and the well-being of humans, plants, animals, birds, air and the land. Developments have not only polluted the waters, land, and air; but, water tables and weather conditions have been severely altered, as

well. Since the ecosystem is so delicate and inter-connected, human beings on this planet earth can no longer afford to make immediate developments for immediate returns.

Investigation and public hearings means open consultation. As the nation states of Canada and the United States attempt to continually deal with good government, public good or conflict of interest, it is also important to give recognition that fairness also carries over into consultation, where those with capital have the resources to submit more elaborate scientific studies or legal arguments to further their recommendations or proposals. The Batchewana First Nation requests that the IJC's capacity to investigate be also mandated to undertake studies in addition to receiving briefs from the public hearings. This would respond to the gap between the "have and the have nots". It is recommended that a study be undertaken to examine the historical affects of development and their impact on the Great Lakes.

Consultation of First Nations is a requirement. The Batchewana First Nation of Ojibways recommend that your committee strongly support for increased political commitment for proper and meaningful consultation with First Nations which will result in securing the proper legislative instruments to address inadequate water quality monitoring of the Great Lakes watershed by the Canadian Government. The Supreme Court of Canada has stated in numerous court decisions that meaningful consultation with First Nations must take place if, an infringement on Section 35 on Aboriginal rights of the Canadian Constitution may be violated.

Specific Areas of IJC Investigation

The Batchewana First Nation of Ojibways offers the following comments and recommendations in respect to IJC areas of investigation:

1. Existing and potential consumptive uses of water

The water removed from the Great Lakes watershed for industrial and municipal use is returned in most cases to the watershed as a risk to human health. Current legislative instruments still operate on the theory that dilution is the solution for water returned to the Great lakes ecosystem by industry/municipalities on the Ontario side.

2. Existing and potential diversions of water in and out of transboundary basins, including withdrawals of water for export;

The Batchewana First Nation of Ojibways recommend that your committee direct the Federal Governments to implement proper and meaningful consultation with aboriginal/treaty right communities in developing legislative instruments for an accounting of all water removed from the Great Lakes watershed. To our knowledge there is huge gaps in how much water is being removed because of no clear knowledge of how much water is being transferred out of the

watershed by Ontario's water bottling companies.

3. The cumulative effects of existing and potential diversions and removals of water; including removals in bulk for export;

The Batchewana First Nation of Ojibways recommend that your committee based on the western science to date place the structuring of a technical committee with First Nation representation (Convention of Biodiversity signed by Canada just last year respects traditional environmental knowledge as having a place within even the highest level committee structures to address environmental issues) to develop a Great Lakes Water Resources Management Program as a request to the Governments who placed this charge to you to examine.

The establishment of such a program is called for under Principle V of the Great lakes Charter of 1985; which states "The Governors and Premiers of the Great Lakes states and provinces commit to ... the development of a Great Lakes Water Resources Management Program and to additional, concerted and coordinated research efforts to provide improved information for future water planning and management decisions".

4. The current laws and policies as may affect the sustainability of the water resources in boundary and transboundary basins.

The Batchewana First Nation of Ojibways state that the current laws and policies concerning water resources in our waters (Ontario) fail to meet the direction given in aboriginal/treaty rights decisions by the Supreme Court of Canada. Consultation by Ontario will continue to be inadequate until proper and meaningful consultation with the accompanying legislative instruments developed from those consultations are put in place.

BRIEF FROM THE BATCHEWANA FIRST NATION

The following is a brief from the Batchewana First Nation of Ojibways, signatory to the 1850 Robinson Treaty and located at the center of the Great Lakes. This brief will address:

1. Overview of the Water/Fishery of the Batchewana First Nation
2. 1850 Robinson Huron Treaty
3. Description of the Current Fisheries of the Batchewana First Nation
4. Keepers of the Water
5. Nova Corporation 1998 Application to Remove Water for Export

1. Overview of the Water/Fishery of the Batchewana First Nation

The fishery and water are inter-connected to the political situation of the Batchewana First Nation. The Batchewana First Nation has lived at the center of the Great Lakes from time immemorial. Before and at contact Batchewana was a functioning organized nation with a world view of creation, man and nature, laws and values, a language, a territory or land base, technology, and a sacred history.

