# Annex 2001 and Protection of the Waters of the Great Lakes: Legal Implications of Provincial Participation

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## I. Introduction.

Great Lakes water diversions have a long history in Canada-U.S. relations, a history marked by both conflict and cooperation. The last few years have seen the return of an intense debate about the wisdom of large-scale removals of water from the Great Lakes and about the ability of American and Canadian governments to prevent or control such removals. The impetus behind the latest round of debate was a 1998 proposal by a Canadian company to remove millions of litres of water from Lake Superior and ship it by tanker to Asia. An Ontario permit to allow the export was initially granted with only minimal scrutiny but was later rescinded in the face of very intense criticism. This incident touched a deep anxiety within the Great Lakes Basin. What shocked many was not just that there was commercial interest in Great Lakes water but also that the mechanisms in place for managing proposals to export it from the Basin were inadequate. Actions at many levels followed to address the perceived inadequacies, including adoption of a new regional agreement among the Great Lakes states and the provinces of Ontario and Québec, known as "Annex 2001".[1]

In adopting Annex 2001, the leaders of the Great Lakes jurisdictions agreed to develop a binding agreement within three years that will ensure a cooperative and harmonized system of water management for the Basin. A sense of urgency has given

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way to a desire to put effective and enduring mechanisms in place before new proposals come forward. Certainly, reaching a final agreement will be technically, politically and legally challenging.[2] However, if agreement can be reached in accordance with the terms of Annex 2001, it will have far-reaching consequences for the Basin as a whole, as well as for each of the individual jurisdictions comprising the Basin.

While it seems counterintuitive that those in the world's largest freshwater system should worry about water, the "waters of the Great Lakes, are for the most part, a nonrenewable resource," renewed annually by less than 1% of their volume.[3] Thirty million people depend on the waters of the Great Lakes Basin for drinking, sanitation, agriculture, industry and power, shipping and recreation, and use is expected to rise in the future. The Great Lakes are under a multiplicity of stresses[4] that point to an uncertain future, and management has been inconsistent and not well-coordinated. Thus, the primary motivation behind Annex 2001 is a strong regional consensus on the need to protect the waters of the Great Lakes Basin for their present and future environmental, economic and social importance to the region.

Despite the challenges, Annex 2001 represents an unprecedented opportunity to put in place common regional water management principles and tools that emphasize sustainability, conservation and ecosystem values. Some significant legal and administrative changes will be needed to ensure full implementation. One of the most

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[1] Council of Great Lakes Governors, *The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter*, signed June 18, 2001, available online at www.cglg.org ("Annex 2001").

[2] See discussion in International Joint Commission, International Water Uses Review Task Force, *Protection of the Waters of the Great Lakes: Three Year Review* (8 November 2002). Also see, Tom Henry, "Water diversion accord on hold," The Toledo Blade, November 16, 2002, www.toledoblade.com.

[3] International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* (Washington, D.C. and Ottawa: IJC, 2000), p. 6.

important implications of Annex 2001 is that each of the 10 jurisdictions must implement a comprehensive water management system. Each is currently at a different stage of development and must assess what will be needed to put a comprehensive system in place. Depending on the approach taken, changes could require us to rethink: our assumptions – if nothing else, at least about the relative abundance of Great Lakes water; our priorities – from unlimited use to conservation; our loyalties – beyond our province or state to the Great Lakes Basin as a whole; and our legal rights and obligations – including whether riparian rights should be completely replaced with a comprehensive permit system. Each of these demands more than the commitment of the ten government leaders. Implementing changes consistent with the intent of Annex 2001 will require broad public understanding and acceptance.

The purpose of this paper is to explore one aspect of this initiative, the legal issues associated with provincial participation in Annex 2001, primarily as a matter of Canadian law.[5] There are several components to this exploration. First are the threshold questions as to the basis for provincial participation, in particular whether Québec and Ontario can enter into a binding agreement with the Great Lakes states and whether they have full authority to make the decisions necessary to implement agreement obligations. This is a matter of Canadian constitutional law. Second are the questions as to what changes will be required for each province to ensure its compliance with the provisions of Annex

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[4] For example, the Great Lakes face challenges from toxic contaminants in water, biota and sediments, alien invasive species, air pollution and climate change. See, International Joint Commission, *11th Biennial Report on Great Lakes Water Quality* (Washington, D.C. and Ottawa: September 2002).

[5] Many of the issues involved in state participation are explored in Chris A. Shafer, "Great Lakes Diversions Revisited: Constraints and Opportunities for State Programs," (2000), 17 T.M. Cooley L. Rev. 461. Also see, Gary Ballesteros, "Great Lakes Water Exports and Diversions: Annex 2001 and the Looming Environmental Battle," (May 2002), 32 Environmental Law Reporter 10611.

2001. This is a matter of evaluating the scope and effectiveness of existing regulatory schemes and identifying the gaps to be filled.

## II. Background.

The previous round of debate over the fate of Great Lakes water, in the mid 1980s, was primarily concerned with proposals to divert water from the Basin into other drainage basins in the United States.[6] In response to such proposals, the Council of Great Lakes Governors undertook development of a regional cooperative initiative which culminated in 1985 in adoption of an agreement, known as the "Great Lakes Charter" by the leaders of eight states and two provinces.[7] The focus then was on developing a uniform process to be followed by all of the state and provincial governments when facing diversion or consumptive use proposals. Under the Charter, the governors and premiers agreed to consult with and take the advice of each other if any one of them was approached with a large-scale diversion or consumptive use proposal. The leaders also agreed to develop and coordinate information, research and management programs. In this way, it was thought, proponents could not play individual governments off against each other; rather, diversion proponents would be faced with a common, regional response and, it was hoped, this response would ensure conservation and protection of Great Lakes waters.

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[6] Several proposals are discussed in Michael J. Donahue, Alicia A. Bixby and David Siebert, "Great Lakes Diversion and Consumptive Use: The Issue in Perspective," (1986), 18 Case Western Reserve J. Intl. L. 19.

[7] The history is traced in Peter V. MacAvoy, "The Great Lakes Charter: Toward a Basinwide Strategy for Managing the Great Lakes," (1986), 18 Case Western Reserve J. Intl. L. 49. The Charter recognizes that the Great Lakes constitute a single hydrologic system, in which the many uses of the Lakes are interdependent. The purposes of the Charter are to conserve levels and flows, protect and conserve the environmental balance, provide for cooperative programs and management, make secure present developments and provide a secure foundation for future regional investment and development.

Despite public pressure for a ban, diversions from the Great Lakes were not prohibited under the Charter, but were to be evaluated on their merits. Guiding this approach were some then-recent court decisions holding that an outright ban on interstate exports of water or differential standards between inter- and intrastate allocation would violate U.S. constitutional law, but that discriminatory restrictions might be justifiable where necessary to protect a compelling state interest, such as a local water shortage, provided regulation is even-handed:[8]

> "Evenhanded regulation is permitted; thus a state that imposes stringent conservation requirements on its own water users as a condition of holding a water right can impose like conditions on exports. This opens up the possibility that what may amount to de facto unequal application of de jure evenhanded water allocation statutes can act very much like an export ban. ... Another possible means of limiting water exports is the state taking control of water and making all new large scale water uses the subject of a state-run leasing program."[9]

Although the Charter did not ban inter-basin diversions, its adoption nevertheless left lingering concerns about its enforceability, particularly under U.S. constitutional law.[10] In response to these concerns, Congress gave express legal recognition to the governors' arrangement. Under the 1986 *Water Resources Development Act*, diversions from the Great Lakes or their tributaries to areas outside the basin were prohibited

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[8] *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982). This case established that groundwater is an article of commerce that falls within Congress' commerce power, limiting states' ability to regulate it in ways that unreasonably burden interstate commerce. The court stated that the conservation purpose behind the Nebraska law was legitimate but that one aspect of the scheme, requiring reciprocity in the state of import, interfered with interstate commerce.

[9] Robert Haskell Abrams, "Interstate Water Allocation: A Contemporary Primer for Eastern States," (2002), 25 U. Ark. Little Rock L. Rev. 155, at pp. 163-4. Also see discussion in Mark J. Dinsmore, "Like a Mirage in the Desert: Great Lakes Water Quantity Preservation Efforts and Their Punitive Effects," (1993), 24 U. Toledo L. Rev. 449.

[10] The Charter was referred to as "a kind of gentleman's agreement" by the U.S. District Court in *Little Traverse Bay Bands of Odawa Indians* v. *Great Spring Waters of America, Inc.*, (2002), 203 F.Supp.2d 853 (W.D. Michigan), p. 858.

without the approval of each of the eight governors.[11] This arrangement applied only to diversions and not to consumptive uses, and applied to any diversion regardless of size, in contrast to the Charter's consultation provisions that applied only for large-scale diversions. This arrangement was intended to operate as a waiver by Congress of the "dormant commerce clause".[12] Two diversions have been approved under this provision, each within a Great Lakes state but to an area outside the basin.[13]

This appeared to be an effective[14] and workable arrangement until 1998. On March 31 of that year, the Ontario Ministry of the Environment issued a "permit to take water" allowing Nova Group of Sault Ste. Marie to take 10,000,000 l/d from Lake Superior and export it by tanker to Asia. Although the proposal had been posted on Ontario's electronic registry, allowing a 30-day comment period, no comments had been

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[11] 42 U.S.C. s. 1962d-20(d). The Act applies to diversions from the portions of the Great Lakes that are within U.S. territory and does not apply to groundwater. The Canadian provinces are not included but the Charter continues to apply to them.