The Creator place our peoples on the lands, waters and the Creator gave us laws that govern all our relationships to live in harmony with nature and mankind. The laws of the Creator defined our rights and responsibilities. The Batchewana First Nation had a way of life that was self-sufficient and dynamic, and the Peoples lived in a rich land of abundant natural resources. Nation to nation relationships existed with other nations and councils of nations met at the center of the Great Lakes.

2. 1850 Robinson Huron Treaty

The activities of Chief Nebenaigoching of the Batchewana First Nation and Chief Shingwaukonce of the Garden River First Nation to protect our lands brought about the 1850 Robinson Huron Treaty. They were concerned about the British Crown's disregard of the 1763 Royal Proclamation, delivered as part of the Treaty of Niagara 1764, with its procedures to establish treaties with nations. Our nations were not treated as nations and were prevented from entering directly into co-development ventures with Europeans. The Chiefs and nations were also greatly concerned about the settlement of outsiders into their territories and their exploitation of the natural resources. In 1849, the two Chiefs along with supporters attempted to stop mining exploitation at Mica Bay. The Crown dispatched a militia and the incident ended in the jailing of the Chiefs. The 1850 Robinson Treaty was negotiated the following year.

According to the 1850 Robinson Huron Treaty, "*reservations shall be held and occupied by the said Chiefs and their tribes in common for their own use and benefit...*" And further that, "*Her*

Majesty and the Government hereby promises and agrees, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have theretofore been in the habit of doing.” In his Report to the Superintendent-General of Indian Affairs dated September 24, 1850, Commissioner William B. Robinson wrote that the lands surrendered were “*Notoriously barren and sterile, and will in all probably never be settled except in a few localities by mining companies...*” Robinson also wrote in his report; “*In allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for the purpose of residence and cultivation, and by these to them and the rights of hunting and fishing over the ceded territory, they cannot say the Government takes from their usual means of subsistence and therefore have no claims for support, which they no doubt would have preferred, had this not been done...*” The Batchewana First Nation (“the First Nation”) agreed to a 300 square mile reserve in 1850 during the negotiations of the Robinson Treaty which included the islands and waters adjoining. The reserve was acquired through the vigorous efforts of Chief Nebenaigoching.

3. Description of the Current Fisheries of the Batchewana First Nation

The Batchewana First Nation of Ojibways currently commercially/subsistence fishes from the area of Gros Cap (located just west of the city of Sault Ste. Marie) westward over two hundred miles to an area close to Marathon, Ontario.

We, at Batchewana take great pride in our ability and commitment to develop a practical management capacity of our sustainable commercial fishery which presently supports up to twenty (20) Batchewana First Nation families, while creating a harmonious relationship with the Canadian government and citizens.

Below is in chronological order, recent developments in re-asserting our inherent right to fish as protected within the context of the 1850 Robinson Treaty

- 1) Chief and Council in 1991 established and recognized roles and responsibilities for a Fishing Committee through Band Council Resolution 91-251;
- 2) has drafted rules and regulations in regards to Batchewana First Nation commercial fishing activities in that same year;
- 3) drafted a Statement of Philosophy regarding the advancement of resource rights in the interests of conservation and economic well-being which was supported by Chief and Council in March of 1993 by way of band Council Resolution 93-005;
- 4) initiated a Tribunal process in August 1994, where one of our fishermen violated our Statement of Philosophy;

- 5) have a annual fishery assessment work plan for assessing the state of the fishery in our waters and have had our own report of the state of the fishery in Eastern lake Superior drafted and approved by Council November 1998 for public review.

4. Keepers of the Water

Women have been given the role of Keepers of the Water in the Anishanbek tradition and ceremony. Men have been entrusted as Keepers of the Fire. Fire and Water are considered sacred elements necessary for sustaining life.

The Anishinaabe have been taught to respect all things and to take care of the gifts given by the Creator. If the people care for the elements, they will care for the people. The teachings provoke humility and an understanding of man's dependence on nature.

It is said that fire comes from the center of the Earth and water falls from a great lake above the Earth. When the Water touches the earth, it becomes the responsibility of the women.

Water is like the blood of Mother Earth (aki) to the Anishinaabe. It is central to life...the "spark of life" needed to make seeds grow. We are conceived in water and birthed in water, so it is natural that women, as the life givers, would be the caretakers of the water.

Traditionally, Anishinaabekwe (Ojibway women) listen to the water. For instance, the first cracking of the ice during the early spring thaw indicates to them that the time for spring ceremonies has come, so preparations get underway.

One spring ceremony is the Water Ceremony which pays respect to Spirits of the Water. It is a time for being thankful for the gifts of the water and to ask for the continued blessings that the water provides. It is also a time for the people as caretakers to be cognizant of the needs of the water itself.

Many Anishinaabe fear for the safety of the water today and the devastating effect of polluted pure water flowing through the veins of Aki. The impure water eventually effects all other living things-the two-legged, the four-legged, the winged, and the ones who live under the water. All creation feels the hurt from damaged water.

Note: Acknowledgments for the information above to: Eddie Benton-Benai and Robert Van Zile, Three Fires Midewiwin Society; Francis Van Zile, Mole Lake Band of Chippewa, and Fred Ackler, Mole Lake Band of Chippewas)

5. Nova Corporation 1998 Application to Remove Water for Export

The Batchewana First Nation of Ojibways would first state that a proper and meaningful consultation process by Ontario in regards to the permit to remove water for export from Eastern Lake Superior issue was absent. Ontario has the delegated authority for the management and conservation of freshwater fisheries (correspondence dated July 14, 1998 received from the Honourable David Anderson, Minister of Fisheries and Oceans to Chief Angela Neveau, Batchewana First Nation, attached).

The Batchewana First Nation currently exercises an aboriginal/treaty right to commercially fish on Siesta Shoal, Mica Shoal and Montreal Shoal which are in the application area by Nova Corporation. Batchewana First Nation did not receive any notice of Nova Corporation's application even though there may have been severe limitations placed on our right to fish contained within the approval of this application. It is through the ballast water from shipping industry activities that non-original fish species are introduced into the Great Lakes ecosystem.

The Ontario government considered that public consultation (a legislative instrument found in the Ontario law through the Environmental Bill of Rights) regarding Nova Corporations application to remove water from an area of the waters in which we harvest fish on an annual basis as part of our aboriginal/treaty right as sufficient. It is important to note that the public consultation was limited to posting notice on the Internet bulletin board for Ontario's Environmental Registry for thirty days.

In a letter dated May 4, 1998 from Ontario's Minister of the Environment, Norman Sterling, addressed to Lloyd Axworthy, Minister of Foreign Affairs, regarding Nova Corporation's application to remove water from Lake Superior (letter attached), the Honourable Norman Sterling states " For your information, the Ontario Ministry of Environment did pursue a public consultation process as required by Ontario law through the Environmental Bill of Rights Registry. No comments were received."

Batchewana First Nation has no Internet capacity to review the Environmental Bill of Rights Registry on a daily, weekly, monthly basis. There was no notice was published in any newspaper. In fact, not one First Nation within the Robinson Superior Treaty area were aware of the application of the Nova Corporation until after the permit was issued.

After a public outcry, The Honourable Norman Sterling stated as one of his reasons for canceling the first approved permit was "2) Appropriate consultation with other agencies and interested parties was not conducted as prescribed in paragraph 5a) Section 34 of the Ontario Water Resources Act" which came into effect after the Nova Corporation application. **Batchewana First Nation agrees.**

Batchewana First Nation of Ojibways who would probably suffer the most from any harm

05/05/98 TUE 16:36 FAX 312 201 0683
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GLPF MAILBOXES, ETC.