[12] That is, states cannot interfere with interstate commerce (a federal power) and it was feared that state restrictions on diversion of water could be struck down on this ground. Congress has the power to delegate its authority provided it specifies an "intelligible principle" or standard to guide implementation. This is what *WRDA* is intended to do, thereby insulating the arrangement from constitutional challenge. Some have questioned whether *WRDA* in fact met the intelligible standard requirement: see International Joint Commission, International Water Uses Review Task Force, *Protection of the Waters of the Great Lakes, Three Year Review* (Ottawa: IJC, November 2002), p. 27. In contrast, Shafer argues that the language, even though vague, is sufficient to meet the requirements for valid delegation: "Great Lakes Diversions Revisited," supra note , at p. 487.

[13] These cases underline the point that the focus of governance is the Great Lakes basin, and not the states themselves. One approved a diversion to Akron, Ohio; the other to Pleasant Prairie, Wisconsin. In both cases, water would be returned to the basin, leading to no net loss. A proposal to divert water to the town of Lowell, Indiana was vetoed by the Governor of Michigan. See Dinsmore, "Like a Mirage in the Desert," supra note x. A proposal to divert groundwater from the basin to the Mississippi River system in Northern Wisconsin was ruled as not triggering *WRDA* because it only applies to "waters of the Great Lakes" and not to groundwater. A Michigan irrigation project triggering the Charter's consultation requirements as a major consumptive use was also outside of *WRDA*: International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* (Ottawa and Washington, D.C.: IJC, 2000), p. 37.

[14] At least with respect to diversion proposals. One of the flaws of the Charter from an environmental perspective was its assumption that diversions out of the basin and consumptive uses were the most important problems. There is a great deal of evidence to suggest that other issues in water management, such as the cumulative effects of waste/misuse of water within the basin, diversions between sub-basins, pollution, climate effects, etc. were not being addressed in a coordinated way among basin jurisdictions. [IJC, GLU]

received. However, once the permit was issued and news circulated about it, a hailstorm of criticism descended on the Ontario government from all corners of the Great Lakes basin. It was suggested that the Ontario government had not appreciated the implications of such an export for the future of water management in the basin and that it had failed to consult with its neighbouring jurisdictions as required under the Charter. The Ministry quickly developed a new "Surface Water Transfers Policy" and cancelled the permit in reliance thereon.[15]

This incident demonstrated some of the gaps in the existing arrangements. First, the Canadian provinces are not subject to the binding *WRDA* requirement that all governments be notified and unanimously approve any diversion proposal before it can proceed. Second, the non-binding Charter applies only to certain proposals. Thus, where the amount of water to be removed from the Basin does not meet the threshold in the Charter, i.e., 19 million l/d, there is no requirement that the other parties be notified and allowed to comment. Also, *WRDA* deals only with "diversions" and the Charter only with "diversions" and "consumptive uses" and bulk export by tanker was arguably not clearly included in the definition of either, even if the impact on the basin might be the same in each case.

What followed this incident were many actions in a number of jurisdictions. The American and Canadian federal governments referred the issue to the International Joint Commission for study and report.[16] As well, *WRDA* was amended,[17] the Canadian

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[15] [cites]

[16] A study team was assembled, public hearings were held and a final report issued in 2000: see, International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* (Washington, D.C. and Ottawa: IJC, February 22, 2000).

[17] *Water Resources Development Act 2000*, Pub.L. 106-541, s. 504. This added "export" to the prohibited activities requiring approval by the governors and added a policy of encouraging "the Great Lakes States, in consultation with the Provinces of Ontario and Quebec to develop and implement a mechanism that

*International Boundary Waters Treaty Act* was amended,[18] new regulations and legislation were adopted in states and provinces[19] and the Council of Great Lakes Governors and Premiers entered into negotiations that culminated in June of 2001 in the adoption of the agreement known as "Annex 2001".

Annex 2001 is a subsidiary agreement to the Great Lakes Charter. It is an intermediate step toward the adoption of a binding agreement among the 10 jurisdictions within 3 years, by June of 2004.[20] The focus of this agreement will be the establishment of "a decision making standard that the States and Provinces will utilize to review new proposals to withdraw water from the Great lakes Basin as well as proposals to increase existing water withdrawals.."[21] The principles on which this new standard will be based are:

- "Preventing or minimizing Basin water loss through return flow and implementation of environmentally sound and economically feasible water conservation measures; and
- No significant adverse individual or cumulative impacts to the quantity or quality of the Waters and Water-Dependent Natural Resources of the Great Lakes Basin; and
- An improvement to the Waters and Water-Dependent Natural Resources of the Great lakes Basin; and

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provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin."

[18] Bill C-15, amending the *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17. These amendments prohibit the removal of water from boundary waters and taking it outside its basin. The Canadian government also attempted to get agreement of all the provinces to an accord banning the bulk removal of water from major drainage basins in Canada. This was considered necessary because of proposals to export water from other areas of Canada, in particular Newfoundland and British Columbia.

[19] See, for example, *La Loi visant la préservation des dessources en eau,* S.Q. 1999, c. 63, as amended by *Loi modifiant la Loi visant la préservation des ressources en eau,* S.Q. 2001, c. 48.

[20] Annex 2001, supra note , Directive #1. The form of this agreement is a difficult issue. For the U.S. states, an interstate compact would not only provide authority to affect interstate commerce but would also be enforceable. However, a compact could not bind the provinces in the same way it would bind the states, as discussed infra.

[21] Annex 2001, supra note , Directive #3.

- Compliance with the applicable state, provincial, federal, and international laws and treaties."[22]

Other commitments include public participation in the preparation and implementation of the binding agreement, a decision support system for information management and analysis and a number relating to coordination of monitoring and implementation.

Annex 2001 builds on the structures of the Charter but is much more far-reaching. For example, Annex 2001 does not even reference water diversions or exports but applies to "withdrawals" of water from the basin, regardless of size. This means that even small or routine withdrawals for use within the Basin will be evaluated under the common standard. This focus will allow for the uniform treatment of all withdrawals regardless of their destination or purpose and for the monitoring of cumulative impacts. Another change is that Annex 2001 goes beyond requirements of notice and consultation and requires that all withdrawals comply with a common standard before they can proceed. This standard will focus on *conservation* of basin water and *improvement* in the quality of water and water-dependent natural resources. These changes ensure that proposals for withdrawals *within* the basin will be subject to the same process and substantive evaluation as proposals for diversions and export of water *outside* the basin. This non-discriminatory and ecologically grounded approach opens the way for sustainable water management of the basin as a whole.

This new approach is considered necessary not only because of the perceived gaps in the Charter and *WRDA* and their vulnerability under U.S. law but due to a dramatic shift in the context of the debate since 1985. The issue is now dominated by the international trade agenda – by the language of the North American Free Trade

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[22] Annex 2001, supra note , Directive #3.

Agreement and the GATT and by how that language has been interpreted in numerous cases.[23] There are widely-differing views on the implications of trade obligations,[24] but the governments are basing their actions on certain conclusions. First, the national governments and the International Joint Commission are satisfied that while water is in its "natural state" it is not a product or good to which trade regimes apply.[25] This means that governments can conserve and manage water resources and protect ecosystem integrity, including determining whether and on what terms to allow exploitation and the pace and manner of exploitation. Second, once exploitation is allowed and water is captured, the trade regimes apply. In particular, Article XI of the GATT disallows prohibitions or restrictions (other than duties, taxes or other charges) on the export of products.[26] Articles XI and XX of the GATT allow for exceptions to this. Article XI allows export prohibitions or restrictions to alleviate critical national shortages, and Article XX allows them if "necessary to protect human, animal or plant life or health," or if they "relat[e] to the conservation of exhaustible natural resources" but only "if such measures are made effective in conjunction with restrictions on domestic production or consumption". Article XX exceptions must also meet the requirements that they not be

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[23] [cites] NAFTA came into effect in January 1994. WTO/GATT cites. The purpose of this discussion is not to evaluate the validity of Annex 2001 in light of trade obligations. Rather, it is simply to establish one of the major forces motivating Basin governments to pursue Annex 2001 and shaping its form.

[24] See for example, Christine Elwell, "NAFTA Effects on Water: Testing for NAFTA Effects in the Great Lakes Basin," in Commission for Environmental Cooperation, *The Environmental Effects of Free Trade: Papers Presented at the North American Symposium on Assessing the Linkages between Trade and the Environment (October 2000)* (Montreal: CEC, 2002); Steven Shrybman, *Water Export Controls and Canadian International Trade Obligations*.

[25] This is not in the text of either agreement. With respect to NAFTA, the three signatories issued a joint statement in December 1993, prior to NAFTA coming into effect, declaring that "unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA... Water in its natural state in lakes, rivers, reservoirs, aquifers and the like is not a good or product..." Despite this statement, many have questioned whether it could influence the interpretation of the agreement and whether it is in substance consistent with U.S. domestic law or international law: see, Shrybman, s. 2.1.

[26] [disagreement over whether national treatment applies to Art XI – Shrybman]

"applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." The panels and appellate bodies that have considered these exceptions have construed them quite strictly and have failed to allow conservation measures to stand where they are either discriminatory or are protectionist.

Third, NAFTA contains more restrictions than the GATT. For example, NAFTA does not allow the use of export duties, taxes or charges valid under the GATT and export restrictions otherwise justified under GATT Article XX may violate Article 315 of NAFTA, which imposes an obligation to maintain existing proportions between domestic supply and exports when exports are reduced. In addition, NAFTA provides that investments in one NAFTA country by nationals from another NAFTA country must be accorded national treatment and receive a minimum standard of treatment. Water-related investments could include access to water in its natural state. As well, these investments cannot be "expropriated"[27] without meeting certain conditions, including the payment of compensation. The above Art. XX exceptions do not apply to rights under this chapter so that even non-discriminatory regulations with a true conservation purpose could lead to a successful challenge.[28]

The effects of the trade agreements on basin and national governments' ability to limit the export of water are uncertain, disputed and as yet untested. Short of the federal governments negotiating an amendment to the trade agreements, Basin jurisdictions can at best take steps to protect their interests bearing in mind the trade obligations and hope

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[27] Or limited in a way that is "tantamount to expropriation". This has been broadly interpreted.

[28] A pending c. 11 case involves the withdrawal of provincial licences to export water from British Columbia, where settlement was reached with a Canadian company but not with a U.S. company holding a licence. The U.S. company, Sunbelt, claims damages under c. 11 arguing its investment was expropriated.

they will be upheld should a dispute arise. It seems clear that governments cannot refuse water export without a legitimate conservation or environmental protection purpose. Even then, conservation must also be imposed on users within the Basin and measures cannot be applied in an arbitrary or discriminatory way.[29] Furthermore, investors from the three NAFTA countries must be treated evenhandedly. It has been suggested that to avoid falling afoul of the investment provisions of NAFTA, governments "should avoid creating undue expectations by clearly articulating their water-management policies in a fully transparent manner, by acting in a manner that is entirely consistent with their stated policy, and by limiting the time for which authorizations are valid."[30] The regulatory system must be a true environmental regime, not a protectionist one cloaked in environmental guise.

These demands motivate Annex 2001 and the efforts to create a Basin-wide water management regime. The irony is that these demands are, unintentionally, creating for the first time both the conditions and the will to develop a management regime that is consistent with the ecosystem approach and principles of sustainable development.

## III. Provincial Participation: the Constitutional Context.

Ontario and Québec are participating in Annex 2001 on equal terms to the Great Lakes states, implying that they have full powers to meet their obligations thereunder. This section explores the extent to which Canadian constitutional law allows the provinces to "deliver" on their commitments. Two questions are considered in this part.

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[29] The Government of Canada takes the view that differential standards for in-basin use and out-of-basin diversion are justifiable: see discussion in International Water Uses Review Task Force, *Three Year Review, supra*.

[30] International Joint Commission, *Protection of the Waters of the Great Lakes, supra* p. 34.

First, do provinces have the power to enter into a binding arrangement with the Great Lakes states? And, second, assuming so, do they have full power to ensure compliance with the provisions of the Annex?

**Provincial Authority to Enter Binding Agreements.**

The first question requires some explanation of the foreign affairs powers of Canadian governments, which are not explicit in the Canadian Constitution. The prevailing view is that only the federal executive has authority to negotiate international treaties. Québec has maintained, since the 1960s, that it has treaty-making power, but this view "has never commanded wide acceptance in Canada. Certainly, it has never been accepted by the federal government."[31] However, even if treaty making is exclusively a federal power, treaty implementation is divided between provinces and the federal government, depending on the subject matter of the treaty. If the subject falls within provincial jurisdiction, the federal government has no authority to adopt legislation implementing the treaty.[32]

Regardless of whether provinces have power to enter into obligations recognized under international law, they do have power to negotiate agreements with other governments, including foreign ones. There is a long tradition of federal-provincial and inter-provincial agreements addressing a wide variety of issues within Canada. As well, hundreds of agreements have been concluded between provinces and U.S. states. The

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[31] Peter Hogg, *Constitutional Law in Canada*, pp. 11-16 to 11-18. The silence of the Canadian Constitution on this issue reflects Canada's status at Confederation in 1867 as a dominion whose foreign affairs would continue to be conducted by Britain.

[32] The only exception to this is for "Empire" treaties, that is, those that were negotiated on behalf of Canada by the U.K. prior to Canada's assumption of full authority for its international relations. The most important water related example of such a treaty is the Boundary Waters Treaty of 1909. The federal government acted under this head of power in adopting the recent amendments to the *International Boundary Waters Treat Act*.

authority to enter into such agreements is not found in the Canadian Constitution but the courts have recognized it as a common law power of the executive.[33] Legislation is not required, but where statutes do delineate the powers of particular officials to enter agreements or set out consultation or approval requirements, they must be followed.[34] As well, the validity of intergovernmental agreements can be challenged on a number of grounds, including constitutional and administrative law grounds.[35]

The extent to which these intergovernmental agreements are binding on the parties and on third parties varies, depending on a number of factors, with several levels of formalization possible.[36] The courts have suggested that some are simply political accords, that identify the ways in which two governments intend to exercise their powers in the future.[37] These political agreements are generally considered unenforceable by either the parties[38] or third parties and, based on the principle of parliamentary sovereignty,[39] can be unilaterally repudiated without legal recourse. In other words, if two governments initially agree but one then fails to carry out the agreement, there is no legal remedy possible. Only a political solution will be available.

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[33] Hogg, *Constitutional Law of Canada, supra,* p. 11-16. This has been accepted in many cases, e.g., *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

[34] *A.G. Canada v. Saskatchewan Water Corp*oration, [1991] 1 WWR 426.

[35] See discussion in Nigel Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Arrangements in Canada and Australia," (1991), 29 Alta. L. Rev. 792.

[36] John Whyte, "Issues in Canadian Federal-Provincial Cooperation," in J. Owen Saunders, *Managing Natural Resources in a Federal State* (CIRL), 322-336, at p. 324. The courts look at the form of the agreement, the intention of the parties as reflected in the substance of the agreement, the language used, and whether dispute resolution is provided for in the agreement.

[37] Whyte, "Issues in Canadian Federal-Provincial Cooperation," supra. An example of a political accord is the Canada-Wide Accord on Environmental Harmonization, discussed in *Canadian Environmental Law Association v. Canada,* 30 C.E.L.R.(N.S.) 59 (Fed. Ct., T.D.), aff'd 34 C.E.L.R.(N.S.) 159 (Fed. C.A.).

[38] While they resemble contracts, "they are not like ordinary contracts," enforceable by the parties: *Reference re Canada Assistance Plan (B.C.),* [1991] 2 S.C.R. 525. However, interpretive principles from contract law are used to interpret the terms of the agreements: see, Didier Culat, "Coveting Thy Neighbour's Beer: Intergovernmental Agreements, Dispute Settlement and Interprovincial Trade Barriers," (1992), 33 Les Cahiers de Droit 617-638.

[39] That is, that Parliament and provincial Legislatures reserve the power to modify the decisions of their predecessors.

Other agreements have been considered binding, enforceable by the parties[40] and in some cases by third parties.[41] Some agreements have been formalized as either "legislative agreements", where the governments confirm the terms and provide for implementation through legislation,[42] or "constitutionalized agreements", where the agreement is entrenched in the Constitution.[43] Without these formalities, the Crown can contract only to bind itself. An executive agreement alone cannot change provincial legislation or affect the rights of third parties; legislation will be required to do so.[44] However, even for legislative or constitutionalized agreements, the principle of parliamentary sovereignty allows a government to change its mind and amend or repeal legislation or seek an amendment to the constitution even though an agreement remains

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[40] Agreements that closely resemble commercial contracts, for example, those that address commercial subjects, are written in precise language, and contain standard contract clauses, will be enforceable by the parties. See discussion in Alastair R. Lucas and Cheryl Sharvit, "Underlying Constraints on Intergovernmental Cooperation in Setting and Enforcing Environmental Standards," in Patrick C. Farfad and Kathryn Harrison, eds., *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston, Ont.: Queen's University School of Policy Studies, 2000), pp. 149-150. If the parties are willing to continue the agreement and want to resolve disputes, they can agree to submit them to the courts or to arbitration. Some federal-provincial agreements specify a route for dispute settlement, usually the Federal Court (see, for example, *the Master Agreement on Apportionment for the Prairie Provinces Water Board*), while some create their own dispute resolution mechanism, such as in the *Agreement on Internal Trade* (discussed infra) or the Northern Flood Agreement (*Agreement Between The Government of Manitoba, The Manitoba Hydro-Electric Board, The Northern Flood Committee, Inc. and the Government of Canada*, Dec. 16, 1977, Article 24). Under the *Federal Court Act*, the Federal Court has jurisdiction over controversies between provinces where the provinces have passed legislation agreeing to its jurisdiction. See, R.S.C. 1985, c. F-7, s. 19.

[41] The cases suggest that third parties have standing to challenge implementation of an agreement only if it is implemented through legislation: see cases discussed in Bankes, "Co-operative Federalism," supra note .

[42] There are a number of different forms this legislation can take but specific statutory language will be required to change the law of the province and bind third parties. See Bankes, "Co-operative Federalism," supra note . Bankes suggests that if the agreement is referenced in the legislation, it can be used to assist in interpreting the legislation and guide its implementation.

[43] Whyte, "Issues in Canadian Federal-Provincial Cooperation," supra. This has rarely been done in Canada. An example would be the Natural Resources Transfer Agreements.