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May 4, 1998

The Honourable Lloyd Axworthy
Minister of Foreign Affairs
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2

Dear Mr. Axworthy:

I am writing to express my concern about the export of Ontario's water resources and any diversion of water from the Great Lakes. I can assure you that my ministry will continue to protect Ontario's environment by setting and enforcing tough standards and guidelines within our jurisdiction. However, the primary responsibility for laws governing export remain clearly in the federal domain and I anticipate you will be taking the appropriate action to address concerns about this situation.

The permit issued by my ministry was simply a permit to take water, not to export it. The permit was issued because it was determined that the taking of the specified amount of water would not have a significant environmental impact to this area of Lake Superior, nor did it trigger the consultation requirements under the Great Lakes Charter. Specifically, as you know, the Charter references the taking of 19 million litres of water per day, averaged over a 30-day period as the trigger point at which consultation with the U.S. is required. The amount specified in this permit clearly falls below that target.

For your information, the Ontario Ministry of the Environment did pursue a public consultation process as required by Ontario law through the Environmental Bill of Rights Registry. No comments were received.

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Davy Bellenger,
Counsellor - Mail

Minister of
Fisheries and Oceans

Ministre des
Pêches et des Océans

Ottawa, Canada K1A 0E6

JUL 14 1998

Chief Angela Neveau
Batchewana First Nation of Ojibways
Reserve 15D
236 Frontenac Street - RR #4
Sault Ste. Marie, Ontario
P6A 5K9

Dear Chief Neveau:

I want to thank you for your letter of May 4, 1998. I enjoyed the opportunity to meet with the Assembly of First Nations National Fisheries Committee in February 1998.

First of all, I would like to place the issue of delegation of authority into its constitutional context. Jurisdiction over fisheries is shared by the federal and provincial governments.

Section 91 (12) of the *Constitution Act, 1867* gives the federal government responsibility for sea coast and inland fisheries. In general, in freshwater (inland) fisheries, the provinces have partial jurisdiction over fisheries that arises from provincial ownership of the underlying solum (or waterbed), or where the bed is privately owned, from their jurisdiction under section 92 (13) of the *Constitution Act, 1867* over property and civil rights.

For an inland fishery, jurisdiction over property and civil rights establishes provincial authority over proprietary aspects of a fishery, such as harvest allocation (i.e. who will be issued a licence). For example, the province allocates the fishery after conservation needs are met. The federal government establishes management and conservation measures such as gear restrictions and open and close times.

The Government of Canada has delegated the authority for the management and conservation of freshwater fisheries resources to the province. In particular, application and administration of federal regulations made under the *Fisheries Act*. As part of this arrangement, the province recommends proposed amendments to the *Ontario Fishery Regulations* made under the *Fisheries Act* to the Department of Fisheries and Oceans. However, these proposed amendments must be processed in accordance with the federal regulatory process.

Canada

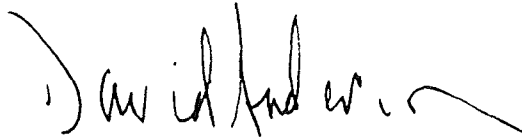


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In 1899, the Government of Canada and the Province of Ontario entered into an administrative arrangement for fisheries management of inland fisheries. On May 8th, 1926, this arrangement was formalized by way of Order-in-Council PC 714. This Order-in-Council explicitly confirms that administration of inland fisheries in Ontario was transferred to the province in 1899. A copy of Order-in-Council PC 714 is available from the National Archives of Canada upon request.

I hope you will find this information useful.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "David Anderson". The signature is written in dark ink and includes a long, sweeping horizontal stroke at the end.

David Anderson, P.C., M.P.