[44] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, per Laskin, C.J.C.

in place.[45] Of course, changes to legislation or the constitution must be made through the relevant amendment processes, with the attendant procedural requirements.

The preferred vehicle for binding the states to the Annex 2001 commitments is the use of an interstate compact, which is provided for under the U.S. Constitution. Even though there is some debate over whether states can enter into a binding compact with foreign governments,[46] such a compact would have no legitimacy under Canadian law, other than as an intergovernmental agreement subject to the interpretive rules discussed above. There is no equivalent provision in the Canadian Constitution and, in fact, delegation of legislative powers from the federal government is prohibited. If history is a guide, it is also unlikely that the Congress would endorse a compact including the provinces. In the existing Great Lakes Basin Compact, Congressional consent was withheld for 13 years over the issue of including Canadian provinces as members; when consent was given, it excluded the provisions of the compact dealing with the provinces.[47]

In summary, Ontario and Québec have the power to enter into an accord, such as Annex 2001, with U.S. states. However, absent federal involvement, such an agreement would not create obligations that are binding in international law. Furthermore, the parties to an accord will have difficulty enforcing provincial adherence to its terms unless the agreement itself creates specific obligations and either provides for a dispute resolution mechanism or is implemented through legislation. Implementing legislation

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[45] *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525. This is a common law principle but it is also expressed in federal and provincial *Interpretation Acts*: see, for example, *Interpretation Act*, R.S.O. 1990, c. I.11, s. 13.

[46] See discussion in International Water Uses Review Task Force, *Three Year Review, supra*, p. 33.

[47] See Public Law 90-419, 90th Congress, S. 660, July 24, 1968, s. 2. Ontario and Québec were "observers" but now participate on the Great Lakes Commission with "Associate Member" status, pursuant to a Declaration of Partnership signed in 1999: www.glc.org.

will be necessary to effect a change in provincial water resource law and to afford third parties standing to challenge a province's implementation of the terms of the accord. However, no matter how the agreement is implemented, provincial governments retain the right to change their minds; if at some point a province decides it is in the public interest to back out of the agreement, it is free to do so.[48] It is not clear what the chances of repudiation might be, but it should be noted that the Canadian experience has been that intergovernmental agreements are "treated with a high level of political respect," and thus are usually followed in practice and that ".. governments consider altering their commitments under a political accord only in dramatic circumstances..."[49]

**Provincial Authority to Manage Water Resources.**

The second question is a matter of the extent to which provinces can control decisions about water management, allocation and use within their territory. Under the Canadian Constitution, jurisdiction over water management is overlapping. While the provinces have wide powers to manage the water resources within their boundaries, these powers are not exclusive to the provinces and their exercise must take into account the federal government's jurisdiction, particularly over transboundary (international and inter-provincial) waters, fisheries, navigation and trade. In addition, provincial water management must take into account the constitutionally-protected rights of First Nation communities. Thus, while most aspects of water management are within exclusive provincial control, some decisions and certain types of projects will require the participation and consent of other governments.

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[48] This is similar to the way in which international agreements work in relation to domestic law.
[49] Whyte, "Issues in Canadian Federal-Provincial Cooperation," supra, pp. 324-325.

**Provincial Jurisdiction**. In Canadian constitutional law, provinces have authority over water resources both as owners of public lands and as the primary legislators with respect to the "management and sale of public lands", resources and "property and civil rights" within their boundaries.

At Confederation in 1867, the Constitution provided that the "Lands, Mines, Minerals and Royalties" then "belonging" to the provinces would continue to belong to the provinces.[50] As well, all "public property" not otherwise allocated to the federal government was retained by the provinces.[51] The property falling within this allocation was all ungranted public lands, including the beds of rivers and other watercourses, and all water rights incidental to ownership of such lands, including riparian rights.[52] Subsequent cases have determined that Ontario owns the beds of the Great Lakes up to the international boundary and that Quebec owns the bed of the St. Lawrence River.

The effect of provincial property rights in public lands and resources is that it "carries with it power to act in respect thereof in the same way as an ordinary landowner."[53] Thus, a province can control whether to allow exploitation of its resources

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[50] Section 109, *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. All provinces eventually achieved the same terms through the *Natural Resource Transfer Agreement, Constitution Act, 1930,* (U.K.), 20-21 Geo. V, c. 26.

[51] *Ibid.*, s. 117.

[52] *Burrard Power Co. Ltd.* v. *R.*, [1911] A.C. 87 (P.C.) . In both common law and civil law in Canada, there is no concept of ownership of the water itself until it has been abstracted from a watercourse. See, Gerard V. LaForest, *Water Law in Canada – The Atlantic Provinces* (Ottawa: Information Canada, 1973), c. 7. This common law rule can be changed by statute. Landis concluded that this had not occurred prior to Confederation so that the water in the Great Lakes is not owned by the federal government: Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin," (1970), 48 Canadian Bar Rev. 66-157 at 100-106. And, even though provinces such as Alberta have adopted legislation that declares the Crown as the owner of all waters, neither Québec nor Ontario has done so. However, ownership of the beds of waterways combined with broad legislative powers is generally recognized to give the Crown in right of the province the exclusive power over the development of water resources.

[53] LaForest, *Water Law in Canada, supra*, p. 68.

and the terms and conditions of that exploitation, in ways that it could not do for privately-owned resources.[54]

> "Obviously, the rate of production, the degree of processing within the province and (subject to market conditions) the price at which it is to be sold can be controlled by the province as proprietor. These matters could not necessarily be controlled in the case of privately-owned resources, because legislation would be necessary and there are limits to provincial legislative power over natural resources, especially those resources destined for export from the province."[55]

Provincial legislative powers over the management and sale of public lands in s. 92(5) reinforce these proprietary powers. For privately owned lands and resources, the provinces have regulatory power pursuant to their legislative authority over "property and civil rights", "local works and undertakings", and the "development, conservation and management" of non-renewable natural resources, forestry resources and electrical energy generation.[56]

**Federal Jurisdiction.** The broad scope of provincial power over water resources is tempered by several aspects of federal power under the Constitution. Federal proprietary rights are limited within a province but certain categories of lands and works, including public harbours and canals, are owned by the federal government. Primarily,

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[54] Cases have accepted that provinces can impose conditions in leases or licences of provincially-owned resources as matters of contract that they would not be able to impose through legislation because they would trench on federal authority. E.g., two early cases upheld, respectively, a condition that all timber cut under a provincial licence be sawn into lumber in Canada prior to export and a condition that no Chinese or Japanese labour be employed in the cutting of timber: *Smylie v. The Queen*, (1900), 27 OAR 172 (C.A.); *Brooks-Bidlake v. A.G. B.C.*, [1923] A.C. 450. There has been a debate in the literature about the extent of this power and the appropriateness of this line of authority in light of a "renaissance" of federal powers over trade and commerce: see, Peter Hogg, *Constitutional Law of Canada,* Looseleaf Edition (Toronto: Carswell), p. , and William D. Moull, "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution," (1983), 23 Alta. L. Rev. 472-487; however, these cases have never been overruled.

[55] Hogg, *Constitutional Law of Canada, ibid.*, p. 28-4.

[56] *Constitution Act, 1867, supra* note x, ss. 92(13), 92(10) and 92A.

however, the reach of federal authority is set by its legislative powers that affect the use of waters and the trade in natural resources. Specific water-related powers include those over fisheries, navigation and shipping and some aspects of water pollution (under the general power to make laws for the "peace, order and good government" of Canada and under the criminal law power).[57] There is also judicial authority and practice to support a primary federal role in the regulation of inter-provincial[58] and international waterways[59] and any works, such as pipelines, that connect a province to another or to a location outside Canada are under federal control.[60]

The fisheries power gives the federal government control over the exploitation of inland fisheries, even though the fish themselves are "resources" owned by the provinces. This power includes the ability to legislate for conservation of fish stocks, for protection of the habitat of aquatic species and for the prevention of water pollution that would

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[57] *Constitution Act, 1867, supra* note x, ss. 91(12), 91(10), 91 (preamble) and 91(27) respectively. Federal regulation of pollution in provincial marine waters has been upheld as a matter of "national concern" and thus within the peace, order and good government power: *R. v. Crown Zellerbach,*[1988] 1 S.C.R. 401. Federal regulation of toxic substances has been upheld as a matter of criminal law: *R. v. Hydro Quebec*, [1997] 3 S.C.R. 213.

[58] *Interprovincial Cooperatives and Dryden Chemicals v. R.*, [1976] 1 S.C.R. 477. In practice, the federal government takes a cooperative approach, and as a result there has been little litigation. For example, allocation of the flow in the eastward flowing interprovincial rivers in the 3 prairie provinces is regulated through a federal-provincial mechanism, the Prairie Provinces Water Board, established in 1948 and administered through Environment Canada. (The Board also addresses water quality and integrated management for these rivers.) The Board follows the 1969 Master Agreement on Apportionment which is based on the principle of equitable sharing of flow between the 3 provinces. Alberta recently threatened to take more than its share of that flow in order to compensate for drought conditions; Saskatchewan responded to the effect that to do so would violate the federal-provincial agreement and Alberta took no action.

[59] This authority is based on the international relations power, s. 132 and perhaps on the peace, order and good government power and s. 92(10)(c), the power to declare works for the general advantage of Canada. See: LaForest, *Water Law in Canada, supra.* The federal government has passed legislation regulating improvements in rivers that flow across the international boundary (*International River Improvements Act*, R.S.C. 1985, c. ) and in boundary waters (*International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17). The latter implements Canadian obligations under the 1909 Boundary Waters Treaty, which requires approval by the International Joint Commission for any use, obstruction or diversion of boundary waters that will affect the level or flow of water on the other side of the international boundary. The Great Lakes are boundary waters subject to this regime but other waters in the Basin are not. Under this statute, the federal government recently adopted an amendment that prohibits withdrawals that will be taken outside of the basin in which boundary waters are located.

adversely affect aquatic life. The navigation and shipping power gives the federal government authority to regulate shipping and the use of, and all improvements on, navigable waterways, which are most of the inland waters of Canada. This power has been used to support legislation that requires federal permission for the construction of any work that may obstruct navigation. Clearly, these federal responsibilities could conflict with a provincial scheme for the exploitation of water resources. This would most likely occur with a proposal for the construction of works for the damming or diversion of water, particularly if it involves boundary waters such as the Great Lakes. Under Canadian constitutional law, where there is a conflict (and this is read quite narrowly), federal legislation prevails. Federal powers would most likely come into play where a proposal to divert water involves the construction of physical works.

Another area with the potential to constrain provincial action, particularly to prohibit the export of water, is that of the federal government's power to regulate "trade and commerce". Despite broad language, this power was very narrowly interpreted in the late 19th and early 20th centuries when final appeals went to the Privy Council, so that a strong federal role in these areas did not emerge,[61] leaving the provinces with a great deal of room to regulate the economy in ways that affected inter-provincial trade. Since the mid-20th century, when appeals to the Privy Council were abolished, the Supreme Court of Canada has expanded federal jurisdiction to some extent but the federal government

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[60] *Constitution Act, 1867, s.* 92(10)(a). This would include water pipelines.

[61] The history is traced in Hogg, *Constitutional Law of Canada, supra* note x, c. 20. The essence of the "interpretive problem" for the courts has been the need for "accommodation of the federal power over 'the regulation of trade and commerce' (s. 92(2)) with the provincial power over 'property and civil rights in the province' (s. 92(13)). On the face of it, these powers appear to overlap. ... However, the courts, by a process of 'mutual modification', have narrowed the two classes of subjects so as to eliminate the overlapping and make each power exclusive." (p. 20-2).

has been reluctant to push the boundaries of its powers.[62] Thus, this power has never reached the dimensions of the commerce power under the U.S. Constitution.

In Canadian law, the trade and commerce power is divided between two branches: a general commerce power, whereby the federal government may regulate aspects of commerce as a whole, such as competition, and a power to regulate inter-provincial and international trade. This latter branch has been the subject of a number of conflicting Supreme Court decisions, resulting in some confusion about the limits on provincial power to interfere with inter-provincial trade.[63] In some cases, the court restricted provinces to regulating only transactions occurring wholly within their territory, while transactions that entered the flow of inter-provincial or external trade were beyond provincial authority. In other cases, the court allowed provincial regulations that indirectly affected inter-provincial trade so long as they were not directly "aimed at" regulating such trade.

Certain limits are clear, however. Provinces cannot pass laws that prohibit extra-provincial transactions, such as trading between residents and non-residents, or adopt regulations that are discriminatory barriers to goods from other provinces.[64] As well, provinces cannot directly regulate extra-provincial trade – at most, an otherwise valid provincial scheme can indirectly affect such trade, though to what degree remains

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[62] Monahan cites the example of attempted federal control of the gasoline additive MMT. The federal government, in the belief that it could not regulate the gasoline industry under its trade and commerce power, adopted legislation that only prohibited import and inter-provincial trade of MMT. However, this legislation was then successfully challenged by the importing company as a violation of the Agreement on Internal Trade; a claim under NAFTA was withdrawn. Patrick Monahan, "Canadian Federalism and its Impact on Cross-border Trade," (2001), 27 Canada-United States L. J. 19.

[63] A useful summary of the leading cases is provided in George Vegh, "The Characterization of Barriers to Interprovincial Trade under the Canadian Constitution," (1996), 34 Osgoode Hall L.J. 355-410.

[64] Section 121 of the Constitution prohibits discriminatory tariffs on goods from other provinces but has been interpreted more generally to prohibit discriminatory trade regulation that "in its essence and purpose is related to a provincial boundary." See Sujit Choudry, "The Agreement on Internal Trade, Economic Mobility, and the *Charter*," in

uncertain. In addition, because of s. 6 of the *Charter of Rights and Freedoms* protecting "mobility rights", provinces cannot use residence as a basis for discriminating against investors from other provinces.[65] For resources, however, despite their impact on trade, "production controls and conservation measures . . . are, ordinarily, matters within provincial legislative authority"[66] that cannot be interfered with by other provinces or the federal government. Even provincial production controls on resources destined primarily or wholly for export have been treated as within provincial power when they have been undertaken to ensure physical conservation of the resource.[67]

On the other hand, federal legislation regulating primarily extra-provincial trade can now incidentally affect local trade. Additionally, the federal trade and commerce power authorizes exclusive federal control over exports of goods from a province, particularly to destinations outside Canada. This power is the basis for regulation of exports of oil, natural gas and electricity through the National Energy Board. [68]

After several failed attempts at constitutional reform to bring some clarity to this area and reduce internal trade barriers, constitutional reform was dropped in favour of negotiation of a federal-provincial-territorial agreement.[69] The *Agreement on Internal Trade*,[70] adopted in 1994, was motivated by the perception that the internal Canadian market was plagued by too many provincial trade barriers, [71] which the above analysis

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[65] *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.
[66] Vegh, "The Characterization of Barriers to Interprovincial Trade," *supra* note x, at .
[67] *Spooner Oils v. Turner Valley Gas Conservation Board*, [1933] SCR 629; *Central Canada Potash v. Saskatchewan*, [1979] 1 SCR 42.
[68] *National Energy Board Act*, R.S.C. 1985, c. .
[69] The history is summarized in Michael J. Trebilcock and Rambod Behoodi, "The Canadian Agreement on Internal Trade: Retrospect and Prospects," in Michael J. Trebilcock and Daniel Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: C.D. Howe Institute, 1995).
[70] Internal Trade Secretariat, *Agreement on Internal Trade*, www.intrasec.mb.ca.
[71] G. Bruce Doern and Mark Macdonald, *Free Trade Federalism: Negotiating the Canadian Agreement on Internal Trade* (Toronto: U of T. Press, 1999).

suggests were constitutionally valid. The AIT does not alter respective constitutional powers but the parties agree to abide by the agreement and not push their full legal rights.[72] The Agreement is modeled on international trade agreements and covers a wide range of economic issues, including procurement, investment, labour mobility, standards, agricultural and other goods, resources, communications and transportation, in attempting to reduce the prevalence of internal trade barriers. There is also a dispute resolution mechanism modeled on those in the international trade agreements.

For resources generally, the AIT recognizes a distinction between primary production and processing and only applies standards of non-discrimination once resources are subject to processing. However, water resources were excluded from the AIT. In the negotiations ".. it was fairly quickly decided that water would be defined very narrowly and that, except for containerized water, it would be excluded from the chapter and from the AIT as a whole."[73] As a result, while barriers to trade in other resources are being reduced, the provinces are not limited by the AIT in protecting their water resources and discriminating in doing so. They are limited only (as a matter of Canadian law) by their constitutional powers.

**First Nations.** In Canadian law, it is becoming increasingly necessary for governments to address the rights of First Nation communities when making decisions that affect natural resources. With water, First Nations are relevant in different ways. For example, private and government decisions about water use can adversely affect their interests; also, provincial regimes addressing water use cannot limit the actions of First

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[72] *Agreement on Internal Trade*, Art. 300.

Nations. There are two constitutional bases for this latter development. First, the Canadian Constitution provides that "lands reserved for the Indians" are within exclusive federal legislative jurisdiction.[74] This means that water use and development on reserves (or other "lands reserved") are beyond the reach of provincial law.[75] Instead, these issues are addressed on reserves by Band Councils and the federal government under federal legislative authority.[76] While there is some dispute over whether title to reserves (which are held by the Crown for the exclusive use and benefit of the band) includes title to the beds of adjacent waterways,[77] it seems likely that reserve lands carry with them riparian rights, or rights to use water flowing past a reserve.[78] Certainly groundwater on reserves is recognized as part of the rights associated with reserve ownership. Some Aboriginal communities are using their groundwater resources to develop a bottled water business.[79]

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[73] Doern and Macdonald, *ibid.*, p. 129. The AIT provides that it "does not apply to ... water, and services and investments pertaining to water, ..." (Art. 1102).

[74] *Constitution Act, 1867, supra* note x, s. 91(24). "Lands reserved" has been broadly interpreted to include reserves, settlements, lands subject to Aboriginal title and land-based Aboriginal rights, as well as those included in the Royal Proclamation of 1763.

[75] Rules of constitutional interpretation (and s. 88 of the Indian Act) accept that provincial laws of "general application", that is, not directed specifically at First Nation peoples, can apply to them while on reserve. However, the case law has for the most part held that general provincial laws affecting land rights cannot apply to lands reserved. See discussion in Phillip G.C. Ketchum, "Indian Rights to Water in the Prairie Provinces," App. G in Harriet I. Rueggeberg and Andrew R. Thompson, *Water Law and Policy Issues in Canada* (Vancouver: Westwater, 1984) and in Kenneth J. Tyler, "The Division of Powers and Aboriginal Water Rights Issues," in Canadian Bar Association, *National Symposium on Water Law (Proceedings)*, April 1999 (Toronto: Canadian Bar Association, 1999).

[76] See, Indian and Northern Affairs Canada and Health Canada, *Safe Drinking Water on First Nation Reserves: Roles and Responsibilities* (Ottawa: INAC, November 20, 2001).

[77] The cases address only the boundaries of specific reserves, and do not establish a general principle due to the variety of methods by which reserves have been created, e.g., under treaty, by agreement or by Crown grant, and the specific language and intentions in each case. See, *R. v. Lewis*, [1996] 3 CNLR 131 (SCC) and *R. v. Nikal*, [1996] 3 CNLR 178 (SCC).

[78] Kent McNeil, "Riparian Rights and 'Lands Reserved for the Indians': Some Constitutional Issues," in Canadian Bar Association, *National Symposium on Water Law* 1999, *supra*, p. 8.

[79] For example, Iroquois Water Inc., run by the Mohawks of Akwesasne First Nation, serves the local community and casinos in Ontario and Michigan: Indian and Northern Affairs Canada, "Business Project: Iroquois Water Inc., Mohawks of Akwesasne First Nation," www.ainc-inac.gc.ca/on/ter_e.html.

Second, since 1982, the Constitution has protected "existing Aboriginal and treaty rights".[80] In recent years, the courts have been developing the extent of this protection and clarifying the demands it places on Canadian governments when acting in ways that could interfere with protected rights. Aboriginal rights are specific to each community rather than common to all First Nations. They can arise through a treaty entitlement or through proof of both historical use and significance to the community and its culture.[81] They can be site specific or exercised generally over a large territory, and exclusive to the community or shared with others.[82] If a right is shared with non-Aboriginals, constitutional protection means that First Nations have priority to the resource. The kinds of resource-related rights that have been successfully recognized through litigation include rights to fish (in certain areas, for certain species, for certain traditional purposes – including commercial ones), to hunt, to harvest wild rice, to cut timber. So far, no cases have addressed Aboriginal rights to water but some of the litigated rights are dependent on the maintenance of high quality and appropriate quantities of water. To successfully claim an Aboriginal right to water itself, a community would need to develop a case around particular traditional values, practices and uses of water.

One category of Aboriginal right is known as Aboriginal title and requires a different analysis. Aboriginal title is considered a common law property right but is characterized as being "sui generis" due to its differences from other property rights. If a claim is proved by a community, it is entitled to *exclusive* use and occupation of a defined territory.[83] This would include ownership of all land, minerals and resources,

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[80] S. 35(1).
[81] *R. v. van der Peet*, [1996] 2 S.C.R. 507.
[82] Brian Slattery, "Making Sense of Aboriginal and Treaty Rights," (2000), 79 C.B.R. 196-224.
[83] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

presumably including all water rights within the boundaries of the territory. In most of Ontario and Quebec, aboriginal title has been "extinguished" through treaties and other agreements between the Crown and First Nations or through legislative actions inconsistent with its continuation. However, there are many unresolved claims and contested treaties. At least one community has launched a formal claim for recognition of unextinguished Aboriginal title to its traditional territory in the Great Lakes basin, including title to the beds of parts of Lakes Huron and Erie, Lake St. Clair and the St. Clair and Detroit Rivers.[84]

As well as establishing the content of Aboriginal rights, courts have developed principles for governments whose actions may affect or interfere in some way with protected rights. Under Canadian law, the Crown can interfere with Aboriginal rights[85] but because of constitutional protection of those rights and the Crown's fiduciary obligation to First Nations, it can no longer do so with impunity. While still quite unsettled as to many of the details, the courts have said that the onus is on the Crown to justify any interference: there must be a valid legislative purpose that is compelling and substantial, and the Crown must act in a manner that is consistent with its fiduciary duty. This means that consultation, at a minimum, is always required. If rights will be more seriously interfered with, negotiation with, and consent of the Band affected, and payment of compensation will likely be required as well.[86]

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[84] Walpole Island First Nation, "Press Release," April 26, 2000.

[85] While there are judicial statements, in obiter, that the Crown in right of a province could interfere with Aboriginal rights for legitimate provincial purposes (*Delgamuukw*), this has been questioned as being inconsistent with existing constitutional principles. See McNeil, "Riparian Rights and 'Lands Reserved for the Indians'," *supra* note , p. .

[86] *Delgamuukw, supra*. One of the reasons consultation is required is to avoid litigation and initiate negotiations: Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult," (2000), 79 C.B.R. 252.

These requirements must be accommodated in Ontario's water management practice.[87] Whenever Aboriginal or treaty rights might be affected by water management or export decisions, consultation will be required and consent may be necessary.

**Conclusion.** Provinces have primary authority to manage water resources within their territories and thus have the constitutional power to adopt and implement Annex 2001. However, Ontario and Quebec do not have the authority to make all the water management decisions contemplated by Annex 2001. The Great Lakes themselves are international boundary waters, making them subject to both federal and provincial authority. And, even though tributary waters and groundwater within the Great Lakes Basin are more squarely within exclusive provincial authority to manage, in doing so provinces must ensure the protection of fisheries, navigation, Aboriginal rights and international and inter-provincial interests. Most decisions about allocation and use of water resources will therefore be addressed under provincial law, but many decisions, particularly those with respect to structural diversions, may require participation by and perhaps the consent of federal agencies and Aboriginal communities, depending on the particular circumstances. Decisions about the export of water, whether to other provinces or outside Canada (even if within the Great Lakes Basin) touch on federal authority and cannot be directly regulated by the provinces. Absent NAFTA, provinces could indirectly affect trade to a greater extent than a U.S. state could.[88] However, in Canada, unlike in the U.S. where Congressional authorization of interstate compacts allows states

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[87] The Chiefs of Ontario take the view that they have an inherent right to full and meaningful participation in all water-related decision-making where there is the potential to impact First Nations. See, Chiefs of Ontario, *Drinking Water in Ontario First Nations Communities,* Submission to Part II of the Walkerton Inquiry, 2001.

to act in ways that would otherwise violate the dormant commerce clause, the federal government cannot delegate this power to the provinces. Thus, water management in the Great Lakes may require federal-provincial cooperation and coordination.[89]

## III. The Law and Policy of Provincial Water Management.

Annex 2001 demands of each participating jurisdiction the establishment and operation of a comprehensive system for managing the waters of the Great Lakes Basin. In making decisions under this system, Annex 2001 expects each participant to apply the common regional standard of conservation and improvement and to cooperate with the others. Of the two participating provinces, Ontario has the more fully developed system in place, however, accommodating the terms of Annex 2001 will require changes to the existing system in Ontario and development of a system in Québec. Because Québec is only in the early stages of developing a comprehensive water regime, the focus in this part will be on Ontario.

### Ontario Water Management.

**Legal foundations.** Ontario's present system of water management is complex. It is a system founded on several common law principles that have been significantly modified by statute. The most important foundational principles are:

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[88] Shafer,

[89] See Steven A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (Calgary: Canadian Institute of Resources Law, 1991). The federal government could take a more prominent role in water management than it has in the past based on its combined constitutional powers, but in practice its focus has become narrower over the last 15 years and its preference is to undertake cooperative programs with provincial and territorial governments, rather than acting alone. See: Peter H. Pearse, "Water Management in Canada: The Continuing Search for the Federal Role," presented at the 51st Annual Conference of the Canadian Water Resources Association, Victoria, June 1998. Implementation of the Great Lakes Water Quality Agreement is done cooperatively through the Canada-Ontario Agreement.

- water flowing in a watercourse is not capable of ownership. It is a public resource and only becomes "property" when abstracted by those entitled to access it.[90]
- beds of navigable watercourses are vested in the Crown, while those of non-navigable watercourses are privately owned by the owners of the banks. Since most waterways are navigable, Crown ownership of the beds ensures public access for fishing and transportation.[91]
- Owners of the banks of a watercourse have certain rights, including access to the water, maintenance of flow, drainage and quality, and rights to use the water.[92] These "riparian" owners can withdraw an unlimited amount of water for "ordinary", that is, domestic and livestock, uses to meet needs on the riparian land and a "reasonable" amount for "extraordinary" uses, including irrigation or manufacturing. The determination of a reasonable use requires a balancing of rights among all riparians on the watercourse. These rights continue to exist despite the statutory changes discussed below.
- Percolating groundwater is not subject to this balancing among owners but may be appropriated without limit by the owner of the surface land. The Supreme Court of Canada has said, however, that the taking cannot cause a nuisance or negligently result in damages to one's neighbours.[93]

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[90] H. Stuart Moore, *Coulson and Forbes on the Law of Waters*, 5th ed. (London: Sweet & Maxwell, 1933), p. 115.
[91] Bruce H. Ziff, *Principles of Property Law*, 3d ed. (Scarborough, Ont.: Carswell, 2000), pp. 99-100 and LaForest, *Water Law in Canada, supra*, c. 10.
[92] Ziff, *ibid.*, p. 101 and LaForest, *ibid.*, c. 9.

**Water Management and Use**. Several provincial government departments have authority with respect to water. The primary ones are the Ministry of Natural Resources ("MNR") and the Ministry of the Environment ("MOE"). The MNR is responsible for managing public lands and resources, including surface water,[94] for overseeing regional conservation authorities (which manage individual watersheds)[95] and for regulating dams and other works on watercourses.[96]

The MOE is responsible for managing groundwater, approving water and sewage works, protecting water quality and regulating water withdrawals, known as "takings". Withdrawals of both ground and surface water are governed primarily by the *Ontario Water Resources Act*,[97] which is administered by the MOE. The *OWRA,* first adopted in 1956, addresses several aspects of water management, including establishment and operation of municipal water and sewage works, regulation of municipal and industrial discharges to water, as well as withdrawals. Requirements for the construction of wells are also regulated, but under a companion statute, the *Environmental Protection Act.*

The Ontario government first began controlling withdrawals of water in 1961 in response to increasing competition among tobacco farmers for irrigation water.[98] Through an amendment to the *Act*, certain withdrawals of either ground or surface water thereafter required a permit. Specifically, a withdrawal of 50,000 litres/day or more

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[93] *Pugliese et al.* v. *National Capital Commission, et al.*, [1979] 2 S.C.R. 104. The SCC held that taking groundwater in amounts in excess of that authorized by a provincial permit would prima facie qualify as a nuisance or constitute evidence of negligence.

[94] *Public Lands Act*, R.S.O. 1990, c. P.43.

[95] *Conservation Authorities Act*

[96] *Lakes and Rivers Improvement Act*, R.S.O. 1990, c. L.3. Under this statute, works that impound or divert water require a permit from MNR; MNR will consider the effects on public uses, on riparian owners and on the environment before issuing a permit.

[97] R.S.O. 1990, c. O.40.

[98] S.O. 1960-61, c. 71, s. 3.

requires a "permit to take water" (or "PTTW").[99] MOE may require a permit for a smaller withdrawal if it would interfere with any "private or public interest in water".[100] However, even takings over 50,000 litres are exempted from a permit if they are for domestic use, farm purposes (other than irrigation of commercial crops) or fire-fighting.[101] This in effect preserves the common law rights of riparian owners to take unlimited amounts of water for "ordinary" purposes.[102] Municipalities are not entitled to take advantage of this provision when withdrawing water for distribution to their residents, but must obtain permits in all cases, unless they fall within the group whose works and takings were in existence when the program commenced in 1961, in which case no permit is required.[103] Finally, as mentioned above, for constitutional reasons, federal water takings and takings for use on First Nations lands are in practice exempt from the provincial system.

PTTWs are issued by regional directors of the Ministry on the basis of new criteria, adopted in 1999 in the wake of the Nova Group permit. In the past, directors had absolute discretion to determine when and on what terms to issue permits with virtually no statutory guidance. As well, the process was not open to public involvement at any

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[99] *Ibid.*, s. 34(3). As of 2000/01, there were approximately 5,400 PTTWs in force, with approximately 1,500 new or renewed permits per year: Walkerton Inquiry.

[100] *Ibid.*, s. 34(4).

[101] *Ibid.*, s. 34(5).

[102] The continuation of common law rights has raised a number of issues with respect to the interaction of the two systems that have never been resolved. See discussion in David R. Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resources Law, 1988), p. 77(??) and Environmental Commissioner of Ontario, *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources,* Brief to the Walkerton Inquiry, January 2001, p. 6.

[103] "The major water users which are not covered by permits (apart from 'ordinary' users and those which take less than [50,000 litres] per day) are the large older municipalities, industries and hydroelectric installations whose works predated the legislation." Richard S. Campbell, Peter H. Pearse, Anthony Scott and Milan Uzelac, "Water Management in Ontario – An Economic Evaluation of Public Policy," (1974), 12 Osgoode Hall L.J. 475-526, at p. 486.

stage; only the applicant could appeal a decision if a permit was refused or modified or if the applicant was dissatisfied with the terms and conditions.

Prior to the new regulation, the MOE, despite no statutory direction, developed administrative policies for deciding when to issue permits and on what terms. Important considerations under these policies were the protection of supplies for ordinary users, protection of supplies for established permit holders and protection of the "natural functioning of the stream".[104] Protecting stream functioning generally meant protecting a minimum flow and MOE consulted MNR and other sources of hydrological information to determine this. The limited availability of this information meant that MOE often issued permits on the basis of inadequate information but made them subject to conditions that withdrawal rates be reduced in periods of short supply and that compensation be paid to other users who were adversely affected by any excessive withdrawals by the permit holder.[105] There was no charge for the permit, or for the water, and the time limits for a permit varied from no expiry date to five (surface water) or ten years (groundwater).

The new criteria[106] *require* in every case consideration of the protection of natural ecosystem functions, the effect of the taking on ground and surface water and on the interests of persons who may be affected, and Ontario's obligations under the Great

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[104] See, Campbell, et al., *ibid.*, p. 484, and Ontario Ministry of the Environment, *Water Management* (1994 as amended), s. 5. Where there is insufficient water available to meet all existing and proposed uses, this MOE policy sets out the priority of uses: private domestic and farm purposes, followed by municipal water supply, then industrial, commercial and irrigation purposes. Use of water for pollution control, flood control, fire protection, recreation and wildlife are "also important considerations"(s. 5.1.1) but are not given priority.

[105] Campbell, et al., *ibid.*, p. 485.

[106] *Water Taking and Transfer Regulation*, O.Reg. 285/99 ("*WTTR*").

Lakes Charter.[107] They allow, but do not mandate, consideration of any existing and planned uses of the water, and consideration of whether granting the permit would be in the public interest. The regulation prohibits *any* transfer of water out of a "major drainage basin" except where the water is incorporated into a manufactured product or is in a small container or in a vehicle and necessary for its operation.[108] Permit holders must also comply with other relevant laws, federal,[109] provincial[110] and municipal.[111]

Several factors have prompted increasing public interest in and scrutiny of MOE's approach to water taking permits.[112] This increased attention has helped identify a

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[107] The Ministry now identifies protection of ecosystem functions as "our overriding goal": see, MOE, *In Brief: Review process for permits to take water*, January 2000, p. 1.

[108] *WTTR, supra* note x, s. 3. Ontario is divided into three drainage basins: the Great Lakes, the Nelson River and Hudson Bay. It appears that a proposal to transfer water out of one of these basins will not be subject to a consideration of its impact but will be refused in all cases, other than those specifically provided for. Transfers of water out of sub-basins, e.g., from one Great Lake to another, are not caught by this prohibition.

[109] For example, the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Navigable Waters Protection* Act, R.S.C. 1985, c. N-. Application of these acts would also trigger review under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

[110] For example, the *Environmental Assessment Act*, R.S.O. 1990, c. E.18; *Lakes and Rivers Improvement Act*. R.S.O. 1990, c. L.3.

[111] For example, official plans and zoning by-laws under the *Planning Act*. In a recent case, the commercial taking of groundwater was held to be a use of land, subject to municipal planning control. See, *Grey Association for Better Planning* v. *Artemesia Waters Ltd.,* Ont. Superior Court of Justice, Divisional Court, November 21, 2002 (unreported).

[112] First, the permitting process has been opened up to limited public involvement. Under the *Environmental Bill of Rights, 1994*, notices of many applications for water taking permits are required to be posted on an electronic registry and members of the public are entitled to a minimum 30-day period in which to comment on the application. Certain types of applications are not posted on the registry, including municipal takings (due to an exemption in the *EBR* for *Environmental Assessment Act* approvals), takings for irrigation and takings lasting less than a year. Additionally, the *EBR* entitles the public to apply to the Environmental Review Tribunal for leave to appeal a permit that has been issued. Even though there is an onerous test for obtaining leave, applicants have been successful in getting board review of permits in a few cases. These cases address the shortcomings of the process. A second factor increasing public interest was the Nova permit and subsequent activities, discussed above. A third factor was the death of seven people and the sickness of thousands in the town of Walkerton in 2000 due to a municipal drinking water supply tainted by bacteria. The province appointed a public inquiry which reviewed the causes of this tragedy and scrutinized all aspects of Ontario's water policy. Water taking permits were peripheral to the main issue of protecting the quality of drinking water sources, however, some participants discussed them and the Commission made some recommendations regarding PTTWs. (See, Report of the Walkerton Inquiry). A fourth factor has been the increasing incidence of conflicts, including concerns in a number of rural municipalities with commercial bottling of spring water, and of local water shortages which led the MOE to announce a moratorium on the issuance of new permits in the spring of 1999. (See, Nancy Hofmann and Bruce Mitchell, "Evolving Toward Participatory Water Management: The *Permit to Take Water Program* and Commercial Water Bottling in Ontario," (1995), 20(2) Canadian Water Resources J.

number of problems with Ontario's PTTW system that affect the province's ability to successfully manage water resources. Many of these problems will require action in order for Ontario to meet its Annex 2001 commitments.

First, the system is less than comprehensive. Because of the 50,000 litre threshold and the domestic use exemptions, an unknown number of new users are not required to obtain a permit. For those outside the regulatory system, the MOE has no mechanism for keeping track of the amount of water that is being withdrawn. In addition, a mixed common law and administrative system means that obtaining a permit is no guarantee of a secure supply of water: riparian owners can increase in number, can increase their use of water and can, through litigation, effectively limit permitted takings that are "unreasonable".

Enlarging the scope of the permitting system to encompass all withdrawals raises the issue of whether riparianism should be abolished in favour of an exclusive permit system[113] This would effectively entail the expropriation of existing private property rights and seems highly unlikely to be supported by the Ontario government. Short of abolishing the traditional exemptions to the permit process, the province might find it more acceptable to introduce data requirements on all withdrawals that would at least allow for a comprehensive picture of water use to be developed.

A second concern is that, even for those within the system, there are serious data gaps. The Ministry has not required or kept information on the actual amounts of water withdrawn per year or on withdrawals v. consumptive uses (that is, amounts of water

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91-100.) Apparently the MOE did not actually impose a moratorium but rather intensified its scrutiny of PTTW applications. See, Environmental Commisioner of Ontario, *The Protection of Ontario's Groundwater and Intensive Farming*, Special Report to the Legislative Assembly of Ontario, July 27, 2000, p. 5.

returned to the system v. amounts not returned).[114] This information is necessary for the effective administration of the system and for protection of Ontario's waters and ecosystems:

> "Without a database of reliable water taking information, there is significant risk that many water taking permits will be granted and land use planning decisions made without adequate knowledge of the availability of water resources... MOE has admitted that it does not know how much water is available in the province for taking purposes. These information gaps may have already resulted in the permitting of an excessive level of water taking for some ecosystems and watersheds. The overuse of a water resource can and has resulted in habitat loss, impairment of other uses and conflict between competing users."[115]

The lack of monitoring in the system contributed to enforcement being primarily reactive to complaints of interference with supplies. In other words, the MOE generally waited until a problem developed before undertaking a thorough investigation.[116] Once conflicts arose, the MOE attempted to resolve them through negotiation and mediation. There were few formal orders issued and few charges laid.

Third, the Ministry has failed to provide for future ecosystem needs in its assessment of PTTW applications.[117] The MOE is required to apply an ecosystem approach due to two legal obligations: the *Environmental Bill of Rights* requirement that it take every reasonable step to ensure its "Statement of Environmental Values" (which includes an ecosystem approach) is considered whenever decisions affecting the

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[113] See Robert Abrams, [cites].

[114] There has also been inadequate measurement of the amount of water in an aquifer prior to issuance of PTTWs: see Walkerton Inquiry, Part I, p. 434.

[115] Environmental Commissioner of Ontario, *Ontario's Permit to Take Water Program, supra* note x, p. 25.

[116] H.J. Leadlay and R.D. Kreutzwiser, "Rural Water Supply Allocation in Ontario: An Evaluation of Current Policy and Practice," (1999), 24(1) Canadian Water Resources J. 1-14, at 9.

[117] Leadlay and Kreutzwiser, *ibid.*, at 7-8.

environment are made;[118] and the requirement in the *Water Taking and Transfer Regulation* that the director shall consider "the protection of the natural functions of the ecosystem" in all permit decisions. The Environmental Review Tribunal has criticized MOE's reluctance to apply an ecosystem approach and recently ruled that such an approach must be applied in every case.[119] However, the MOE has not yet developed the detailed procedures and guidance to enable a consistent approach to be followed.[120] The approach that the MOE has taken has been deemed insufficient, at least in some cases: it has focused primarily on the aquatic system rather than all aspects of an ecosystem; it has not taken into consideration the impact of existing takings; it has failed to address cumulative effects or future needs; and it has failed to address the effect of takings on water quality.[121]

Fourth, the existing framework focuses almost exclusively on facilitating the supply of water and very little on demand management. Most permit applicants are not required to demonstrate water conservation efforts or commit to the use of conservation technology in order to obtain a permit. Perhaps because of the perception of the relative abundance of water available in Ontario, conservation as a condition of permit issuance or renewal has never been routinely required,[122] except more recently within the Greater Toronto Area.[123] Furthermore, because the Province charges no royalty or fee for the use

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[118] *Environmental Bill of Rights*, S.O. 1993, c. 28, s. 11.

[119] *Dillon, et. al. v. Director, MOE*, Ontario Environmental Review Tribunal, February 19, 2002, unreported; *Kolodziejski*

[120] *Dillon, ibid.* Many of these concerns are reportedly under development within the MOE.

[121] *Dillon, ibid.*, and *Schneider v. Ontario (MOE)*, [1999] O.E.A.B. No. 19, August 31, 1999. There is some indication that the MOE's regional offices vary in their application of the criteria and in availability of staff to undertake the requisite assessments: see, Environmental Commissioner of Ontario, *Ontario's Permit to Take Water Program, supra* note x, pp. X and 24; and Leadlay and Kreutzwiser, "Rural Water Supply Allocation," *supra* note x, at 8.

[122] Leadlay and Kreutzwiser, *supra* note x, at 11.

[123] Great Lakes Commission, *Report on State and Provincial Water Use and Conservation Programs in the Great Lakes-St. Lawrence Basin*, July 2002, p. 22.

of water, there is no economic incentive to conserve.[124] Conservation is encouraged instead, through educational materials and incentives provided under a combination of federal, provincial and municipal programs.[125] However, the use of water in Ontario remains amongst the highest in the world.

Identification of these concerns spurred a number of actions in response. In particular, information needs are being addressed through several projects. For example, the information gaps about water availability in Ontario are being filled in a new joint federal provincial study.[126] The need to coordinate water information that is collected by numerous agencies and make it available for water management decisions led to the establishment of the Water Resources Information Project of the MNR in 2000.[127] The inadequacies in groundwater monitoring revealed by the Walkerton Inquiry led the province to provide $20 million over several years toward the establishment of the Provincial Groundwater Monitoring Network and fund other groundwater studies. Other initiatives target some of the other problems in the administration of the PTTW system. For example, a new guide for applicants for PTTWs requires that applications for large takings of groundwater must include a monitoring plan and a contingency plan to address mitigation of any adverse impacts from the taking and applications for surface water takings must provide information on the availability of water relative to the proposed

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[124] The permit system is not directed toward the *efficient* allocation of water resources. See discussion in Steven Renzetti and Diane Dupont, "An Assessment of the Impact of Charging for Provincial Water Use Permits," (1999), 25Canadian Public Policy 361-378, at 364.

[125] See: Canadian Council of Ministers of the Environment, Water Use Efficiency Task Group, *National Action Plan to Encourage Municipal Water Use Efficiency*, www.ccme.ca; Environment Canada, Ontario Region, *Mnicipal Water Conservation in Ontario: Report on a Comprehensive Survey*, 1999; Federation of Canadian Municipalities, Green Municipal Enabling Fund and Green Municipal Investment Fund; MOE, Tips on Water Conservation, www.ene.gov.on.ca.

[126] This study is known as the Water Use and Supply Project. See, Environment Canada, Ontario Region, *Media Advisory: Study to assess Ontario water supply and demand*, June 20, 2002.

[127] MNR, *Water Resources Information Project*, www.mnr.gov.on.ca.

water taking.[128] Another initiative is the development of a provincial plan for responding to increasingly prevalent low water levels and drought conditions in southern parts of the province.[129] This plan outlines a systematic response to three levels of concern, focusing first on voluntary conservation, then conservation plus restrictions on certain non-essential uses, and finally regulation of allocation along a hierarchy of uses.[130]

The development of technical protocols for assessing ecosystem protection, cumulative impacts and resource improvement (all required to comply with Annex 2001) will be much more difficult to achieve in the short run. Research is continuing on how best to implement these concepts, but it may take a decade or more to develop a "scientifically sound and legally defensible" regulatory regime based on these concepts.[131]

**Conclusion.** Participation in Annex 2001 requires Ontario and the 9 other jurisdictions to have comprehensive water management systems. Ontario is ahead of many jurisdictions because it already has many of the essential components of a comprehensive system and is working to improve. The system in Ontario is a hybrid, with government administered permitting built on top of common law riparian rights. The most difficult legal challenge will be how to implement a comprehensive regulatory scheme in light of this hybrid approach. Other legal challenges include reaching

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[128] MOE, *Guide for Applying for Approval of Permit to Take Water: Interim Guide*, June 2000, p. 2.

[129] Ontario Ministry of Natural Resources, Ontario Ministry of the Environment, Ontario Ministry of Agriculture, Food and Rural Affairs, Ontario Ministry of Municipal Affairs and Housing, Ontario Ministry of Economic Development and Trade, Association of Municipalities of Ontario and Conservation Ontario, *Ontario Low Water Response*, May 2001.

[130] *Ibid.* The hierarchy divides uses into "essential" (to protect life and health, including drinking and sanitation, health care, public institutions and public protection and basic ecological functions); "important" (to protect social and economic well-being, including industrial, commercial and agricultural uses) and "non-essential" (including swimming pools, lawn watering and vehicle washing).

consensus on whether a single standard for in-basin and out-of-basin uses is necessary, how to accommodate First Nations and federal interests, how to bind the province to following through on its obligations, and how to ensure effective public participation.

The criteria of conservation, resource improvement and ecosystem protection from individual or cumulative impacts can be added to the regulations easily, but as the experience with the 1999 regulation and the requirement to integrate an ecosystem approach illustrate, agreement on the technical protocols and how to implement them must be in place first, if the regulatory regime is to be effective. Until these technical challenges are worked out among the Basin jurisdictions, detailed regulatory provisions must wait. One option for the interim is to adopt a simpler criterion for assessment of withdrawals.[132] In addition, imposing some conservation requirements on permittees could be accomplished more quickly.

## IV. Conclusions.

[131] International Water Uses Review Task Force, *Three Year Review, supra.*

[132] The International Water Uses Review Task Force suggests using the criterion applied in the decisions to allow diversions to Akron and Pleasant Prairie, that is, no net loss of water to the Basin. *Ibid.*